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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS–SC–20–0036; SC20–930–3 FR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin; Changes to Subcommittee Size and Addition of Term Limits

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to change subcommittee size and add term limits under the marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin.

DATES: Effective December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Senior Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Jennie.Varela@usda.gov* or *Christian.Nissen@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.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement and Order No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. Part 930 (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 Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the production area, and a public member.

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 the 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.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to a marketing order may file with USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing 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 not later than 20 days after the date of the entry of the ruling.

This rule changes subcommittee size and adds term limits to subcommittee appointments under the Order. This action modifies the composition of the subcommittee which reviews exemption requests by increasing the subcommittee from three members and an alternate to a maximum of five members with no alternate. This rule also adds a five-year term limit to these appointments. This should provide more opportunities for participation and additional flexibility in staffing the subcommittee. The Board unanimously recommended this change at its March 19, 2020, meeting.

Section 930.31 of the Order authorizes the Board to have committees and subcommittees as may be necessary. Section 930.59 authorizes handler diversion of tart cherries from the reserve for specific uses including, but not limited to, new product and new market development. Section 930.62 authorizes the Board, with approval of the Secretary, to exempt cherries from the assessment, volume regulation, and reserve provisions of the Order for specified uses. Both sections authorize the Board, with the approval of the Secretary, to establish requirements necessary and incidental to the administration of the Order.

Section 930.159 of the Order's administrative requirements specifies methods of handler diversion, including using cherries or cherry products for exempt purposes prescribed under § 930.162. Section 930.162, in part, establishes a Board appointed subcommittee, as authorized under § 930.31 stated above, to assist the Board staff in reviewing the applications for exemptions. The changes will impact this subcommittee.

In seasons with volume regulation, handlers can sell cherries for exempt uses, including new products and new markets, and receive diversion credit rather than keeping that tonnage in reserve. The Board established the review subcommittee to review and grant exemption requests that have the potential to expand new markets. The subcommittee works with Board staff to carry out these tasks. Prior to this action, this subcommittee consisted of three members and one alternate, each having no handler affiliation but knowledge of the tart cherry industry. Section 930.162 further specifies that one of the members or the alternate should be the Board's public member or

the Board's public member alternate, if either are available to serve. This rule increases the size of the subcommittee and includes term limits for all subcommittee appointments. The current requirement regarding the service of the Board's public member or their alternate continues to remain in effect.

The Board formed a New Product New Market Committee (Committee) to examine the current regulations regarding the subcommittee responsible for reviewing applications for exemption or the renewal of exemption. The formation and tasking of this Committee was largely the result of growing Board member perceptions that the exemption process was not fully understood or utilized by industry. The Committee reviewed the process for selecting subcommittee members, assessed subcommittee operations, and identified improvement opportunities.

During Board meetings in January and March 2020, the Committee outlined some of the challenges associated with the subcommittee, including subcommittee participation. The Committee stated the requirements, which stipulate the subcommittee shall consist of three members and one alternate, were limiting. The Committee did not recommend any changes to existing qualification requirements to serve on the subcommittee. Any subcommittee meeting and quorum requirements would be addressed in the Board's bylaws.

The Committee recommended expanding the size of the subcommittee to five members without mandating a set number of members required to conduct business. The Committee noted this adjustment would provide some flexibility in staffing the subcommittee while allowing the subcommittee to fulfill its responsibility to review and grant exemptions.

The Committee also recommended the inclusion of five-year term limits for all subcommittee appointments as this would help balance preserving subcommittee institutional knowledge with the need to include new participants and perspectives in the exemption review process. One Committee member also noted a fixed term may encourage more qualified people to pursue subcommittee participation because they would know their commitment to the Board would not be open-ended. The Committee also believed establishing a regular schedule of appointments through term limits should lead to increased awareness of when participation opportunities would be coming available.

In discussing the Committee's suggested changes, the Board was supportive of the recommendations to increase the number of seats on the subcommittee and to establish term limits for subcommittee participants. In reviewing the increase in the size of the subcommittee, the Board did not recommend a specific quorum requirement for the subcommittee to meet. However, the Board believes the additional subcommittee members would provide more candidates to draw from when scheduling subcommittee meetings and would help ensure some members were in attendance for each scheduled subcommittee meeting. The Board also agreed increasing the number of seats on the subcommittee would provide the opportunity for more participation. The Board concluded no changes should be made to the existing requirement that the public member or alternate public member, when available, serve on the subcommittee, but did decide removing the requirement for an alternate subcommittee member would simplify the structure of the subcommittee.

The Board was also supportive of establishing term limits for subcommittee members. Members agreed having term limits would increase opportunities for others to serve on the subcommittee, and qualified candidates may be more willing to participate if there is a fixed term.

Accordingly, the Board unanimously voted to increase the size of the subcommittee to a maximum of five total members with a five-year term limit for all appointments to the subcommittee. The Board believes the changes will not only improve operational flexibility and administration of the subcommittee but encourage greater industry and small business participation on the subcommittee and in new product and new market projects.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule 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 in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 producers of tart cherries in the production area and 40 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 the National Agricultural Statistics Service and Board data, the average annual price for tart cherries during the 2018–19 season was approximately $0.196 per pound. With total utilization at 288.8 million pounds for the 2018–2019 season, the total 2018–2019 value of the crop utilized for processing is estimated at $56.6 million. Dividing the crop value by the estimated number of producers (400) yields an estimated average receipt per producer of $141,500. This is well below the SBA threshold for small producers. A free on board (FOB) price of $0.80 per pound for frozen tart cherries was reported by the Food Institute during the 2018–2019 season. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying the FOB price by total utilization of 288.8 million pounds results in an estimated handler-level tart cherry value of $231 million. Dividing this figure by the number of handlers (40) yields estimated annual handler receipts of $5.8 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This rule will increase the size of the subcommittee and add term limits to subcommittee appointments under § 930.162. This action modifies the composition of the subcommittee which reviews exemption requests from three members and an alternate to a maximum of five members with no alternate. This rule also adds a five-year term limit to these appointments. This will provide more opportunities for participation and additional flexibility in staffing the subcommittee. The authority for these actions is provided in §§ 930.31, 930.59 and 930.62. These changes were unanimously recommended by the Board at its meeting on March 19, 2020.

It is not anticipated that this action will impose any additional costs on growers or handlers. This change is administrative in nature, does not increase reporting requirements, and

will provide the Board with improved flexibility in staffing the subcommittee.

This action will have a beneficial impact as it will encourage greater industry and small business participation in applying for diversion credit for new product and new market projects under § 930.162, and expanding the market for tart cherries. The subcommittee performs the function of reviewing and granting exemption requests that have the potential to expand these markets. Increasing the maximum size of the subcommittee without mandating that all seats be filled allows for more flexibility in conducting subcommittee business. The Board also believes the additional members will provide more candidates to draw from when scheduling subcommittee meetings and help ensure some members are in attendance for each scheduled meeting. Adding a five-year term limit to subcommittee membership helps maintain subcommittee institutional knowledge while ensuring the inclusion of the perspective and insight from new participants.

This rule is expected to benefit the industry. The effects of this rule are not expected to be disproportionately greater or lesser for small handlers or producers than for larger entities.

The Board considered one alternative to this change. The Board considered making no changes either to the structure of the subcommittee or the lack of term limits for serving thereon. However, when discussing the alternative, Board members assessed that increasing the subcommittee size and the inclusion of term limits would not only increase the likelihood of subcommittee participation, but also promote increased industry confidence and trust in the subcommittee's composition and function. Therefore, the alternative was rejected.

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. 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes in those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry 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. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule. Further, the public comment received concerning the proposal did not address the initial regulatory flexibility analysis.

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.

The Board's meeting was widely publicized throughout the tart cherry industry. All interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the March 19, 2020, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on July 24, 2020 (85 FR 44792). Copies of the proposed rule were also mailed or sent via email to all tart cherry handlers. The proposal was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending August 24, 2020, was provided for interested persons to respond to the proposal.

One comment was received in response to the proposal. However, this comment did not address the merits of the proposal. Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://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.

After consideration of all relevant material presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart Cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Amend § 930.162 by revising paragraph (d) to read as follows:

§ 930.162 Exemptions.

* * * * *

(d) *Review of applications.* A Board appointed subcommittee shall review applications for exemption or renewal of exemption and either approve or deny the exemption. The subcommittee shall consist of up to five total members, each having no handler affiliation but knowledge of the tart cherry industry, one of whom shall be the public member or the alternate public member if available to serve. Each subcommittee appointment shall be limited to a five-year term. Any denial of an application for exemption or renewal of an existing exemption shall be served on the applicant by certified mail and shall state the reasons for the denial. Within 10 days after the receipt of a denial, the applicant may file an appeal, in writing, with the Deputy Administrator, Specialty Crops Program, supported by any arguments and evidence the applicant may wish to offer as to why the application for exemption or renewal of exemption should have been approved. The Deputy Administrator, upon consideration of such appeal, will take such action as deemed appropriate with respect to the application for exemption or renewal of exemption.

* * * * *

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–24910 Filed 11–18–20; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1400

[Docket ID CCC–2019–0007]

RIN 0560–AI49

Payment Limitation and Payment Eligibility

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Correcting amendments.

SUMMARY: The Farm Service Agency (FSA) on behalf of the Commodity Credit Corporation (CCC) amended its regulations concerning payment limitation and eligibility through a final rule published in the **Federal Register** on August 21, 2020. This correction restores the previous definitions of ''active personal management,'' ''significant contribution,'' ''significant contribution of active personal management,'' and ''significant contribution of the combination of active personal labor and active personal management.''

DATES: *Effective:* November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Paul Hanson; telephone: (202) 720–4189; email: *Paul.Hanson@usda.gov*. Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION: This document corrects certain sections of the regulations in 7 CFR part 1400, which were implemented in the final rule that was published in the **Federal Register** on August 24, 2020 (85 FR 52033–52041).

The final rule amended the definitions in 7 CFR 1400.3 for ''active personal management'' and ''significant contribution,'' which apply throughout part 1400. It also removed and reserved § 1400.601, which contained definitions of ''active personal management,'' ''significant contribution of active personal management,'' and ''significant contribution of the combination of active personal labor and active personal management'' that applied only to Subpart G, which provides additional payment eligibility provisions for joint operations and legal entities comprised of non-family members or partners, stockholders, or persons with an ownership interest in the farming operation. The changes were intended to provide consistency in the definitions of the terms used throughout part 1400.

After publication of the rule, stakeholders notified FSA of concerns regarding potential non-intended, adverse effects to farming operations comprised solely of family members. In streamlining the definitions for consistency, these revised definitions were inadvertently made applicable to farming operations solely owned by family members. This was not the intent of this rule change, and as revised, the definitions were more restrictive than they needed to be in order to provide intended consistency in the rule. Those more restrictive definitions were not intended to apply to farm operations comprised or owned solely of family members. Therefore, this document restores § 400.601 and the previous the definitions of ''active personal management'' and ''significant contribution'' in § 1400.3 that were applicable prior to publication of the final rule on August 24, 2020. The more restrictive definitions described in § 1400.601 apply only to farming operations comprised of non-family members that are subject to a limit in the number of farm managers seeking to qualify for actively engaged in farming based on a contribution of active personal management alone.

List of Subjects in 7 CFR Part 1400

Agriculture, Grant programs-agriculture, Loan programs-agriculture, Natural resources, Price support programs.

Accordingly, 7 CFR part 1400 is corrected by making the following correcting amendments:

PART 1400—PAYMENT LIMITATION AND PAYMENT ELIGIBILITY

■ 1. The authority citation for part 1400 continues to read as follows:

Authority: 7 U.S.C. 1308, 1308–1, 1308–2, 1308–3, 1308–3a, 1308–4, and 1308–5; and Title I, Pub. L. 115–123.

Subpart A—General Provisions

■ 2. Amend § 1400.3 in paragraph (b) as follows:

■ a. Remove the first occurrence of the definition of ''Active personal management''; and

■ b. Revise the definition of ''Significant contribution''.

The revision reads as follows.

§ 1400.3 Definitions.

* * * * *

(b) * * *

Significant contribution means the provision of the following to a farming operation:

(i)(A) For land, capital, or equipment contributed independently by a person or legal entity, a contribution that has a value at least equal to 50 percent of the person's or legal entity's commensurate share of the total:

(*1*) Value of the capital necessary to conduct the farming operation;

(*2*) Rental value of the land necessary to conduct the farming operation; or

(*3*) Rental value of the equipment necessary to conduct the farming operation; or

(B) If the contribution by a person or legal entity consists of any combination of land, capital, and equipment, such combined contribution must have a value at least equal to 30 percent of the person's or legal entity's commensurate share of the total value of the farming operation;

(ii) For active personal labor, an amount contributed by a person to the farming operation that is described by the smaller of the following:

(A) 1,000 hours per calendar year; or

(B) 50 percent of the total hours that would be necessary to conduct a farming operation that is comparable in size to such person's or legal entity's commensurate share in the farming operation;

(iii) With respect to active personal management, activities that are critical to the profitability of the farming operation, taking into consideration the person's or legal entity's commensurate share in the farming operation; and

(iv) With respect to a combination of active personal labor and active personal management, when neither contribution by itself meets the requirement of paragraphs (ii) and (iii) of this definition, a combination of active personal labor and active personal management that, when made together, results in a critical impact on the profitability of the farming operation in an amount at least equal to either the significant contribution of active personal labor or active personal management as defined in paragraphs (ii) and (iii) of this definition.

* * * * *

Subpart G—Additional Payment Eligibility Provisions for Joint Operations and Legal Entities Comprised of Non-Family Members or Partners, Stockholders, or Persons With an Ownership Interest in the Farming Operation

■ 3. Add § 1400.601 to read as follows.

§ 1400.601 Definitions.

(a) The terms defined in § 1400.3 are applicable to this subpart and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions are also applicable to this subpart:

Active personal management means personally providing and participating in management activities considered critical to the profitability of the farming operation and performed under one or more of the following categories:

(i) Capital, which includes:

(A) Arranging financing and managing capital;

(B) Acquiring equipment;

(C) Acquiring land and negotiating leases;

(D) Managing insurance; and

(E) Managing participation in USDA programs;

(ii) Labor, which includes hiring and managing of hired labor; and

(iii) Agronomics and marketing, which includes:

(A) Selecting crops and making planting decisions;

(B) Acquiring and purchasing crop inputs;

(C) Managing crops (that is, whatever managerial decisions are needed with respect to keeping the growing crops living and healthy—soil fertility and fertilization, weed control, insect control, irrigation if applicable) and making harvest decisions; and

(D) Pricing and marketing of crop production.

Significant contribution of active personal management means active personal management activities performed by a person, with a direct or indirect ownership interest in the farming operation, on a regular, continuous, and substantial basis to the farming operation, and meets at least one of the following to be considered significant:

(i) Performs at least 25 percent of the total management hours required for the farming operation on an annual basis; or

(ii) Performs at least 500 hours of management annually for the farming operation.

Significant contribution of the combination of active personal labor and active personal management means a contribution of a combination of active personal labor and active personal management that:

(i) Is critical to the profitability of the farming operation;

(ii) Is performed on a regular, continuous, and substantial basis; and

(iii) Meets the following required number of hours:

TABLE 1 TO PARAGRAPH (iii) OF THE DEFINITION OF SIGNIFICANT CONTRIBUTION OF THE COMBINATION OF ACTIVE PERSONAL LABOR AND ACTIVE PERSONAL MANAGEMENT

Combination of active personal labor and active personal management minimum requirement for a significant contribution		
Management contribution in hours	Labor contribution in hours	Meets the minimum threshold for significant contribution, in hours
475	75	550
450	100	550
425	225	650
400	250	650
375	375	750
350	400	750
325	425	750
300	550	850
275	575	850
250	600	850
225	625	850
200	650	850
175	675	850
150	800	950
125	825	950
100	850	950
75	875	950
50	900	950
25	925	950

Richard Fordyce,

Administrator, Farm Service Agency.

Robert Stephenson,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2020–25456 Filed 11–18–20; 8:45 am]

BILLING CODE 3410–05–P

FEDERAL RESERVE SYSTEM

12 CFR Part 261a

[Docket No. R–1704]

RIN 7100–AF78

Privacy Act of 1974; Privacy Act Regulation

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is issuing a final rule revising its regulation implementing the Privacy Act of 1974 (Privacy Act Rule) to add BGFRS–43, ''FRB—Security Sharing Platform,'' to the list of systems of records identified as ''exempt'' systems of records.

DATES: Effective November 19, 2020.

FOR FURTHER INFORMATION CONTACT: David B. Husband, Counsel, (202) 530–6270, or *david.b.husband@frb.gov;* Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On April 1, 2020, the Board published a notice of proposed rulemaking to amend the Board's Privacy Act Rule, with a 30-day public comment period ending on May 1, 2020 and concurrently, in a separate notice, established BGFRS–43 as a new system of records.[1] The rulemaking proposed to add BGFRS–43 to the Board's list of exempt systems of records pursuant to 5 U.S.C. 552a(k)(2), which exempts the listed system of record from certain provisions of the Privacy Act to the extent the system contains investigatory material compiled for law enforcement purposes. The Board did not receive any comments on the proposed amendment to the Privacy Act Rule and therefore,

[1] See, 85 FR 18156 (April 1, 2020) (Notice of Proposed Rulemaking) and 85 FR 18240 (April 1, 2020) (System of Records Notice). BGFRS–43, ''FRB—Security Sharing Platform,'' became effective on May 1, 2020.

the Board is adopting the proposed rule as final, without modification.

Accordingly, the Board is amending 12 CFR 261a.12(b) to redesignate paragraph (b)(11) referencing BGFRS/OIG–1 Investigative Records as paragraph (b)(12) and adding ''BGFRS–43, Security Sharing Platform'' as new paragraph (b)(11).

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605, the Board certifies that this rule will not have a significant economic impact on a substantial number of small entities because it applies only to internal personnel matters of the agency.

Administrative Procedure Act

This rule is exempt from the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553, and the Congressional Review Act, pursuant to 5 U.S.C. 804(3)(B) and (C), because it is a rule relating to agency management or personnel and a rule of agency procedure that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 12 CFR Part 261a

Privacy.

Authority and Issuance

For the reasons stated in the preamble, the Board amends 12 CFR part 261a as follows:

PART 12 CFR 261a—RULES REGARDING ACCESS TO PERSONAL INFORMATION UNDER THE PRIVACY ACT 1974

■ 1. The authority citation of part 261a continues to read as follows:

Authority: 5 U.S.C. 552a.

■ 2. Amend § 261a.12(b) by redesignating paragraph (b)(11) as (b)(12) and adding new paragraph (b)(11) to read as follows:

§ 261a.12 Exempt records.

* * * * *

(b) * * *

(11) BGFRS–43 Security Sharing Platform

* * * * *

By order of the Board of Governors of Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2020–24088 Filed 11–18–20; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0513; Product Identifier 2019–SW–037–AD; Amendment 39–21321; AD 2020–23–05]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2018–08–01 for Airbus Helicopters Model EC225LP helicopters. AD 2018–08–01 required inspecting the control rod attachment yokes (yoke) of certain main rotor rotating swashplates (swashplate). This new AD retains the inspection requirements of AD 2018–08–01, expands the applicability, establishes a life limit, and adds a one-time inspection of stripped yokes. This AD was prompted by the identification of additional swashplate serial numbers affected by the unsafe condition and the establishment of a life limit for the swashplates. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 24, 2020.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0513.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0513; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Union Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The address for Docket Operations is Document Operations, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Matthew Fuller, AD Program Manager, Operational Safety Branch, Airworthiness Products Section, General Aviation & Rotorcraft Unit, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *Matthew.Fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2018–08–01, Amendment 39–19254 (83 FR 17617, April 23, 2018) (AD 2018–08–01) and add a new AD. AD 2018–08–01 applied to Airbus Helicopters Model EC225LP helicopters with certain serial-numbered swashplates part number (P/N) 332A31–3074–00 or P/N 332A31–3074–01 installed. The NPRM published in the **Federal Register** on June 3, 2020 (85 FR 34118). The NPRM proposed to require determining the date of manufacture of the swashplate and establishing a life limit of 12 years since the date of manufacture. The NPRM proposed to retain the repetitive visual inspections of AD 2018–08–01 to inspect each yoke for a crack at intervals not to exceed 15 hours time-in-service (TIS) for swashplates that have accumulated less than 7 years since the date of manufacture. For a swashplate that has accumulated 7 or more years, but less than 12 years since the date of manufacture, the NPRM proposed to require removing the grease and stripping certain areas of the yokes and inspecting these areas for corrosion, pitting, loss of material, and a crack. If there are no cracks, the NPRM proposed to require performing a dye penetrant inspection of the yoke for a crack. Depending on the results of this inspection, the NPRM proposed to require either repairing the surface of the swashplate or removing it from service.

The NPRM was prompted by EASA AD No. 2019–0074, dated March 28, 2019 (EASA AD 2019–0074) issued by EASA, which is the Technical Agent for the Member States of the European Union, to supersede EASA AD No. 2017–0191R2, dated December 15, 2017

(EASA AD 2017–0191R2). EASA AD 2019–0074 followed Airbus Helicopters revising Emergency Alert Service Bulletin (EASB) No. 05A051, Revision 1, dated November 16, 2017, to Revision 2, dated February 26, 2019, to establish a life limit (also called a service life limit) of 12 years for the swashplate and add a reporting requirement if there is a crack or corrosion in a yoke. EASA advises that additional analysis determined that it is necessary to introduce the new life limit for the affected swashplates. Accordingly, EASA AD 2019–0074 retains the requirements of EASA AD 2017–0191R2 and adds a life limit and a reporting requirement.

Additionally, when the FAA issued AD 2018–08–01 to address the unsafe condition of a crack in a swashplate yoke, the FAA did not require stripping certain yokes and performing a one-time inspection within 100 hours TIS for corrosion and a crack as specified in EASA AD 2017–0191R2, as there was sufficient time to allow for notice and comment prior to this long-term AD requirement going into effect. The FAA has determined that this inspection is needed to address this unsafe condition. Accordingly, the NPRM also proposed to require, within 100 hours TIS and for certain yokes, removing the grease and stripping certain areas of the yokes and inspecting these areas for corrosion, pitting, loss of material, and a crack.

Comments

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

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all of the known relevant information and determining that an unsafe condition is likely to exist or develop on other helicopters of the same type design and that air safety and the public interest require adopting the AD requirements as proposed.

Differences Between This AD and the EASA AD

The EASA AD requires performing a non-destructive inspection only if there is doubt whether there is a crack. Instead, this AD requires a visual inspection and if there are no cracks, requires a non-destructive inspection. The EASA AD specifies instructions for reporting inspection reports; this AD does not.

Related Service Information Under 1 CFR Part 51

The FAA reviewed one document that co-publishes two Airbus Helicopters EASB identification numbers: EASB No. 05A051 for Model EC225LP helicopters and EASB No. 05A046 for non-FAA type-certificated Model EC725AP helicopters, each Revision 2 and dated February 26, 2019 (EASB 05A051 and EASB 05A046). EASB 05A051 is incorporated by reference in this AD. EASB 05A046 is not incorporated by reference in this AD.

This service information specifies inspections for swashplate P/N 332A31–3074–00 and P/N 332A31–3074–01. This service information specifies procedures for a repetitive inspection of the yokes for a crack and a one-time inspection of the stripped yokes for corrosion and a crack. If in doubt about whether there is a crack, this service information specifies performing a non-destructive inspection. This service information also specifies touching up the swashplate with varnish if there is corrosion, removing any damage within allowable limits, and refinishing the yokes. If there is a crack in a yoke, this service information specifies replacing the swashplate. This service information also specifies a life limit of 12 years since the date of manufacture for the swashplates and reporting requirements if a crack or corrosion is discovered.

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

Other Related Service Information

The FAA reviewed one document that co-publishes two Airbus Helicopters EASB identification numbers: EASB No. 05A051 for Model EC225LP helicopters and EASB No. 05A046 for non-FAA type-certificated Model EC725AP helicopters, each Revision 1 and dated November 16, 2017. Revision 1 of this service information specifies the same inspections as Revision 2 of this service information. However, Revision 2 of this service information clarifies some of the inspection instructions and adds a life limit and a reporting requirement.

Costs of Compliance

The FAA estimates that this AD affects 26 helicopters of U.S. registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. Labor rates are estimated at $85 per work-hour.

Determining the date of manufacture of the swashplate takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $1,118 for the U.S. fleet.

Inspecting the yokes takes about 0.25 work-hour for an estimated cost of $21 per helicopter and $546 for the U.S. fleet per inspection cycle.

Removing grease, stripping the yokes, and inspecting the stripped yokes takes about 8 work-hours, for a total estimated cost of $680 per helicopter.

Dye-penetrant inspecting a yoke for a crack takes about 6 work-hours and parts cost about $50, for an estimated cost of $560 per yoke.

Removing any corrosion or repairing damage within the allowable limit takes about 3 work-hours, for an estimated cost of $255 per yoke.

Replacing the swashplate takes about 6 work-hours, and parts cost about $85,661 for an estimated cost of $86,171 per instance.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–08–01, Amendment 39–19254 (83 FR 17617, April 23, 2018), and adding the following new AD:2020–23–05

Airbus Helicopters: Amendment 39–21321; Docket No. FAA–2020–0513; Product Identifier 2019–SW–037–AD.

(a) Applicability

This airworthiness directive (AD) applies to Airbus Helicopters Model EC225LP helicopters, certificated in any category, with a main rotor (M/R) rotating swashplate (swashplate) part number (P/N) 332A31–3074–00 or P/N 332A31–3074–01 installed.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack in a swashplate control rod attachment yoke (yoke). This condition could result in failure of the yoke, loss of M/R control, and subsequent loss of control of the helicopter.

(c) Affected ADs

This AD replaces AD 2018–08–01, Amendment 39–19254 (83 FR 17617, April 23, 2018).

(d) Effective Date

This AD is effective December 24, 2020.

(e) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(f) Required Actions

Before further flight, review Appendix 4.A. of Airbus Helicopters Emergency Alert Service Bulletin No. 05A051, Revision 2, dated February 26, 2019 (EASB 05A051) to determine the date of manufacture of the swashplate.

(1) If the swashplate has accumulated 12 or more years since the date of manufacture, remove from service the swashplate.

(2) If the swashplate has accumulated less than 12 years since the date of manufacture, create a component history card or equivalent record indicating a life limit of 12 years since the date of manufacture. Thereafter, continue to record the life limit of the swashplate on its component history card or equivalent record and remove from service any swashplate before accumulating 12 years since the date of manufacture.

(3) For each swashplate that has accumulated less than 7 years since the date of manufacture, within 15 hours time-in-service (TIS) and thereafter at intervals not to exceed 15 hours TIS, until the swashplate accumulates 7 years since the date of manufacture, visually inspect each yoke for a crack, paying particular attention to the areas shown in Details B, C, and D of Figure 1 of EASB 05A05.

(i) If there are no cracks, perform a dye penetrant inspection of the yoke for a crack.

(ii) If there is a crack on a yoke, before further flight, remove from service the swashplate.

(4) For each swashplate that has accumulated 7 or more years, but less than 12 years, since the date of manufacture, within 100 hours TIS:

(i) Remove the grease from areas (E), (F), (G), (H), (J), and (K) of each yoke as shown in Details B, C, and D of Figure 1 of EASB 05A051. Using a plastic spatula, strip areas (E), (F), (G), (H), (J), and (K) of each yoke as shown in Details B, C, and D of Figure 1 of EASB 05A051. Do not use a metal tool to strip any area of a yoke.

(ii) Inspect areas (E), (F), (G), (H), (J) and (K) of each yoke as shown in Details B, C, and D of Figure 1 of EASB 05A051 for corrosion, pitting, and loss of material.

(A) If there is any corrosion less than 0.0078 in. (0.2 mm), before further flight, remove the corrosion and apply varnish (Vernelec 43022 or equivalent) to the surface of areas (E), (F), (G), (H), (J) and (K).

(B) If there is any pitting or loss of material of less than 0.0078 in. (0.2 mm), before further flight, remove the damage by sanding with sandpaper 200/400 or 330.

(C) If there is any corrosion, pitting, or loss of material of 0.0078 in. (0.2 mm) or greater, before further flight, remove from service the swashplate.

(iii) Visually inspect each yoke for a crack, paying particular attention to the areas shown in Details B, C, and D of Figure 1 of EASB 05A051.

(A) If there are no cracks, perform a dye penetrant inspection of the yoke for a crack.

(B) If there is a crack on a yoke, before further flight, remove from service the swashplate.

(g) Credit for Previous Actions

If you performed the actions in paragraph (f)(4) of this AD before the effective date of this AD using Airbus Helicopters Emergency Alert Service Bulletin No. 05A051, Revision 1, dated November 16, 2017, you met the requirements of paragraph (f)(4) of this AD.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Matthew Fuller, AD Program Manager, Operational Safety Branch, Airworthiness Products Section, General Aviation & Rotorcraft Unit, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggests that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(i) Additional Information

(1) Airbus Helicopters Emergency Alert Service Bulletin No. 05A051, Revision 1, dated November 16, 2017, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD No. 2019–0074, dated March 28, 2019. You may view the EASA AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2020–0513.

(j) Subject

Joint Aircraft Service Component (JASC) Code: 6230, Main Rotor Mast/Swashplate.

(k) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 05A051, Revision 2, dated February 26, 2019.

(ii) [Reserved]

Note 1 to paragraph (k)(2): Airbus Helicopters EASB No. 05A051, Revision 2, dated February 26, 2019, is co-published as one document along with Airbus Helicopters EASB No. 05A046, Revision 2, dated February 26, 2019, which is not incorporated by reference in this AD.

(3) For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

(5) You may view this service information that is incorporated by reference at the

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

Issued on October 29, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25472 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0978; Project Identifier MCAI–2020–00459–R; Amendment 39–21318; AD 2020–23–02]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus Helicopters Model EC225LP helicopters. This AD was prompted by a report of a manufacturing and control issue regarding the ceramic balls in the bearing installed in the swashplate assembly of the main rotor mast assembly. This AD requires repetitive inspections of the bearing in the swashplate assembly of the main rotor mast assembly for discrepancies (ceramic balls that have a hard point or sensitive axial play or both) and, depending on the findings, replacement of an affected main rotor mast assembly with a serviceable main rotor mast assembly, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective December 4, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 4, 2020.

The FAA must receive comments on this AD by January 4, 2021.

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

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

For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0978.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0978; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aviation Safety Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3218; email: *kathleen.arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0079, dated April 1, 2020 (EASA AD 2020–0079) (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Helicopters Model EC225LP helicopters. This AD was prompted by a report of a manufacturing and control issue regarding the ceramic balls of the bearing installed in the swashplate assembly of the main rotor mast assembly.

The FAA is issuing this AD to address defective ceramic balls in the bearing installed in the swashplate assembly of the main rotor mast assembly, which could lead to premature spalling of the ball itself and of the bearing, loss of function of the bearing, and overload of the main rotor mast scissor, resulting in reduced control of the helicopter. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0079 describes procedures for repetitive inspections of the main rotor mast swashplate assembly for discrepancies (ceramic balls that have a hard point or sensitive axial play or both), and replacement of an affected main rotor mast assembly with a serviceable main rotor mast assembly. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2020–0079 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Difference Between this AD and the MCAI.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers

and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0079 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0079 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0079 that is required for compliance with EASA AD 2020–0079 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0978.

Difference Between This AD and the MCAI

Although the service information referenced in EASA AD 2020–0079 specifies to return affected parts to the manufacturer, this AD does not include that requirement.

Interim Action

The FAA considers this AD interim action. If final action is later identified, the FAA might consider further rulemaking then.

FAA's Justification and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because defective ceramic balls in the bearing installed in the swashplate assembly of the main rotor mast assembly could lead to premature spalling of the ball itself and of the bearing, loss of function of the bearing, and overload of the main rotor mast scissor, resulting in reduced control of the helicopter. In addition, the compliance time for the required action is shorter than the time necessary for the public to comment and for publication of the final rule. Therefore, the FAA finds good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reasons stated above, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, the FAA invites you to send any written comments, data, or views about this AD. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one copy of the comments. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0978; Project Identifier MCAI–2020–00459–R'' at the beginning of your comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Kathleen Arrigotti, Aviation Safety Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3218; email: *kathleen.arrigotti@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

The FAA estimates that this AD affects 30 helicopters of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
4 work-hours × $85 per hour = $340, per inspection ..	$0	$340	$10,200, per inspection.

The FAA estimates the following costs to do any necessary on-condition action that would be required based on the results of any required action. The FAA has no way of determining the number of helicopters that might need this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTION *

Labor cost	Parts cost	Cost per product
4 work-hours × $85 per hour = $340	(*)	* $340

* The FAA has not received any definitive data regarding the parts cost, therefore this table does not include estimated costs for parts.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–23–02 Airbus Helicopters: Amendment 39–21318; Docket No. FAA–2020–0978; Project Identifier MCAI–2020–00459–R.

(a) Effective Date

This airworthiness directive (AD) becomes effective December 4, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Helicopters Model EC225LP helicopters, certificated in any category, all manufacturer serial numbers.

(d) Subject

Joint Aircraft System Component (JASC) Code 6230, Main Rotor Mast/Swashplate.

(e) Reason

This AD was prompted by a report of a manufacturing and control issue regarding the ceramic balls in the bearing installed in the swashplate assembly of the main rotor mast assembly. The FAA is issuing this AD to address defective ceramic balls in the bearing installed in the swashplate assembly of the main rotor mast assembly, which could lead to premature spalling of the ball itself and of the bearing, loss of function of the bearing, and overload of the main rotor mast scissor, resulting in reduced control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0079, dated April 1, 2020 (EASA AD 2020–0079).

(h) Exceptions to EASA AD 2020–0079

(1) Where EASA AD 2020–0079 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0079 does not apply to this AD.

(3) Although the service information referenced in EASA AD 2020–0079 specifies to return affected parts to the manufacturer, this AD does not include that requirement.

(4) Where the service information referenced in EASA AD 2020–0079 specifies ''compliance with the works steps concerned with the check is described in a video'' this AD requires a complete rotation of the swashplate in both directions using a rate of one revolution per minute.

Note 1 to paragraph (h)(4): Refer to the video specified in the service information referenced in EASA AD 2020–0079 for guidance.

(5) Where EASA AD 2020–0079 refers to flight hours, this AD requires using hours time-in-service. The guidance provided by Note 1 to Table 1 in EASA AD 2020–0079 is still applicable.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2020–0079 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(k) Related Information

For more information about this AD, Kathleen Arrigotti, Aviation Safety Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3218; email: *kathleen.arrigotti@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0079, dated April 1, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0079, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet

www.easa.europa.eu. You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

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

Issued on October 27, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–25466 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0987; Project Identifier MCAI–2020–01205–R; Amendment 39–21323; AD 2020–23–07]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive for all Leonardo S.p.a. Model AB139 and AW139 helicopters. This AD requires removing certain emergency life raft (raft) reservoirs (reservoirs) from service, inspecting the reservoirs and raft actuator cables (actuator cables), and depending on the inspection results, replacing the reservoir or adjusting the actuator cable. This AD was prompted by the inadvertent activation and deployment of a raft while the helicopter was in flight. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD becomes effective December 4, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of December 4, 2020.

The FAA must receive comments on this AD by January 4, 2021.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *https://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0987; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Union Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this final rule, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0987.

FOR FURTHER INFORMATION CONTACT: Daniel E. Moore, Aviation Safety Engineer, Regulations & Policy Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *daniel.e.moore@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and the FAA did not provide you with notice and an opportunity to provide your comments prior to it becoming effective. However, the FAA invites you to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the AD, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit them only one time.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking during the comment period. The FAA will consider all the comments received and may conduct additional rulemaking based on those comments.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this final rule contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this final rule, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this final rule. Submissions containing CBI should be sent to Daniel E. Moore, Aviation Safety Engineer, Regulations & Policy Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *daniel.e.moore@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2020–0185, dated August 19, 2020, to correct an unsafe condition for Leonardo S.p.A. Helicopters, formerly Finmeccanica S.p.A, AgustaWestland S.p.A., Agusta S.p.A.; and AgustaWestland Philadelphia Corporation, formerly Agusta Aerospace Corporation Model AB139 and AW139 helicopters, all serial numbers, if equipped with emergency flotation kit part number (P/

N) 4G9560F00111 (15 passengers) or P/N 4G9560F00211 (18 passengers). An inadvertent raft activation and deployment event occurred on a Model AW139 helicopter during flight. EASA advises that following the deployment, the raft separated from the helicopter and was lost at sea. EASA states that investigation is on-going into the cause of this event. Model AB139 helicopters are subject to the same unsafe condition due to design similarity to the AW139 helicopters. EASA advises that this condition, if not detected and corrected, may lead to further unintended activation and deployment of the raft in flight and separation with possible impact on the rotors, resulting in reduced control of the helicopter.

To address this unsafe condition, Leonardo Helicopters has issued Alert Service Bulletin No. 139–648, dated August 10, 2020 (ASB 139–648) to provide replacement instructions for certain reservoirs and a one-time inspection for all other reservoirs to verify that the actuator cable and the valve pull rod are correctly installed.

Accordingly, the EASA AD requires, for some helicopters, replacement of affected reservoirs and, for other helicopters, inspections of the valve pull rod and the actuator cable of the raft and, depending on findings, accomplishment of the applicable corrective action(s). The EASA AD also prohibits (re)installation of an affected reservoir on any helicopter.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all of the information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of the same type designs.

Related Service Information Under 1 CFR Part 51

The FAA reviewed ASB 139–648, which specifies procedures to replace certain reservoirs and return them to the supplier, inspect the measurement of the actuator cable between the face of the pull rod and the back of the valve cap, inspect the actuator cable by inspecting the clearance between the sphere at the end of the actuator cable and the activation system, and adjust the actuator cable.

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

AD Requirements

This AD requires the following:

- For helicopters with certain serial-numbered right-hand (RH) or left-hand (LH) reservoirs P/N 3G2560V01951 or P/N 3G2560V01251 installed, within 25 hours time-in-service (TIS), removing each affected reservoir from service.
- For helicopters with certain other serial-numbered RH or LH reservoirs P/N 3G2560V01951 or P/N 3G2560V01251 installed, within 25 hours TIS or before the reservoir accumulates 55 total hours TIS since first installation on a helicopter, whichever occurs later, inspecting the valve pull rod of each reservoir. If the measurement of the actuator cable between the face of the pull rod and the back of the valve cap exceeds 68.5 mm, this AD requires replacing the reservoir before further flight.
- For helicopters with certain other serial-numbered RH or LH reservoirs P/N 3G2560V01951 or P/N 3G2560V01251 installed, this AD requires, within 25 hours TIS, inspecting the actuator cable of each reservoir. If the clearance between the sphere at the end of the actuator cable and the activation system exceeds 5.0 + 0.00/ − 2.0 mm, this AD requires adjusting the actuator cable before further flight.

This AD also prohibits installing certain serial-numbered reservoirs P/N 3G2560V01951 or P/N 3G2560V01251 on any helicopter and prohibits installing any other serial-numbered reservoir P/N 3G2560V01951 or P/N 3G2560V01251 on any helicopter unless the actuator cable of the reservoir has been inspected, and if required, the actuator cable adjusted.

Differences Between This AD and the EASA AD

The EASA AD states one of the compliance times to inspect the valve pull rod is since installation of a serviceable reservoir due removal of an affected reservoir, whereas this AD does not. The EASA AD requires returning removed reservoirs to the supplier, whereas this AD requires removing certain reservoirs from service and replacing other certain reservoirs instead.

Regulatory Flexibility Act

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

Costs of Compliance

The FAA estimates that this AD affects 130 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this AD.

Replacing a reservoir takes about 1 work-hour and parts cost about $400 for an estimated cost of $485 per reservoir.

Inspecting the valve pull rod of the reservoirs takes about 1 work-hour for an estimated cost of $85 per helicopter and $11,050 for the U.S. fleet.

Inspecting the actuator cables takes about 0.25 work-hour for an estimated cost of $21 per helicopter and $2,730 for the U.S. fleet. If required, adjusting an actuator cable takes about 0.75 work-hour for an estimated cost of $64 per cable.

FAA's Justification and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the required corrective actions must be completed within 25 hours TIS or before a component accumulates 55 total hours TIS since first installation on a helicopter, a short time period of about two months based on the average flight-hour utilization rate of these helicopters. Therefore, notice and opportunity for prior public comment are impracticable and contrary to public interest pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the reasons stated above, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of

the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

For the reasons discussed, I certify that this AD:

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

2. Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–23–07 Leonardo S.p.a.: Amendment 39–21323; Docket No. FAA–2020–0987; Project Identifier MCAI–2020–01205–R.

(a) Applicability

This airworthiness directive (AD) applies to Leonardo S.p.a. Model AB139 and AW139 helicopters, certificated in any category, with emergency flotation kit part number (P/N) 4G9560F00111 (15 passengers) or 4G9560F00211 (18 passengers).

(b) Unsafe Condition

This AD defines the unsafe condition as inadvertent activation and deployment of the emergency life raft (raft). This condition could result in the deployment of the raft during flight, separation of the raft with possible impact on the rotors, and subsequent reduced control of the helicopter.

(c) Effective Date

This AD becomes effective December 4, 2020.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) For helicopters with a right-hand (RH) or left-hand (LH) life raft reservoir (reservoir) P/N 3G2560V01951 or P/N 3G2560V01251 and with a serial number (S/N) listed in Table 1 of the Leonardo Helicopters Alert Service Bulletin No. 139–648, dated August 10, 2020 (ASB 139–648), within 25 hours time-in-service (TIS), remove each affected reservoir from service.

(2) For helicopters with a RH or LH reservoir P/N 3G2560V01951 or P/N 3G2560V01251 and with an S/N not listed in Table 1 of ASB 139–648 installed, within 25 hours TIS or before the reservoir accumulates 55 total hours TIS since first installation on a helicopter, whichever occurs later, inspect the valve pull rod of each reservoir by following paragraphs 3. through 5.1, of the Accomplishment Instructions, part II, of ASB 139–648. If the measurement of the raft actuator cable (actuator cable) between the face of the pull rod and the back of the valve cap exceeds 68.5 mm, before further flight, replace the reservoir.

(3) For helicopters with a RH or LH reservoir P/N 3G2560V01951 or P/N 3G2560V01251 and with an S/N not listed in Table 1 of ASB 139–648 installed, within 25 hours TIS, inspect the actuator cable of each reservoir by following paragraphs 3. through 5.1, of the Accomplishment Instructions, part III, of ASB 139–648. If the clearance between the sphere at the end of the actuator cable and the activation system exceeds 5.0 +0.00/−2.0 mm, before further flight, adjust the life raft actuator cable by following Annex A of ASB 139–648.

(4) As of the effective date of this AD, do not install reservoir P/N 3G2560V01951 or P/N 3G2560V01251 with an S/N listed in Table 1 of ASB 139–648 on any helicopter.

(5) As of the effective date of this AD, do not install a reservoir P/N 3G2560V01951 or P/N 3G2560V01251 with an S/N other than an S/N listed in Table 1 of ASB 139–648 on any helicopter unless you have complied with the requirements in paragraph (e)(3) of this AD.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Daniel E. Moore, Aviation Safety Engineer, Regulations & Policy Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD No. 2020–0185, dated August 19, 2020. You may view the EASA AD on the internet at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–0987.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 2560, Emergency Equipment, and 2564, Life Raft.

(i) Material Incorporated by Reference

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

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

(i) Leonardo Helicopters Alert Service Bulletin No. 139–648, dated August 10, 2020.

(ii) [Reserved]

(3) For service information identified in this AD, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

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

Issued on November 10, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25470 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0652; Product Identifier 2019–SW–066–AD; Amendment 39–21322; AD 2020–23–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Airbus Helicopters Model AS332C, AS332C1, AS332L, and AS332L1 helicopters. This AD requires inspecting the main rotor (M/R) hub assembly (hub) phonic wheel lock washer (lock washer) for correct installation and depending on the outcome, repairing or replacing the M/R hub. This AD was prompted by reported occurrences of M/R revolutions per minute (''NR'') sensor fluctuations. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD is effective December 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of December 24, 2020.

ADDRESSES: For service information identified in this final rule contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0652.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0652; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Union Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, AD Program Manager, Operational Safety Branch, Airworthiness Products Section, General Aviation & Rotorcraft Unit, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Airbus Helicopters Model AS332C, AS332C1, AS332L, and AS332L1 helicopters with an M/R hub part number (P/N) 332A31–0001–00, 332A31–0001–01, 332A31–0001–02, 332A31–0001–03, 332A31–0001–04, 332A31–0001–05, or 332A31–0001–06 installed. The NPRM published in the **Federal Register** on July 16, 2020 (85 FR 43160). The NPRM proposed to require removing at least one M/R ''NR'' sensor and borescope inspecting the phonic wheel lock washer for correct height of the lock washer. The NPRM also proposed to prohibit the installation of an affected M/R hub unless it has successfully passed the required inspection for correct lock washer installation. The proposed requirements were intended to prohibit the incorrect assembly of the M/R hub, which, if not corrected, could result in failure of the M/R hub components and subsequent loss of control of the helicopter.

The NPRM was prompted by EASA AD No. 2019–0172, dated July 18, 2019, issued by EASA, which is the Technical Agent for the Member States of the European Union. This EASA AD was issued to correct an unsafe condition for Airbus Helicopters Model AS 332 C, AS 332 C1, AS 332 L, and AS 332 L1 helicopters with an M/R hub P/N 332A31–0001–00, 332A31–0001–01, 332A31–0001–02, 332A31–0001–03, 332A31–0001–04, 332A31–0001–05, or 332A31–0001–06 installed. EASA advises of reported occurrences of ''NR'' sensor fluctuation and subsequent investigation identifying incorrect positioning of the M/R hub phonic wheel due to incorrect installation of the M/R mast nut press screws during maintenance of the M/R hubs. EASA advises that this condition, if not detected and corrected, could lead to failure of M/R hub components, possibly resulting in loss of helicopter control. Accordingly, the EASA AD requires a one-time inspection of the lock washer position and depending on findings, replacing the M/R hub.

Comments

The FAA gave the public the opportunity to participate in developing this final rule, but the FAA did not receive any comments on the NPRM or on the determination of the cost to the public.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all of the information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of the same type designs and that air safety and the public interest require adopting these AD requirements as proposed.

Differences Between This AD and the EASA AD

The EASA AD requires using a flashlight and visually inspecting the position of the lock washer, and further specifies that using an endoscope can facilitate that inspection. This AD requires borescope inspecting for the correct height of the lock washer instead. After inspecting, the EASA AD requires reinstalling the removed ''NR'' sensor(s), while this AD requires installing airworthy ''NR'' sensor(s) instead. If the lock washer is in an incorrect position, the EASA AD requires replacing the M/R hub, whereas this AD requires repairing or replacing the M/R hub with an airworthy M/R hub instead.

Related Service Information Under 1 CFR Part 51

Airbus Helicopters has issued Alert Service Bulletin No. AS332–62.00.76, Revision 0, dated May 27, 2019, which specifies inspecting the position of the M/R hub lock washer for civilian Model AS332C, C1, L, and L1 and military Model AS332B, B1, F1, M, and M1 helicopters.

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

Costs of Compliance

The FAA estimates that this AD affects 11 helicopters of U.S. Registry.

Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this AD.

Removing an ''NR'' sensor and borescope inspecting takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $473 for the U.S. fleet.

Repairing the M/R hub takes about 10 work-hours and parts cost up to about $3,000 for an estimated cost of up to $3,850 and replacing the M/R hub takes about 8 work-hours and parts cost about $50,000 for an estimated cost of $50,680.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–23–06 Airbus Helicopters: Amendment 39–21322; Docket No. FAA–2020–0652; Product Identifier 2019–SW–066–AD.

(a) Applicability

This airworthiness directive (AD) applies to Airbus Helicopters Model AS332C, AS332C1, AS332L, and AS332L1 helicopters, certificated in any category, with a main rotor (M/R) hub assembly (hub) part number (P/N) 332A31–0001–00, 332A31–0001–01, 332A31–0001–02, 332A31–0001–03, 332A31–0001–04, 332A31–0001–05, or 332A31–0001–06 installed.

(b) Unsafe Condition

This AD defines the unsafe condition as incorrect assembly of the M/R hub. This condition could result in failure of the M/R hub components and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective December 24, 2020.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 55 hours time-in-service, remove at least one M/R revolutions per minute (''NR'') sensor and borescope inspect the phonic wheel lock washer (lock washer) for correct height of the lock washer (if the installation is correct, you can see the edge of the splines) through the hole of the removed ''NR'' sensor(s) as shown in Figure 1 to Airbus Helicopters Alert Service Bulletin No. AS332–62.00.76, Revision 0, dated May 27, 2019.

(i) If the height of the lock washer is correct, before further flight, install the ''NR'' sensor(s).

(ii) If the height of the lock washer is not correct, before further flight, install the ''NR'' sensor(s) and repair or replace the M/R hub in accordance with FAA-approved procedures.

(2) As of the effective date of this AD, do not install M/R hub P/N 332A31–0001–00, 332A31–0001–01, 332A31–0001–02, 332A31–0001–03, 332A31–0001–04, 332A31–0001–05, or 332A31–0001–06 on any helicopter unless the actions of paragraph (e)(1) of this AD have been accomplished.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Matt Fuller, AD Program Manager, Operational Safety Branch, Airworthiness Products Section, General Aviation & Rotorcraft Unit, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggests that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) No. 2019–0172, dated July 18, 2019. You may view the EASA AD on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0652.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6230, Main Rotor Mast/Swashplate.

(i) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Alert Service Bulletin No. AS332–62.00.76, Revision 0, dated May 27, 2019.

(ii) [Reserved]

(3) For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

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

Issued on October 30, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25471 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0685; Project Identifier MCAI–2020–00396–R; Amendment 39–21325; AD 2020–23–09]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus Helicopters Model EC130B4 helicopters. This AD was prompted by reports of inflight detachment of the left-hand (LH) side cabin sliding doors and cases of impact damage on the main rotor blades, which were caused by degradation of the sliding door locking mechanism. This AD requires repetitive checks (measurements) of the load that operates the sliding door opening mechanism, repetitive inspections of the markings of the attachment screws for proper alignment, modifying the attachment system of the sliding door, and corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 24, 2020.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0685.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0685; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kristin Bradley, Aviation Safety Engineer, International Validation Branch, General Aviation & Rotorcraft Unit, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5485; email *Kristin.Bradley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Helicopters Model EC130B4 helicopters. The NPRM published in the **Federal Register** on August 6, 2020 (85 FR 47714). The NPRM was prompted by reports of inflight detachment of the LH side cabin sliding doors and cases of impact damage on the main rotor blades, which were caused by degradation of the sliding door locking mechanism. The NPRM proposed to require repetitive checks (measurements) of the load that operates the sliding door opening mechanism, repetitive inspections of the markings of the attachment screws for proper alignment, modifying the attachment system of the sliding door, and corrective actions if necessary, as specified in an EASA AD.

The FAA is issuing this AD to address degradation of the locking mechanism, which could lead to further events of inflight detachment of a LH side cabin sliding door, and possibly result in damage to the helicopter and injury to persons on the ground.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0069, dated March 24, 2020 (EASA AD 2020–0069) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus Helicopters Model EC130B4 helicopters. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comments received. An anonymous commenter indicated its support for the NPRM.

Conclusion

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

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

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0069 describes procedures for repetitive checks (measurements) of the load that operates the sliding door opening mechanism, repetitive inspections of the markings of the attachment screws of the rear LH upper catch for proper alignment, modifying the attachment system of the sliding door, and corrective actions if necessary. Corrective actions include adjusting the rear LH upper catch to increase the load required to operate the sliding door opening mechanism, inspecting the rear LH upper catch to determine if any anchor nut is not locked, and replacing the anchor nuts of the rear LH upper catch. EASA AD2020–0069 also specifies that doing the modification of the attachment system of the sliding door is a terminating action for the repetitive inspections of the markings of the attachment screws of the rear LH upper catch for proper alignment.

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

Costs of Compliance

The FAA estimates that this AD affects 159 helicopters of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 3 work-hours × $85 per hour = Up to $255.	$0	Up to $255	Up to $40,545.

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–23–09 Airbus Helicopters: Amendment 39–21325; Docket No. FAA–2020–0685; Project Identifier MCAI–2020–00396–R.

(a) Effective Date

This airworthiness directive (AD) is effective December 24, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus Helicopters Model EC130B4 helicopters, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Reason

This AD was prompted by reports of inflight detachment of the left-hand (LH) side cabin sliding doors and cases of impact damage on the main rotor blades, which were caused by degradation of the sliding door locking mechanism. The FAA is issuing this AD to address degradation of the locking mechanism, which could lead to further events of inflight detachment of a LH side cabin sliding door, and possibly result in damage to the helicopter and injury to persons on the ground.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0069, dated March 24, 2020 (EASA AD 2020–0069).

(h) Exceptions to EASA AD 2020–0069

(1) Where EASA AD 2020–0069 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2020–0069 refers to January 24, 2019 (the effective date of EASA AD 2020–0069), this AD requires using the effective date of this AD.

(3) The ''Remarks'' section of EASA AD 2020–0069 does not apply to this AD.

(4) The ''Parts Installation'' allowance provided in paragraph (8) of EASA AD 2020–0069 does not apply to this AD.

(5) Although the service information referenced in EASA AD 2020–0069 specifies to discard certain parts, this AD does not include that requirement.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Manager, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(j) Related Information

For more information about this AD, contact Kristin Bradley, Aviation Safety Engineer, International Validation Branch, General Aviation & Rotorcraft Unit, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5485; email *Kristin.Bradley@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0069, dated March 24, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0069, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0685.

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

Issued on November 4, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25469 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2020–0006; T.D. TTB–164; Ref: Notice No. 191]

RIN 1513–AC69

Establishment of the Tehachapi Mountains Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) establishes the approximately 58,000-acre ''Tehachapi Mountains'' viticultural area in Kern County, California. The Tehachapi Mountains viticultural area is not located within, nor does it contain, any established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: This final rule is effective December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated the functions and duties in the administration and enforcement of these provisions to the TTB Administrator through Treasury Order 120–01, dated December 10, 2013 (superseding Treasury Order 120–01, dated January 24, 2003).

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for the preparation and submission to TTB of petitions for the establishment or modification of American viticultural areas (AVAs) and lists the approved AVAs.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features, as described in part 9 of the regulations, and a name and a delineated boundary, as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to the wine's geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and provides that any interested party may petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA boundary;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Tehachapi Mountains Petition

TTB received a petition from Julie Bell of Per La Vita LLC, on behalf of local vineyard owners and winemakers, proposing to establish the ''Tehachapi Mountains'' AVA. The proposed AVA is located in Kern County, California, and is not within any established AVA. The proposed Tehachapi Mountains AVA contains approximately 58,000 acres and has 6 commercially-producing vineyards covering approximately 25 acres, as well as 1 winery. The distinguishing features of the proposed Tehachapi Mountains AVA include its topography and climate.

The proposed Tehachapi Mountains AVA is a broad, saddle-shaped region of mountain foot slopes, high valleys and rolling hills situated at the summit of the southernmost pass of the Sierra Nevada mountain range. The proposed AVA has an east-west orientation, and the terrain at the east and west ends of

the ''saddle'' rise sharply before falling away to the lower elevations of the San Joaquin Valley, to the west, and the Mojave Desert, to the east. Elevations within the proposed AVA range from 3,600 and 5,400 feet, with the majority of the area situated between 3,800 and 4,600 feet. Slope angles average between 3 and 11 degrees within the proposed AVA. According to the petition, the high altitude of the proposed AVA exposes grapes to higher intensity ultraviolet light, which stimulates synthesis of phenolic molecules and produces deep colors and thick skins. Additionally, the gentle slope angles reduce the risk of erosion and allow cold air to drain away from vineyards planted in the proposed AVA.

The petition states that topography also affects the climate of the proposed Tehachapi Mountains AVA and allows for successful viticulture, even at such high elevation. The petition notes that wine grapes are generally grown at elevations below 3,000 feet in the United States and around the world, due to colder temperatures at higher elevations that can permanently damage or kill vines. However, the proposed AVA's location within a mountain pass allows prevailing west winds from the San Joaquin Valley and east winds from the Mojave Desert to bring warm air from those regions into the proposed AVA. As a result, the proposed AVA has an average growing season of 198 days and accumulates an average of 2,762 growing degree days [1] (GDDs) annually, both of which are sufficient for ripening late season varietals such as syrah, zinfandel, and cabernet sauvignon. Warm air from the neighboring valleys also results in typical winter low temperatures within the proposed AVA that range from 35 to 26 degrees Fahrenheit. The petition notes that grapevines can suffer permanent damage at temperatures between 0 and −5 degrees Fahrenheit, so vines grown in the proposed AVA are not at risk from serious frost damage.

The Tehachapi Mountains range continues to the south of the proposed AVA. Elevations rise to over 7,000 feet, and slope angles are over 30 degrees. To the north of the proposed Tehachapi Mountains AVA are the Piute Mountains, which have elevations of over 6,000 feet and also have slope angles over 30 degrees. In portions of the northern region that are not exposed to the Mojave Desert or San Joaquin Valley, growing seasons are shorter and GDD accumulations are lower than within the proposed AVA. For example, to the north-northwest of the proposed AVA, the community of Johnsondale is at an elevation of 4,700 feet, has a growing season of 139 days, and accumulates an average of 2,149 GDDs. However, regions with more direct exposure to the desert or the valley can have longer growing seasons and greater GDD accumulations. For example, the community of Walker Pass, to the north-northeast of the proposed AVA at an elevation of 5,572 feet, is more exposed to the Mojave Desert than the proposed AVA and has an average growing season of 216 days and accumulates an average of 3,834 GDDs.

To the east of the proposed Tehachapi Mountains AVA is the Mojave Desert, which has an average elevation of 2,600 feet. The growing season is longer than within the proposed AVA, averaging 231 days at Edwards Air Force Base. GDD accumulations are also much higher, averaging 4,881 annually. To the west of the proposed AVA is the San Joaquin Valley, where elevations drop below 500 feet near Bakersfield. The growing season length in Bakersfield averages 349 days, and an average annual GDD accumulation of 5,521.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 191 in the **Federal Register** on June 26, 2020 (85 FR 38345), proposing to establish the Tehachapi Mountains AVA. In the notice, TTB summarized the evidence from the petition regarding the name, boundary, and distinguishing features for the proposed AVA. The notice also compared the distinguishing features of the proposed AVA to the surrounding areas. For a detailed description of the evidence relating to the name, boundary, and distinguishing features of the proposed AVA, and for a detailed comparison of the distinguishing features of the proposed AVA to the surrounding areas, see Notice No. 191.

In Notice No. 191, TTB solicited comments on the accuracy of the name, boundary, and other required information submitted in support of the petition. The comment period closed August 25, 2020.

In response to Notice No. 191, TTB received a total of eight comments. The commenters included the Tehachapi city manager, the Mayor of Tehachapi City and Tehachapi City Council, the Second District supervisor for Kern County, California State Assemblyman Vince Fong, U.S. Representative Kevin McCarthy, and local wine industry members. All of the comments supported the establishment of the proposed Tehachapi Mountains AVA.

TTB Determination

After careful review of the petition and the comments received in response to Notice No. 191, TTB finds that the evidence provided by the petitioner supports the establishment of the Tehachapi Mountains AVA. Accordingly, under the authority of the FAA Act, section 1111(d) of the Homeland Security Act of 2002, and parts 4 and 9 of the TTB regulations, TTB establishes the ''Tehachapi Mountains'' AVA in Kern County, California, effective 30 days from the publication date of this document.

Boundary Description

See the narrative description of the boundary of the Tehachapi Mountains AVA in the regulatory text published at the end of this final rule.

Maps

The petitioners provided the required maps, and they are listed below in the regulatory text. You may also view the Tehachapi Mountains AVA boundary on the AVA Map Explorer on the TTB website, at *https://www.ttb.gov/wine/ava-map-explorer.*

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name or with a brand name that includes an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

With the establishment of the Tehachapi Mountains AVA, its name, ''Tehachapi Mountains,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the

[1] *See* Albert J. Winkler et al., *General Viticulture* (Berkeley: University of California Press, 2nd ed. 1974), pages 61–64. In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual GDDs, defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees F, the minimum temperature required for grapevine growth.

TTB regulations (27 CFR 4.39(i)(3)). The text of the regulations clarifies this point. Consequently, wine bottlers using the name ''Tehachapi Mountains'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, will have to ensure that the product is eligible to use the AVA name as an appellation of origin. TTB is not designating ''Tehachapi,'' standing alone, as a term of viticultural significance if the proposed AVA is established, in order to avoid potential conflicts with current label holders who use the word ''Tehachapi'' in a brand name or a fanciful name on their labels. Accordingly, the proposed part 9 regulatory text set forth in this document specifies only the full name ''Tehachapi Mountains'' as a term of viticultural significance for purposes of part 4 of the TTB regulations.

Regulatory Flexibility Act

TTB certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of an AVA name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined by Executive Order 12866 of September 30, 1993. Therefore, no regulatory assessment is required.

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this final rule.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

For the reasons discussed in the preamble, TTB amends title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.273 to read as follows:

§ 9.273 Tehachapi Mountains.

(a) *Name.* The name of the viticultural area described in this section is ''Tehachapi Mountains''. For purposes of part 4 of this chapter, ''Tehachapi Mountains'' is a term of viticultural significance.

(b) *Approved maps.* The eight United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Tehachapi Mountains viticultural area are titled:

(1) Bear Mountain, CA, 2015;
(2) Keene, CA, 2015;
(3) Cummings Mountain, CA, 2015;
(4) Tehachapi North, CA, 2015;
(5) Tehachapi NE, CA, 2015;
(6) Monolith, CA, 2015;
(7) Tehachapi South, CA, 2015; and
(8) Tejon Ranch, CA, 2015.

(c) *Boundary.* The Tehachapi Mountains viticultural area is located in Kern County, California. The boundary of the Tehachapi Mountains viticultural area is as described below:

(1) The beginning point is on the Bear Mountain map at the intersection of the 4,800-foot elevation contour and an unnamed road known locally as Skyline Drive. From the beginning point, proceed easterly along the 4,800-foot elevation contour, crossing onto the Keene map, to the intersection of the 4,800-foot elevation contour and Horizon Court; then

(2) Proceed south along Horizon Court to its intersection with the 4,600-foot elevation contour; then

(3) Proceed east, then north along the meandering 4,600-foot elevation contour to its intersection with Shenandoah Place; then

(4) Proceed southeast in a straight line to the 4,400-foot elevation contour south of an unnamed road known locally as Big Sky Court; then

(5) Proceed east, then north along the meandering 4,400-foot elevation contour to its intersection with Bear Valley Road; then

(6) Proceed east in a straight line to the 4,600-foot elevation contour; then

(7) Proceed southeasterly along the 4,600-foot elevation contour, crossing onto the Cummings Mountain map and continuing southeasterly, then northerly along the 4,600-foot elevation contour, crossing back onto the Keene map, and continuing northerly along the 4,600-foot elevation contour to a point due west of the intersection of Marcel Drive and an unnamed road known locally as Woodford-Tehachapi Road; then

(8) Proceed east in a straight line to the intersection of Woodford-Tehachapi Road and Marcel Drive; then

(9) Proceed east in a straight line, crossing onto the Tehachapi North map and crossing Tehachapi Creek, to the 4,400-foot elevation contour northeast of the community of Cable, California; then

(10) Proceed easterly along the 4,400-foot elevation contour, crossing onto the Tehachapi NE map, and continuing southeasterly along the 4,400-foot elevation contour to a point due west of the terminus of Zephyr Court; then

(11) Proceed east in a straight line to the terminus of Zephyr Court; then

(12) Proceed east in a straight line to Sand Canyon Road; then

(13) Proceed south along Sand Canyon Road, crossing onto the Monolith map, to its intersection with East Tehachapi Boulevard; then

(14) Proceed southwesterly in a straight line, crossing the railroad tracks and State Route 58, to the 4,200-foot elevation contour; then

(15) Proceed westerly along the 4,200-foot elevation contour to its intersection with an unnamed intermittent creek; then

(16) Proceed southwest in a straight line to the 4,400-foot elevation contour; then

(17) Proceed west along the 4,400-foot elevation contour, crossing onto the Tehachapi South map, to its intersection with Tehachapi-Willow Springs Road; then

(18) Proceed south along Tehachapi-Willow Springs Road to its intersection with the 4,520-foot elevation contour; then

(19) Proceed west in a straight line to the intersection of the 4,840-foot elevation contour and Snowshoe Lane; then

(20) Proceed north in a straight line to the 4,800-foot elevation contour; then

(21) Proceed westerly along the 4,800-foot elevation contour, crossing onto the Cummings Mountain map and over two unnamed intermittent streams, and continuing to the intersection of the 4,800-foot elevation contour and a third unnamed intermittent stream; then

(22) Proceed south in a straight line to the 5,200-foot elevation contour; then

(23) Proceed southerly along the 5,200-foot elevation contour to a point northeast of the southern terminus of Arosa Road; then

(24) Proceed east in a straight line, crossing onto the Tehachapi South map and over an unnamed road known locally as Water Canyon Road, to the 5,400-foot elevation contour; then

(25) Proceed southeasterly, then south, then southwesterly along the 5,400-foot elevation contour, crossing onto the Cummings Mountain map and continuing to the intersection of the 5,400-foot elevation contour with an unnamed road known locally as Matterhorn Drive; then

(26) Proceed west in a straight line, crossing Mountain Climber Way, to the 4,600-foot elevation contour; then

(27) Proceed westerly along the 4,600-foot elevation contour to its intersection with High Gun Drive; then

(28) Proceed south in a straight line to the second intersection of the line with the 5,000-foot elevation contour; then

(29) Proceed west in a straight line, crossing onto the Tejon Ranch map, to the line's intersection with an unnamed 4-wheel drive road; then

(30) Proceed northwesterly along the 4-wheel drive road to its intersection with the southern terminus of an unnamed road known locally as Carlisle Drive; then

(31) Proceed southwesterly in a straight line to an unmarked 4,680-foot summit; then

(32) Proceed north in a straight line to the 3,640-foot elevation contour; then

(33) Proceed west in a straight line to the 3,600-foot elevation contour; then

(34) Proceed west, then northwesterly along the 3,600-foot elevation contour to its intersection with an unnamed intermittent stream northwest of Jack Springs Road; then

(35) Proceed northeast in a straight line, crossing onto the Bear Mountain map, and continuing to the intersection of the 4,800-foot elevation contour and an unnamed intermittent creek west of Rockspring Court; then

(36) Proceed north along the 4,800-foot elevation to a point due west of the intersection of the 4,800-foot elevation point and an unnamed road known locally as Skyline Drive; then

(37) Proceed east in a straight line to the beginning point.

Signed: October 26, 2020.

Mary G. Ryan,

Administrator.

Approved: November 9, 2020.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. 2020–25301 Filed 11–18–20; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 220

RIN 0596–AD31

National Environmental Policy Act (NEPA) Compliance

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture, Forest Service (Agency) is adopting a final rule amending its National Environmental Policy Act (NEPA) regulations. The final rule establishes new and revised categorical exclusions (pertaining to certain special use authorizations, infrastructure management activities, and restoration and resilience activities) and adds the determination of NEPA adequacy provision to the Agency's NEPA regulations. These amendments will increase efficiency in the Agency's environmental analysis and decision-making while meeting NEPA's requirements and fully honoring the Agency's environmental stewardship responsibilities. Public comment has informed and improved the final rule.

DATES: This rule is effective November 19, 2020.

ADDRESSES: Additional information is available online at *https://www.fs.fed.us/emc/nepa/revisions/index.shtml.*

FOR FURTHER INFORMATION CONTACT: Christine Dawe; Director, Ecosystem Management Coordination; 406–370–8865. 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:

Background

The mission of the Forest Service is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. The National Environmental Policy Act (NEPA) has twin goals of requiring Federal agencies (1) to consider the significant environmental impacts of their proposed actions and (2) to inform the public that environmental concerns were considered in the decision-making process. These goals are not only complementary to the Agency's mission, but such informed decision-making is essential to its achievement. The Agency devotes considerable financial and personnel resources to NEPA analyses and documentation, completing on average 1,588 categorical exclusion (CE) determinations, 266 environmental assessments (EAs), and 39 environmental impact statements (EISs) annually (based on Fiscal Years 2014–2019). The Agency is amending its NEPA regulations as described in this final rule to make more efficient use of those resources to fulfill NEPA's requirements and, in turn, its mission. The final rule is consistent with the Council on Environmental Quality's (CEQ's) intent to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable, and timely manner, and to reduce unnecessary burdens and delays (40 CFR 1500.1).

An increasing percentage of the Agency's resources have been spent each year to provide for wildfire suppression, resulting in fewer resources available for other management activities, such as restoration. In 1995, wildland fire management funding made up 16 percent of the Forest Service's annual spending, compared to 57 percent in 2018. Along with a shift in funding, there has also been a corresponding shift in staff from non-fire to fire programs, with a 39 percent reduction in all non-fire personnel since 1995.

The Consolidated Appropriations Act of 2018 (2018 Omnibus Bill) included new budget authority for fighting wildfires, in addition to regular appropriations. While this budget stability is welcome, the trends discussed above make it imperative that the Agency makes the most efficient use of available funding and resources consistent with its statutory authorities to fulfill its environmental analysis and decision-making responsibilities.

On January 3, 2018, the Agency published an Advance Notice of Proposed Rulemaking (ANPR) (83 FR 302) announcing its intent to revise its NEPA procedures with the goal of increasing the efficiency of environmental analysis. The Agency received 34,674 comments in response to the ANPR, of which 1,229 were unique. Most of the unique comments expressed support for the Agency's effort to identify efficiencies in the NEPA process. The unique comments in support of the ANPR all generally acknowledged that there is room for increased efficiency in the Agency's NEPA process. Some of these comments expressed unqualified support for increasing efficiency; other comments supported the Agency's goals but included caveats that these gains should not come at a cost to public involvement or conservation of natural resources.

On June 13, 2019, the Agency published a proposed rule (84 FR 27544) proposing revisions to its NEPA procedures. Following an initial 60-day comment period that was extended for 14 days in response to requests from the public, the Agency received roughly 103,000 comments. Roughly 6,200 comments were unique, individual comments; the remainder were organized response campaign comments (form letters). A detailed summary of

comments on the proposed rule and the Agency's response follows below.

After the Forest Service rulemaking process had begun, CEQ published an advance notice of proposed rulemaking on June 20, 2018, announcing that it was ''considering updating its implementing regulations for the procedural provisions of the National Environmental Policy Act'' (83 FR 28591). On January 10, 2020, after publication of the Forest Service's proposed rule, CEQ published a proposed rule to revise its regulations at 40 CFR parts 1500–1508 (85 FR 1684). On July 16, 2020, CEQ published a final rule revising its regulations (85 FR 43304).

The Council on Environmental Quality's revised regulations took effect on September 14, 2020 (40 CFR 1506.13). Where existing Forest Service NEPA procedures are inconsistent with CEQ's revised regulations, CEQ's revised regulations shall apply, unless there is a clear and fundamental conflict with the requirements of another statute (40 CFR 1507.3(a)). Per CEQ's revised regulations, the Forest Service shall develop, as necessary, proposed procedures to implement the CEQ's revised regulations no more than 12 months after September 14, 2020, including to eliminate any inconsistencies with CEQ's revised regulations (40 CFR 1507.3(b)).

In light of CEQ's revised regulations, the Forest Service's final rule is of limited scope. The Forest Service is amending its NEPA regulations to add only the new and expanded CEs and a Determination of NEPA Adequacy provision as described in more detail below. Other changes to the Forest Service's NEPA regulations that were included in the proposed rule, along with associated comments, will be reconsidered in association with the Agency's review of its NEPA procedures as directed by CEQ's revised regulations. These changes include, but are not limited to, revisions to the Agency's scoping and public engagement requirements, schedule of proposed actions, condition-based management, classes of actions that normally require an EIS, procedures associated with CE determinations, and use of other agency CEs.

Summary of the Final Rule

The amendments in the final rule will increase efficiency in the Agency's environmental analysis and decision-making while meeting NEPA's requirements and fully honoring the Agency's environmental stewardship responsibilities. The final rule adds a Determination of NEPA Adequacy provision, which outlines a process for determining whether a previously completed Forest Service NEPA analysis can satisfy NEPA's requirements for a subsequently proposed action. The final rule also establishes six new CEs, consolidates two existing CEs into one, and expands two existing CEs. The six new CEs include activities related to recreation special uses, administrative sites, recreation sites, and restoration and resilience projects, along with two CEs for certain road management projects. Two existing CEs are consolidated into one covering clerical modification or reauthorization of existing special uses. The two expanded CEs cover (1) approval, modification, or continuation of special use authorizations on up to 20 acres of NFS lands and (2) decommissioning of both unauthorized roads and trails and National Forest System roads and trails. These CEs are described in greater detail in the comment responses below and in the document titled, ''Supporting Statement: Categorical Exclusions For Certain Special Uses, Infrastructure, and Restoration Projects,'' available at *https://www.fs.fed.us/emc/nepa/revisions/index.shtml.*

Additionally, to avoid public confusion the final rule includes a technical amendment to remove and reserve paragraph § 220.6(e)(10), which was enjoined in *Sierra Club* v. *Bosworth,* 510 F.3d 1016 (9th Cir. 2007).

The proposed rule would have reordered the content of §§ 220.5, 220.6., and 220.7 to align with the levels of NEPA documentation (CE, EA, EIS). The final rule does not reorder the content of these sections.

Comments on the Proposal/Section by Section Description of the Final Rule

General Comments

Comments expressed a wide range of opinions—both strongly for and against—the proposed rule. Comments expressing support for the proposed rule stated that it was a means to improve the Agency's NEPA processes. Other comments, however, opposed various provisions of the proposed rule, expressing concern that the revisions could: (1) Diminish social, economic, or environmental outcomes and lead to abuse; (2) result in inadequate environmental analysis and undermine the Forest Service's mission; (3) reduce the opportunity for public comment and environmental review of projects; (4) and erode public trust, violate existing laws and regulations, and increase potential litigation.

Response: The Agency notes the general comments in support of or in opposition to the rule. The Agency has carefully considered the input from the public, other government entities, and Tribes and has made several adjustments to the final rule to address the concerns described above. These changes are described in more detail below and include, for example, not moving forward with some of the proposed CEs and adding additional limitations to other CEs. Throughout the rulemaking process, the Agency's goal has been to develop a final rule that enables the Agency to efficiently deliver environmental analysis to decision-makers that is scientifically based, is of high quality, and honors environmental stewardship responsibilities. The final rule achieves this goal and will facilitate decision-making that fulfills the Agency's mission of sustaining the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations.

The Agency will make diligent efforts to involve the public in implementing its NEPA procedures as required by CEQ's revised NEPA regulations at 40 CFR 1506.6. The Agency's final rule does not address or reduce existing Agency public involvement practices concerning CEs. Scoping and public engagement requirements will be assessed during the development of revised Agency NEPA procedures required by CEQ's revised NEPA regulations. Further, the Agency will continue to comply with the requirements of all applicable laws and regulations, such as the National Environmental Policy Act, National Forest Management Act, Endangered Species Act, and National Historic Preservation Act.

Comment: Some commenters suggest that there is insufficient justification to support the need for the proposed rule as described in the **Federal Register** notice or indicate, in opposing the proposed rule, that the regulations it would amend are relied upon by the commenters and other stakeholders.

Response: The CEQ regulations state that agencies shall reduce excessive paperwork and delay by using CEs and, for efficiency, shall identify CEs in their agency NEPA procedures (40 CFR 1500.4(a), 1500.5(a), and 1501.4(a)). The final rule reduces paperwork and delay by adding the Determination of NEPA Adequacy provision and establishing new and expanded categorical exclusions based on Agency experience and expertise. The CEQ NEPA regulations at 40 CFR parts 1500–1508 encourage agencies to continue to review their NEPA policies and procedures and to revise them as

necessary. To the extent commenters raise concerns about reliance rights, the Forest Service further notes that rules implementing NEPA, such as this one and its predecessor, are purely procedural. They simply direct the actions of public officials. They therefore do not engender specific, reasonable, and detrimental reliance by individuals and groups outside the government.

Comment: Commenters suggested a need to prepare an EIS to assess the potential impacts from implementation of the proposed rule; in particular, comments request that the Forest Service evaluate proposed rule impacts to social, cultural, and economic conditions of affected communities and user groups; climate change and carbon stores; scenic integrity; National Scenic and Historic Trails; and caves and karst resources.

Response: The CEQ regulations do not require agencies to prepare a NEPA analysis before establishing or updating agency NEPA procedures. See, *e.g., Heartwood, Inc.* v. *U.S. Forest Service,* 230 F.3d 947, 954–55 (7th Cir. 2000). Agency NEPA regulations establish the procedures for fulfilling their responsibilities under NEPA but are not the Agency's final determination of what level of NEPA analysis is required for a particular proposed action. This rule does not authorize any activity or commit resources to a project that may affect the environment. This rule does not have any reasonably foreseeable impact on the environment, nor does the rule authorize or prohibit any action that would have any effect on the environment.

Comment: After CEQ published a notice of proposed rulemaking to revise its regulations for implementing NEPA on January 10, 2020 (85 FR 1684), the Forest Service received a request from several organizations that it abandon or suspend its rulemaking effort pending the outcome of CEQ's rulemaking effort.

Response: The Forest Service has coordinated with CEQ throughout the Forest Service's rulemaking process. Partially as a result of CEQ's revised regulations, the Forest Service's final rule is of limited scope and amends its regulations to add only new and expanded CEs and the DNA provision. On November 10, 2020, CEQ issued a letter stating that CEQ has reviewed this rule and has found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3). Where existing Agency NEPA procedures are inconsistent with CEQ's revised regulations, CEQ's revised regulations shall apply (*see* 40 CFR 1507.3(a)). As explained above, the Forest Service will review its NEPA regulations and initiate another rulemaking process as required by CEQ's revised regulations.[1]

Comment: Commenters disagreed with the discussion of costs and benefits of the proposed rule in its accompanying **Federal Register** notice and stated that the determination did not consider all potential costs. Commenters contend that faster decision-making, especially if it eliminates some opportunities for public input, will often result in worse decisions. This, in turn, will increase the overall amount of time spent on projects due to delays from litigation or re-analysis. Comments suggest that spending more time on NEPA analysis will ensure the analysis is of higher quality. Additionally, some commenters argue that there are no efficiencies to be gained in completing a project under a CE instead of an EA, and that CEs take less time only because projects analyzed under a CE are generally of smaller size than those analyzed in an EA.

Response: The amendments in the final rule are more limited in scope than the Forest Service's proposed rule. The Agency has updated the discussion of cost and benefits of the final rule consistent with these changes (see the *Executive Order 12866* section). The final rule does not address existing Agency public involvement practices concerning CEs.

The notion that CEs are no more efficient than EAs runs counter to the Agency's experience that less-detailed NEPA documentation takes less time to complete than more-detailed NEPA documentation. Indeed, this claim by commenters similarly runs contrary to the whole design of the NEPA regulations since their inception and continuing up through the 2020 CEQ NEPA regulations. Specifically, there are three levels of NEPA review, each of which requires successively more documentation and analysis than the prior level: Determination of whether a CE applies, completion of an EA, and completion of an EIS. *See* 40 CFR 1501.3(a) (describing these three levels); *see also* 40 CFR 1501.4(a) (2019) (noting how these three levels interrelate).

Nevertheless, the Agency compared the days from project initiation to decision for the 68 sample EAs used to develop the restoration CE to the 140 projects completed under the CE in Section 603 of the Healthy Forests Restoration Act since its establishment. The Section 603 CE, like the restoration CE, has a maximum project size in the thousands of acres and covers an array of activities, including several similar activities. Using the 68–EA sample, the median time to complete an EA per 1000 acres was 186 days. Conversely, the median time to complete a decision memo using the Section 603 CE per 1000 acres was 111 days. This analysis supports the Agency's premise that CEs represent a more timely and efficient form of NEPA compliance.

Comment: Comments suggest that the Forest Service should focus on addressing causes of agency inefficiency in environmental decision-making (*e.g.,* funding, staffing, training, internal policies and consistency, and agency culture).

Response: The Agency recognizes that factors outside of its NEPA regulations also contribute to inefficiency in environmental analysis and decision-making. In late 2017, the Agency announced its Environmental Analysis and Decision-Making change effort, which intends to reduce the time and cost of environmental analysis and decision-making processes to produce efficient, effective, and high-quality land management decisions. The scope of this change effort includes and extends beyond revising the Agency's NEPA regulations. The Environmental Analysis and Decision-Making change effort includes, for example: A new, national NEPA training program; formation of National Historic Preservation Act and Endangered Species Act task forces to identify and implement efficiencies; compliance performance metrics for leadership; production of an environmental analysis and decision-making information library and network sharing platform; and development of a contracting center of excellence.

Section 220.4 General Requirements (Determination of NEPA Adequacy)

Comment: Some commenters stated that use of Determinations of NEPA Adequacy (DNAs) would curtail effective analysis and public input by relying on non-site-specific, potentially outdated information, and that the Bureau of Land Management (BLM) model is not appropriate for the Agency. Commenters requested the concept be eliminated or that additional sideboards be applied to ensure it is applied correctly. Commenters also requested that the Forest Service provide more details for when a previous NEPA analysis can satisfy NEPA requirements for a subsequent action, such as geographical considerations (*e.g.,*

[1] CEQ has determined that the categorical exclusions contained in agency NEPA procedures as of September 14, 2020, are consistent with the new CEQ regulations. *See* § 1507.3. The Forest Service notes its concurrence that its existing categorical exclusions are consistent with the 2020 CEQ NEPA regulations.

location, scale); temporal considerations (*e.g.,* previous decision date); and current and desired conditions considerations. Comments also stated that DNAs should require public input and documentation. Alternatively, comments expressed support for the use of DNAs to expedite agency action by reducing redundant analyses of substantially similar proposed actions with substantially similar impacts. Some comments also urged that the proposed rule should more closely follow BLM guidance and language for DNAs.

Response: Section 220.4(i) of the proposed rule added the DNA provision, which outlines a process for determining whether a previously completed Forest Service NEPA analysis can satisfy NEPA's requirements for a subsequently proposed action. The proposed DNA review process required consideration of the following factors: The similarity between the prior decision and the proposed actions, the adequacy of the alternatives to the proposed action, any significant new circumstances or information since the prior decision, and the adequacy of the impact analysis for the proposed action.

The final rule retains and clarifies the DNA provision at § 220.4(j). A DNA documents the responsible official's review and determination whether a NEPA analysis prepared for a prior activity can satisfy NEPA's requirements for a new proposed action that is substantially the same. For example, approval of a special use permit for a commercial fishing derby at a lake on NFS lands could rely on NEPA documentation prepared for the same or similar event the year before. If the elements outlined at § 220.4(j)(1) are not met for the proposed action currently under consideration, the DNA provision should not be used.

The Forest Service has modelled its DNA regulation after provisions of the BLM's NEPA procedures and is consistent with CEQ's NEPA regulations (40 CFR 1500.4(p), 1501.12, 1502.9(d)(4), and 1506.3). CEQ's regulations require elimination of duplication, encourage incorporation by reference, allow reevaluation of prior NEPA analyses, and allow adoption of other agencies' NEPA documentation. BLM uses DNAs in association with previously prepared BLM NEPA documents. The Forest Service intends the use of DNAs to be in line with BLM's practice and will operate as essentially an ''internal adoption'' mechanism to be used when a new proposed action is substantially the same as an alternative analyzed in a prior Forest Service NEPA document.

The BLM's DNA mechanism also allows officials to use DNAs to document that no supplementation of an EIS or EA is required. However, the Forest Service will continue to use its Supplemental Information Reports (see FSH 1909.15, sec. 18) to assess new information and changed circumstances rather than use DNAs for such purposes consistent with 40 CFR 1502.9(d)(4).

As requested by some commenters, the final rule revises § 220.4(j) to more closely align with language from the Department of the Interior and the BLM. However, § 220.4(j)(1)(i) uses ''substantially the same'' instead of the BLM's use of ''essentially similar'' to describe the required relationship of the new proposed action to the previously analyzed proposed action. This change aligns with CEQ's related adoption provision, 40 CFR 1506.3, as described above.

The final rule also clarifies that, in order to use a DNA, the responsible official must determine that each of the elements set out at § 220.4(j)(1) are met. In addition, the final rule clarifies at § 220.4(j)(2) that proposed actions undergoing a DNA review shall be included on the Schedule of Proposed Actions; be subject to scoping; be subject to administrative review processes that were applicable to the prior decision; and include issuance of a new decision document.

Section 220.6 Categorical Exclusions

Comment: Commenters expressed both general support and opposition to the use or expansion of CEs, as described in the proposed rule. Those in favor stated the new CEs will help the Agency conduct its NEPA review of projects in a more timely and efficient manner, supported the analysis done to substantiate the proposed CEs, and expressed confidence that responsible officials will use CEs appropriately. Those in opposition believed that the proposed CEs involved actions that would or could have significant effects, maintained that many or all proposed actions should undergo detailed analysis and public involvement, or that responsible officials would have too much discretion under the proposed CEs.

Response: The Agency has noted the comments providing general support or opposition. Comments specific to a certain CE are addressed below in additional responses. Administratively established CEs are a valid form of NEPA review. The CEQ regulations direct that for efficiency, agencies shall identify in their agency NEPA procedures categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement (40 CFR 1501.4).

The Forest Service is establishing new CEs in the final rule pursuant to CEQ's implementing regulations at 40 CFR 1507.3. On November 10, 2020, CEQ issued a letter stating that CEQ has reviewed this rule and has found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3). The Forest Service has prepared a supporting statement for the CEs that outlines the process the Forest Service followed to substantiate the establishment of the CEs. This document is titled, ''Supporting Statement: Categorical Exclusions For Certain Special Uses, Infrastructure, and Restoration Projects,'' and is available at *https://www.fs.fed.us/emc/nepa/revisions/index.shtml.* Specific responses to comments raised on the supporting statements are also addressed in later sections of this notice.

Categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require EAs or EISs. The use of CEs can reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions where significant environmental impacts are uncertain or anticipated.

Consistent with CEQ regulations, the application of non-statutory Forest Service CEs is limited by ''extraordinary circumstances,'' in which a normally excluded action may have a significant effect (40 CFR 1501.4). Activities conducted under Agency CEs must be consistent with Agency procedures and must comply with all applicable Federal and State laws for protecting the environment. Management direction set forth in Forest Service land management plans also provides important parameters. Land management plans help ensure that potential environmental effects have been taken into account through the consistency requirement set forth in the National Forest Management Act and USDA's implementing regulations (16 U.S.C. 1604(i); 36 CFR 219.15) directing projects and activities be consistent with plan direction or be accounted for through project-specific amendments.

Listing a category of actions as able to be categorically excluded in the agency's NEPA regulations does not constitute a final conclusive determination regarding the appropriate level of NEPA review for a specific proposed action. Listing a category of actions creates an initial presumption

that a CE, rather than an EA or an EIS, is normally appropriate to support approval of the listed actions. The extraordinary circumstances review, interdisciplinary process, or public input can result in the determination to prepare an EA or an EIS.

The Forest Service made several modifications to the final rule regarding CEs as a result of public comment. The proposed CEs for converting unauthorized roads and trails to National Forest System roads and trails, as presented in the proposed rule at § 220.5(e)(23) and (25), were not carried forward in the final rule due to public concerns about whether establishment of those CEs could encourage the creation of unauthorized roads and trails. Additionally, the final rule includes modifications to the restoration CE (§ 220.6(e)(25)); the roads CEs (§ 220.6(e)(23) and (24)); and the special uses CEs (§ 220.6(d)(11) and (12) and § 220.6(e)(3)). Specific changes made to the CEs are discussed further in the responses to comments below and the Supporting Statement.

Comment: Some commenters asked the Forest Service to review all existing CEs and consider increasing their limits. Other commenters suggested the Forest Service is required to review all CEs for their potential for significant effects before proposing additional CEs.

Response: The Agency has exercised its discretion in defining the scope of the current rulemaking process and in electing to pursue additional CEs for special uses, infrastructure, and restoration consistent with its program needs. The Agency believes these program areas present the best opportunities for increasing efficiency in the Agency's NEPA procedures in furtherance of producing efficient, effective, and high-quality land management decisions that will timely accomplish work on the ground consistent with its statutory mission and authorities and be more responsive to the public. Focused consideration on establishing CEs for individual program activities is consistent with past agency practice to develop CEs (see, *e.g.,* Oil and Gas Activities (72 FR 7391), Special Use Authorizations (69 FR 40591), Soil and Water Restoration Activities (78 FR 56153); Limited Timber Harvest (68 FR 44598)).

Comment: Beyond the additional and modified CEs identified in the proposed rule, commenters also asked that the Forest Service incorporate new CEs for a variety of activities, including grazing- and range-related activities, vegetation management plans and vegetation management activities, watershed and other research projects, land exchanges, and mineral exploration.

Response: The Agency appreciates the public interest expressed in identifying additional opportunities for CEs. While the Agency has elected to maintain the rulemaking's focus on special uses, infrastructure, and restoration, this does not preclude the agency from examining additional opportunities for improvement through additional reviews. For example, the Forest Service recently announced in the Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions its intent to update its CE for rangeland management improvement projects at § 220.6(e)(9) to incorporate modern range management practices (*see https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=0596-AD46*).

Comments on New and Revised CEs Not Requiring Documentation in a Project or Case File and Decision Memo

Comment: Many comments expressed support for the CE in paragraph (d)(11) of the proposed rule, along with the Agency's goals to expedite processing of special use authorizations and reduce confusion in implementation of existing CEs in paragraphs (d)(10) and (e)(15). Some commenters requested limiting this CE to recreation special uses, requiring documentation in a decision memo, requiring public involvement, or adding additional examples of actions that would be covered by the CE.

Response: The final rule consolidates two similar existing CEs regarding special use authorizations into a new category at § 220.6(d)(11). The Forest Service agrees that consolidation of CEs at §§ 220.6(d)(10) (covering amendment to or replacement of an existing special use authorization) and (e)(15) (covering issuance of a new special use authorization for a new term to replace an existing or expired special use authorization) of the existing regulations will reduce confusion and increase efficiency in use of the CE for special use authorizations. The Forest Service has extensive experience using these CEs. A review of use of the CE at § 220.6(e)(15) from fiscal years 2012–2016 demonstrates that responsible officials have been relying on this CE appropriately, well within its constraints. From fiscal years 2012 through 2016, category (e)(15) was used 1,584 times (roughly 317 times per year). A review of these projects indicated that the CE is being used as intended and within its limiting factors. Because the new, consolidated CE is limited to actions to replace an existing authorization where there are no changes to the authorized facilities or increases in the scope or magnitude of the authorized activities, the Agency has determined that documentation with a decision memo or project file is not required. An applicant or holder also must continue to comply with the terms and conditions of the existing special use authorization.

Some of the examples of actions covered by the CE have been clarified, but the list of examples for the category is not intended to be exhaustive, and additional examples have not been incorporated into the final rule. Outdated terms such as ''electric transmission line'' and ''powerline,'' which were used during development of the proposed rule, have been replaced with ''powerline facility'' to match recent revisions to the Agency's special use regulations (36 CFR part 251). Additional examples requested by commenters covering changes to the terms and conditions of an authorization that require Forest Service approval have not been added to the final rule because these examples are outside the scope of the existing and consolidated CEs. The CE in paragraph (d)(11) has also not been limited to recreation special uses as requested by some commenters. The existing CEs encompass both recreation and non-recreation special uses; limiting the consolidated CE to recreation special uses would undercut the Agency's efficiency goals.

Comment: Some commenters expressed support for the new CE at § 220.5(d)(12) of the proposed rule because it will increase NEPA efficiency related to recreation special use permits. Additionally, some commenters agreed that issuance of an outfitting and guiding permit where the use supported by the outfitter and guide is already allowed in the area should not have significant environmental effects and would be appropriate to cover under a CE. Many commenters requested that the final rule limit this CE to recreation special uses, provide further clarification on where activities covered by the CE could occur, and provide additional examples of activities covered by the CE. Some commenters also requested that the CE require a decision memo or interpreted the language related to land management plan consistency in the proposed CE to mean that a NEPA analysis would not occur. Some commenters more generally opposed issuance of special use permits being analyzed under a CE and that issuance of special use permits should always be subject to a higher level of environmental review and public input.

Response: The final rule retains this CE at § 220.6(d)(12) and makes some

edits to the language used in the proposed rule. The final rule clarifies that the CE in paragraph (d)(12) is limited to recreation special uses. The final rule also revises the CE to clarify that it is limited to recreation special uses that occur on existing roads or trails, in existing facilities, at existing recreation sites, or in areas where the activities supported by recreation special uses are allowed. The intent of the CE is to facilitate issuance of recreation special use permits where the activities supported by those permits are already occurring or allowed on a noncommercial basis. In general, there is no difference in environmental impacts between recreational activities conducted by the general public and recreational activities led by an outfitter and guide. As a result, the final rule retains this CE under those administrative categories that do not require documentation in a decision memo. Agency proposed actions that rely on this CE, like all of the agency's proposed actions subject to NEPA, must be consistent with the land management plan and all other laws, regulations, and policies. This includes compliance with the Endangered Species Act, Clean Water Act, and National Historic Preservation Act.

Comments on New and Expanded CEs Requiring Documentation in a Project or Case File and Decision Memo

Comment: Some commenters opposed the proposed rule's expansion of the existing special use authorization CE at § 220.6(e)(3) from 5 to 20 acres, on the grounds that this change would quadruple the existing acreage subject to the CE, which would result in significant effects. Some commenters stated that the rationale for expanding the CE was insufficient. Tribes and Tribal organizations expressed concern that this CE could adversely affect sacred and cultural sites. Several commenters supported expansion of the CE.

Response: At § 220.6(e)(3), the final rule retains the expansion of the CE from 5 to 20 acres and retains the removal of the words ''contiguous'' and ''minor.'' These words were removed in the proposed rule to improve clarity and reduce confusion for Agency personnel in determining when the CE can be used. The final rule also modifies the list of examples for this CE to add clarity and reduce redundancy with other CEs. For example, subparagraph (vii) of the former version of the CE (''[a]pproving the continued use of land where such use has not changed and no change in the physical environment or facilities are proposed'') largely was redundant with the two existing CEs now consolidated at § 220.6(d)(11). The types of activities covered under the expanded CE are very similar to those covered under the existing CE. The final supporting statement provides additional information justifying the Agency's conclusion that expanding the CE from 5 to 20 acres will not result in significant impacts. The Agency reviewed 62 EAs, findings of no significant impact, and decision notices for proposed actions like those that would be covered by this CE. The average acreage authorized by these decisions was 41.9 acres. The modest expansion to 20 acres is well below this figure. Based on the agency's history with using the existing CE and the information presented in the supporting statement, the Forest Service has determined that the expansion of the CE is justified.

The Forest Service recognizes the importance of consultation and coordination with Tribes consistent with E.O. 13175, which imposes requirements independent of compliance with NEPA. The Forest Service also will continue to ensure that Tribal consultation occurs on individual projects as required by Agency policy. Additionally, American Indian and Alaska Native religious or cultural sites and archaeological sites or historic properties or areas will be considered as part of the extraordinary circumstances review applicable to all CEs. See 36 CFR 220.6(b)(vi), (vii).

Comment: Some commenters opposed expansion of the existing CE at § 220.6(e)(20) because they believed that such an expansion would allow for closure of roads and trails without any public involvement. Other commenters requested notice, coordination, and consultation with county and local governments and raised concerns about compliance with the National Historic Preservation Act. Some commenters requested additional information regarding use of this CE in relation to the Forest Service's travel management rule at 36 CFR part 212. Other commenters expressed support for the expansion of the CE and agreed with the Agency's finding that the actions and environmental impacts for restoration of lands occupied by a NFS road or NFS trail are generally the same as when restoration occurs for lands occupied by an unauthorized road or unauthorized trail.

Response: The final rule retains the proposed rule's expansion of this CE at § 220.6(e)(20) to include decommissioning of NFS roads and NFS trails, as well as unauthorized roads and trails. The inclusion of NFS roads and NFS trails in the CE will help accomplish restoration objectives on national forests and grasslands, address road and trail maintenance backlogs, and help the Agency maintain compliance with long-standing policies that require decommissioning of unneeded roads and trails. Regardless of whether the activity undertaken is the restoration of lands occupied by an NFS road or NFS trail or unauthorized road or trail, the actions and environmental impacts are generally the same and not significant.

Proposed actions covered by this CE would be developed in compliance with the travel analysis process and the travel management rule. The Agency uses travel analysis to identify the minimum road system, including unneeded NFS roads and NFS trails. Travel analysis is a dynamic, interdisciplinary, science-based process that examines ecological, social, cultural, and economic concerns. Information from the travel analysis process is used to inform future travel management decisions at the project level. In particular, travel management decisions identify whether a route needs to be added or removed, if an NFS trail or NFS road needs to be constructed, or if a route needs to be decommissioned.

Prior to determining if an NFS road or NFS trail could be decommissioned using this CE, the NFS road or NFS trail would need to be identified as unneeded and eligible for decommissioning through the travel analysis and travel management processes. Appropriate compliance with the requirements of the National Historic Preservation Act is independent of compliance with NEPA, and not dependent on whether a CE, EA, or EIS is prepared for the latter.

This CE will not be used to make access decisions about which roads and trails are to be designated open for public use, or which will be closed from public use. This CE will allow the Forest Service to restore, rehabilitate, or stabilize lands more efficiently where public access is not currently permitted, *e.g.,* for roads and trails that are already closed. This approach is consistent with the initial development and establishment of this CE (*see* 78 FR 56157).

Comment: Some commenters supported the proposed rule's new CE regarding administrative sites because it would add efficiency to their overall management and help the Agency address deferred maintenance of administrative facilities. Some commenters stated that the CE was written too broadly. Other commenters stated that the CE overlaps with an existing CE that does not require a

decision memo and that this CE would result in unnecessary work and documentation.

Response: At § 220.6(e)(21), the final rule adopts the proposed rule's CE regarding administrative sites. The existing CE for repair and maintenance of administrative sites at 36 CFR 220.6(d)(3) of the final rule is unaffected by the new CE at 36 CFR 220.6(e)(21). The existing CE was established on September 18, 1992 (57 FR 43180), and the **Federal Register** notice for the final rule states that the CE is intended for routine repair and maintenance. Current Forest Service directives define ''maintenance'' as ''an activity that entails preserving, insofar as practical, the original condition of Forest Service-owned buildings and related facilities'' (Forest Service Handbook (FSH) 7309.11, Zero Code). Repair is defined as ''the refurbishment or replacement of existing facility components with the same kind of materials for the purpose of maintaining the original condition and function while returning the facility to a sound state'' (FSH 7309.11, Zero Code).

The new CE in paragraph (e)(21) allows activities beyond routine repair and maintenance at existing administrative sites. Many of the Forest Service's administrative facilities need reconstruction or major repair, could be decommissioned, or may be subject to disposal. The new CE will increase NEPA efficiency associated with improving existing facilities to provide for both employee and public safety and decommissioning or disposing of administrative facilities to reduce the Agency's footprint. The CE in the final rule is limited to activities within an existing administrative site as defined in section 502(1) of Public Law 109–54 (119 Stat. 559; 16 U.S.C. 580d note). Proposed actions covered by this CE will also be subject to established Agency processes for facilities management, including facility master planning.

Comment: Several commenters expressed opposition to the proposed rule's recreation sites CE at § 220.5(e)(22) on the grounds that it is too broad, that the actions covered could result in significant effects, and that changes to recreation sites should require public input and review. Some commenters argued that certain activities covered under this CE should require analysis under an EA or EIS to ensure consideration of social needs through analysis of multiple alternatives.

Response: The final rule retains the new recreation site CE at § 220.6(e)(22). The Forest Service provides access to roughly 29,700 recreation sites. This CE will increase efficiency in NEPA compliance for proposed actions to improve existing recreation sites that are in decline or pose safety or resource concerns.

The CE is limited to existing recreation sites and covers construction, reconstruction, decommissioning, or disposal of buildings, infrastructure, or existing improvements, including infrastructure or improvements that are adjacent or connected to an existing recreation site and provide access or utilities for that site. The CE does not cover development of new recreation sites. The CE would be used alongside other established Agency processes for recreation and facilities planning.

CEQ regulations define a CE as a category of actions that the agency has determined normally do not have a significant effect on the human environment. CEQ regulations further explain that social effects are not intended by themselves to require preparation of an EIS (40 CFR 1502.16(b)). However, social needs are considered during the recreation site planning process and development of a recreation site design narrative, which precede development of a specific proposed action for which this CE potentially would apply. Additionally, as noted above, this CE is limited to activities at existing recreation sites and does not encompass development of new recreation sites.

During development of this CE, the Forest Service reviewed previously analyzed projects that focused on recreation management and evaluated similar CEs in use by other agencies that manage public recreation sites and facilities. The Agency has determined that the activities covered by this CE will not result in significant effects. Further information and rationale are provided in the supporting statement.

Comment: Comments on the proposed rule's road construction CE at § 220.5(e)(24) were mixed. Those commenters in favor of the CE highlighted the beneficial effects of increasing access and public safety and addressing the Agency's backlog of road reconstruction and rehabilitation. Some of these commenters requested that the CE not have any mileage limitation. Other commenters supported certain road-related activities, such as realignment and culvert and bridge rehabilitation, but only if those activities benefitted fish and aquatic species.

Some commenters stated that the activities covered by the road construction CE would cause erosion and sedimentation and impacts on water quality and aquatic habitats, Commenters also stated that including construction of new roads in a CE would hamper the Agency's ability to maintain its existing roads. Some of these commenters requested reducing the mileage limits for all road activities.

More generally, commenters requested that the Agency clarify public involvement associated with projects that would be supported by this CE, coordination with state agencies, the CE's relation to travel management, the meaning of terms of like ''open'' and ''close'' in this context and the difference between the proposed CE and the existing CE for repair and maintenance of roads.

Response: The proposed rule included a CE for construction or realignment of up to 5 miles of NFS roads, reconstruction of up to 10 miles of NFS roads and associated parking areas, opening or closing an NFS road, and culvert or bridge rehabilitation or replacement along NFS roads. The inclusion of two mileage limits with a single list of examples created confusion. As a result, the final rule divides the proposed rule's roads CE into two separate CEs at §§ 220.6(e)(23) and (24). Each of these CEs applies only to NFS roads. The CE in paragraph (e)(23) covers up to 8 miles of certain road management activities and cannot be used for construction and realignment. The CE in paragraph (e)(24) covers road construction and realignment on up to 2 miles of NFS roads and associated parking areas.

The reduced road mileages in these two CEs are the result of consideration of public comment and additional review conducted by the Agency. As the Agency developed these two CEs, it narrowed the focus of its analysis of previously completed projects from broad, general project purposes to more specific project activities. Specifically, the Agency conducted an additional search of its NEPA database for previously completed projects to define appropriate mileage limitations for each of the CEs. This additional analysis is described in greater detail in the supporting statement.

Also based on additional review and analysis and in response to public comments, the Agency removed the example of opening or closing a road. Additionally, the Agency removed references to culvert rehabilitation and replacement because those activities are covered under the existing CE at 36 CFR 220.6(e)(18) of the final rule. The data used to establish these CEs is included in the supporting statement.

The Forest Service has an existing CE at 36 CFR 220.6(d)(4) of the final rule for

repair and maintenance of roads, trails, and landline boundaries. That CE is intended to be used for routine maintenance of NFS roads and includes no mileage limit and no requirement for documentation in a decision memo. The new CEs established in the final rule cover NFS road management activities that go beyond routine repair and maintenance but have been demonstrated by the Agency's experience not to have significant effects.

In addition to adhering to the mileage limitations, determining that extraordinary circumstances do not exist, and requiring documentation in a decision memo, the responsible official incorporates design features as a standard operating procedure to avoid or minimize resource impacts. Examples of design features that are routinely incorporated are listed in the supporting statement. Design features to prevent impacts from erosion and sedimentation may include requiring road locations to be reviewed by an Agency watershed specialist, requiring erosion control measures in accordance with state department of transportation requirements, or minimizing erosion and removing sediment by capturing and filtering runoff before it leaves the project limits. Additional examples of design features have been added to the supporting statement.

All proposed actions covered under the CEs in paragraphs (e)(23) and (24) must be consistent with applicable travel management decisions. The travel management rule at 36 CFR part 212, subpart A, was promulgated in 2005 and established requirements for administration of the forest transportation system. The Forest Service uses travel analysis to identify the minimum road system. Travel analysis is a dynamic, interdisciplinary, science-based process that examines ecological, cultural, social, and economic concerns. Information from the travel analysis process is used to inform future travel management decisions at the project level. Travel analysis is used to identify whether a road needs to be added to the forest transportation system or decommissioned.

The CEs do not apply to decisions to add roads to the forest transportation system. Rather, once the Agency has determined that a road needs to be constructed during the travel management decision process, a CE could be used to comply with NEPA for the actual road construction. As explained above, the final rule does not address or reduce existing Agency public involvement practices concerning CEs.

Restoration and Resilience CE Comments

Comment: The Agency received many comments covering a wide range of topics related to the restoration CE included in the proposed rule at § 220.5(e)(26). Some commenters supported the establishment of a restoration CE to help the Agency expedite activities to restore National Forest System lands and increase forest and grassland resilience. Other comments opposed the proposed restoration and resilience CE on general grounds or opposed specific elements of the CE.

Response: The Agency notes the general support or opposition regarding the restoration and resilience CE. The final rule retains a modified version of the CE covering restoration and resilience activities at § 220.5(d)(25). Specific comments and the resulting modifications from the proposed rule are addressed below.

Comment: Several comments on the proposed restoration and resilience CE concerned its scope or included activities. Some commenters requested that clearer examples be provided and that the Agency focus on practices instead of outcomes. Some supportive commenters requested removal of the limitation that commercial and non-commercial harvest activities be allowed only in conjunction with another restoration activity.

Some commenters expressed the general sentiment that the CE is too broad and needs narrowing definitions and limitations. Other commenters stated that the CE would allow activities not focused on restoration. Some commenters requested that either timber harvest generally, or salvage harvest in particular, should be prohibited because such activities are not always associated with restoration or scientific literature did not support such treatments use for restoration or resilience purposes.

Response: Following the public comment period, the Forest Service convened a group of Agency scientists to review the body of literature submitted in public comments specific to the proposed restoration CE. This review, combined with input from other Agency subject matter experts in the watershed, wildlife, and forest management program areas, resulted in changes to the restoration CE in the final rule.

In the final rule, the Agency has narrowed the scope of the category of permissible activities. The final rule requires all activities conducted under the CE have a primary purpose of meeting restoration objectives or increasing forest and grassland resilience. ''Primary purpose'' is a well understood operational term both within the Agency and by the public. This adjustment is responsive to concerns that the category focus on outcomes, as well as concerns regarding the use of certain tools that may be used to achieve restoration and resilience goals.

The primary purpose requirement is further amplified in paragraph (ii)(B), which limits qualifying thinning and harvesting activities to those designed to achieve ecological restoration or resilience objectives. Permissible projects may generate secondary or ancillary multiple use benefits other than restoration and resilience. Such is the nature of multiple use management. However, restoration and resilience must be the project's primary objective. Because the final rule adopts a primary purpose requirement, the final rule removes the provision that would have required commercial or non-commercial timber harvest activities to be carried out in combination with at least one additional restoration activity.

The Agency will rely on its standard definition of restoration in applying the category. (Restoration is ''the process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed. Ecological restoration focuses on reestablishing the composition, structure, pattern, and ecological processes necessary to facilitate terrestrial and aquatic ecosystems sustainability, resilience, and health under current and future conditions. Functional restoration focuses on the underlying processes that may be degraded, regardless of the structural condition of the ecosystem.'' (FSH 1909.12 and 36 CFR 219.19)).

The final rule clarifies the list of activities to meet restoration and resilience objectives at paragraph (i). These include stream restoration, aquatic organism passage rehabilitation, or erosion control; invasive species control and reestablishment of native species; prescribed burning; reforestation; road and/or trail decommissioning (system and non-system); pruning; vegetation thinning; and timber harvesting. The restoration CE allows timber harvest because timber harvest is a general term that encompasses removal of trees for a variety of purposes. The restoration CE requires harvest activities to be designed to achieve ecological restoration objectives. The CE will not be available for projects designed primarily to achieve economic returns. The

commercial sale of timber harvested via use of the CE is permissible, but as discussed above, only where commercial value is a secondary or ancillary benefit to the primary restoration activity.

Similarly, the Agency has added a limitation to the vegetation thinning and timber harvesting activities provision disallowing salvage harvesting under the restoration and resilience CE. The Agency defines salvage harvest as the removal of dead trees or damaged or dying trees due to injurious agents other than competition, to recover value that would otherwise be lost (FSM 2470). The effects of salvage harvest and its relation to restoration and resilience depend on a variety of factors. The exclusion of salvage harvest from the restoration CE does not mean that salvage harvest cannot be used to achieve restoration or resilience objectives in other contexts or under other categorical exclusions (see, for example, the existing salvage harvest CE at § 220.6(e)(13)). Nor does it imply that the effects of salvage harvest are significant under NEPA.

Comment: Some commenters supported the acreage limits in the proposed restoration CE. Other commenters argued that the acreage limits in the proposed restoration CE would allow for potentially significant effects, questioned their basis, or argued that the supporting statement did not demonstrate that allowing 4,200 acres of commercial or noncommercial harvest would not result in significant effects. Still other commenters requested removing express acreage limits entirely or expanding the acreage limit for all listed activities to 7,300 acres.

Response: The proposed restoration CE would have allowed activities to improve ecosystem health, resilience, and other watershed conditions on up to 7,300 acres. If commercial/non-commercial timber harvest activities were proposed, those aspects of the project were not to exceed 4,200 of the 7,300 acres.

The Agency reviewed information submitted in public comments, conducted a science review, and reviewed the original project data on which the limitations in the proposed rule were based. Based on that review, the final rule's restoration CE at § 220.6(e)(25) allows activities to improve ecosystem health, resilience, and other watershed conditions on up to 2,800 acres. This revision is described in more detail below in the discussion of the supporting statement for the CE. In general, the 2,800-acre limitation better accounts for the effects of outliers in the sampled EA data set, better reflects the average size of projects from the sampled EAs, and also aligns with average acreages of specific activities in the sampled EA data set for which some commenters had concerns regarding the degree of impacts (such as commercial timber harvest).

Comment: Some commenters supported establishment of the proposed CE and the analysis set forth in the supporting statement associated with the proposed rule and stated that the Agency had provided a strong rationale for the CE. Other commenters questioned the findings that the CE will not result in significant adverse impacts, stating that the supporting statement was insufficient and not supported by science or other benchmarks. Some of these commenters questioned the adequacy of the monitoring information presented, disagreed with reliance on forest plan standards and best management practices to prevent significant effects, questioned how agency experts or cited research papers were used to develop the CE, and argued that the Agency's analysis of sampled EAs did not support the size of the restoration CE in the proposed rule.

Response: The Agency has carefully considered all comments submitted concerning the proposed restoration and resilience CE and made adjustments that refine the terms and parameters for the category. The agency has revised its supporting statement to include more details related to the acreage data and monitoring information. The Agency has revised its acreage calculations to address sampled EAs in order to account for projects with multiple activities occurring per acre. The revised calculations more accurately reflect a net project acreage versus gross total activity acres. The supporting statement now includes a table clearly identifying the source of the acreage data. The appendix of previously implemented projects has also been updated to demonstrate how acreages were calculated.

In response to public comment, the supporting statement for the final rule now includes additional discussion of the project development process and the interactions between proposal development, responsible official engagement, best management practices, design features, extraordinary circumstances, and forest plan compliance. The supporting statement also includes examples of design features that are typically incorporated into a proposed action for activities covered under the CE. The supporting statement also includes additional information related to monitoring and how professional experts were engaged in the development of the CE.

Comment: Some commenters requested that a public participation or collaboration element should be added to the restoration CE.

Response: The Agency has added a collaboration requirement to the restoration CE at § 220.6(e)(25)(ii)(A): ''Projects shall be developed through a collaborative process that includes multiple interested persons representing diverse interests.'' The Agency has had success working with various types of collaborative processes. This requirement is intended to be flexible, accommodate a variety of collaborative approaches, and does not require convening a formal collaborative group.

Comment: The Forest Service received a variety of comments regarding the road limitations in the proposed restoration and resilience CE. Comments included suggestions to increase the road mileages for construction of permanent and temporary roads, removing road construction from the CE, and questioning why the road mileage limitations for the restoration CE differed from those in the CE proposed rule's road construction CE at 36 CFR 220.5(e)(24).

Response: In the final rule, § 220.6(e)(25) includes adjusted road mileage limitations and addressed reconstruction within the framework of construction limits. The restoration CE allows construction and reconstruction of permanent roads up to 0.5 miles; and construction of temporary roads up to 2.5 miles. The restoration and resilience CE requires all temporary roads to be decommissioned no later than 3 years after the date the project is completed. The final rule also clarifies that the category allows repair and maintenance of NFS roads and trails to prevent or address resource impacts.

Some commenters were confused about the road limitations of the CE and how they compare to the limitations of other CEs. A frequent comparison was the limitation of construction of permanent roads of 0.5 miles when the proposed rule also included a proposed CE that would allow five miles of permanent road construction.

The proposed rule's use of different road mileage limitations reflected the purpose of the individual CE and the agency's experience in managing those activities categories. These two CEs were developed independently based on different supporting data and have different focuses. The restoration and resilience CE was developed with a focus on activities that improve overall ecosystem health and restore national

forests and grasslands. The roads management CE was developed with a focus on road management activities to address access issues and resource impacts; it has a narrower scope than the restoration CE. In the final rule the road management CE was also modified, and the mileage limitations have been lowered to 2 miles for permanent road construction.

Forest Service CEs are independently established, as has been the case with historical agency practice concerning development and use of CEs. The activities covered by, or limitations in, a particular CE do not constrain or limit the operation of any other CE. Likewise, more than one CE may apply to an activity. Integrated, multiple-use management activities, which are designed to accomplish management goals that often cross administrative program boundaries, can fit within multiple CEs.

Regulatory Certifications

National Environmental Policy Act

The final rule amends agency regulations for implementing NEPA. Forest Service NEPA procedures assist in the fulfillment of agency responsibilities under NEPA but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. This rule would not authorize any activity or commit resources to a project that may affect the environment. This rule does not have any reasonably foreseeable impact on the environment, nor does the rule authorize or prohibit any action that would have any effect on the environment. The CEQ set forth the requirements for establishing agency NEPA procedures in its regulations at 40 CFR 1507.3. The CEQ regulations do not require agencies to prepare a NEPA analysis before establishing or updating agency NEPA procedures. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 230 F.3d 947, 954–55 (7th Cir. 2000).

Energy Effects

The final rule has been reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that the final rule does not constitute a significant energy action as defined in the Executive Order.

Consultation and Coordination With Indian Tribal Governments

The Forest Service considered this final rule in compliance with E.O. 13175, Consultation and Coordination with Indian Tribal Governments. On June 13, 2019, the agency initiated a 120-day consultation period. This period was extended an additional 26 days, based on requests from some Tribes. The Forest Service also considered input from Tribes received after this period. Twenty-eight federally and non-federally recognized Tribes submitted written comments and/or participated in regional tribal meetings.

While some Tribes expressed support for the proposed rule, many Tribes expressed concern over how the rule would impact the Agency's responsibility to consult with Tribes on federal actions. Specifically, many were concerned that the proposed rule's addition of CEs and elimination of the scoping requirement for CEs and EAs would reduce opportunities for tribal engagement.

In response, the Forest Service maintains and reiterates its commitment to ensuring that Tribal consultation occurs for individual projects as appropriate pursuant to Forest Service Manual 1560 and Forest Service Handbook 1509.13. This regulatory revision makes no change to Tribal consultation. Further as discussed above, the final rule is of limited scope and amends the Forest Service NEPA regulations to include only new and expanded CEs and the DNA provision. Projects and activities supported by environmental assessments remain subject to project-level pre-decisional administrative review process (''objections'' process) at 36 CFR part 218, which requires notice and a designated opportunity for comments.

The Agency acknowledges that it shares a government-to-government relationship with Tribes that differs from its relationship with the general public. The final rule does not change the Forest Service's Tribal consultation obligations.

Executive Order 12866

This rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866 issued September 30, 1993, on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this is a significant rule as defined by E.O. 12866 and therefore subject to interagency review.

A more timely and efficient process will reduce administrative costs. There are many benefits and costs associated with the rule; however, they are not quantifiable with available data. Benefits (or cost reductions) derived from timely and focused environmental analysis, flexibility in preparation of environmental documents, and improved decision-making indicate a positive net benefit of the rule. The direct benefits of the rule are, therefore, reduced costs and time spent on environmental analysis.

For example, by implementing the Determination of NEPA Adequacy (DNA) provision, the Agency anticipates reductions in time and cost as a result of reducing redundant analyses. These efficiencies may reduce total Agency costs and decision-making time. These concepts, however, will take some time to become well established and widely used; potential benefits will occur over time.

The rule also establishes 5 new CEs that require a decision memo. Focusing on the new CEs, the Agency assumes for the purpose of this analysis, based on average use of its existing CEs, that each new CE may be used an average of 1 to 30 times per year. Under these assumptions, the rule may potentially result in 5 to 150 decision memos per year being completed in lieu of a decision notice.

From Fiscal Years 2014 to 2019, the Agency's average annual environmental analysis workload included approximately 1,588 CE determinations and 266 EAs. This six-year span includes the most recent data available. The average time to decision for CEs was 204 days and for EAs was 707 days. As a result, the Agency may complete NEPA analysis on proposed actions using the new CEs an average of 1 to 17 months earlier, per proposed action. In practice, these figures will vary dependent upon the proposed action and the particular CE being applied.

The Forest Service has combined and modified some existing CEs with this rulemaking to reduce confusion and better capture Agency proposed actions that do not normally have significant environmental effects. This, in turn, allows for timelier decision-making. Specifically, combining CEs at § 220.6(d)(10) (not requiring a decision memo) and § 220.6(e)(15) (requiring a decision memo) of the existing regulations, which both covered administrative actions on special use permits, eliminates confusion among Agency staff over which CE applies and reduces administrative workload by not requiring a decision memo. Expanding the acreage of special uses on which the existing CE at § 220.6(e)(3) can be applied from 5 acres to 20 acres, as well as expanding the roads and trails on

which the existing CE at § 220.6(e)(20) can be applied, are practical, common sense changes that increase Agency NEPA efficiency.

While CEs replace the more costly use of EAs, several factors contribute to the determination of the most appropriate form of NEPA analysis. In general, qualifying projects that in the past would have been analyzed under an EA may now rely upon the new CEs, but responsible officials retain discretion to use another form of NEPA analysis.

DNAs will further reduce the number of EAs undertaken each year, as Agency staff make use of this tool rather than defaulting to preparing a second EA. However, the Agency expects that use of the DNA provision will be modest at least in the first several years of its establishment.

The Agency anticipates use of DNAs and of the new CEs to slowly increase over time, taking into account time for adoption across the agency as has been observed during implementation of new CEs, statutory categorical exclusions and exceptions over the course of the past several years.

Executive Order 13771

The final rule has been reviewed in accordance with E.O. 13771 on reducing regulation and controlling regulatory costs and is considered an E.O. deregulatory action. The impacts of the final rule are as discussed above.

Congressional Review Act

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).

Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 require an agency to prepare a regulatory flexibility analysis of a rule if the rule is subject to notice and comment under the Administrative Procedure Act. The final rule directly affects only the Forest Service. Forest Service NEPA procedures assist in the fulfillment of agency responsibilities under NEPA; the final rule does not impose any requirements on small entities. While small entities represent some applicants for special use authorizations that would now be covered by the CEs at §§ 220.6(d)(11) and (12) and 220.6(e)(3), this is a negligible indirect effect only to certain small entities. Not all applicants are small entities and, moreover, the timing of a special use authorization depends on several factors beyond NEPA compliance, including compliance with other laws and incomplete information provided by the applicant. Therefore, the USDA Under Secretary for Natural Resources and Environment certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Federalism

The Agency has considered this final rule under the requirements of Executive Order 13132, Federalism. The Agency has concluded that the rule conforms with the federalism principles set out in this Executive Order; will not impose any compliance costs on the states; and will not have substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary.

No Takings Implications

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the rule does not pose the risk of a taking of protected private property.

Civil Justice Reform

This final rule has been reviewed under E.O. 12988, Civil Justice Reform. Under the final rule, (1) all State and local laws and regulations that conflict with this final rule or impede its full implementation will be preempted; (2) no retroactive effect is given to this final rule; and (3) the rule will not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1531–1538), the Agency has assessed the effects of the final rule on State, local, and Tribal governments, and the private sector. This final rule would not compel the expenditure of $100 million or more by any State, local, or Tribal government, or anyone in the private sector. Therefore, this final rule is not subject to the requirements of section 202 and 205 of the UMRA.

Controlling Paperwork and Burdens on the Public

This final rule does not contain any additional recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law, or are not already approved for use, and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 220

Administrative practices and procedures, Environmental impact statements, Environmental protection, National forests, Science and technology.

Therefore, for the reasons set forth in the preamble, part 220 of title 36 of the Code of Federal Regulations is amended as follows:

PART 220—NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) COMPLIANCE

■ 1. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.;* E.O. 11514; 40 CFR parts 1500–1508; 7 CFR part 1b.

■ 2. Amend § 220.4 by adding paragraph (j) to read as follows:

§ 220.4 General requirements.

* * * * *

(j) *Determination of NEPA Adequacy (DNA).* (1) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety for a new proposed action if the Responsible Official determines that the existing NEPA analysis adequately assesses the environmental effects of the proposed action and reasonable alternatives. The responsible official must determine and document that each of the following elements is met:

(i) The new proposed action is substantially the same as a previously analyzed proposed action or alternative analyzed in detail in the existing NEPA analysis.

(ii) The range of alternatives analyzed in the existing NEPA document(s) is appropriate with respect to the new proposed action.

(iii) Any new information or circumstances relevant to environmental concerns would not substantially change the analysis in an existing NEPA document(s).

(iv) The environmental effects that would result from implementation of the new proposed action are similar to those analyzed in the existing NEPA document(s).

(2) A DNA for a new proposed action shall be included in the project record for the new proposed action. Proposed actions undergoing a DNA review shall:

(i) Be included on the SOPA;

(ii) Be subject to scoping;

(iii) Be subject to pre-decisional administrative review, if applicable; and

(iv) Include issuance of a new decision document (decision memo, decision notice, or record of decision) when approved.

■ 3. Amend § 220.6 by:

■ a. Removing and reserving paragraph (d)(10);

■ b. Adding paragraphs (d)(11) and (12);

■ c. Removing ''through (17)'' and adding ''through (25)'' in its place in paragraph (e) introductory text;

■ d. Revising paragraph (e)(3);

■ e. Removing and reserving paragraphs (e)(10) and (15);

■ f. Revising paragraph (e)(20); and

■ g. Adding paragraphs (e)(21) through (25).

The additions and revisions read as follows:

§ 220.6 Categorical exclusions.

* * * * *

(d) * * *

(11) Issuance of a new special use authorization to replace an existing or expired special use authorization, when such issuance is to account only for administrative changes, such as a change in ownership of authorized improvements or expiration of the current authorization, and where there are no changes to the authorized facilities or increases in the scope or magnitude of authorized activities. The applicant or holder must be in compliance with all the terms and conditions of the existing or expired special use authorization. Subject to the foregoing conditions, examples include but are not limited to:

(i) Issuing a new authorization to replace a powerline facility authorization that is at the end of its term;

(ii) Issuing a new permit to replace an expired permit for a road that continues to be used as access to non-NFS lands; and

(iii) Converting a transitional priority use outfitting and guiding permit to a priority use outfitting and guiding permit.

(12) Issuance of a new authorization or amendment of an existing authorization for recreation special uses that occur on existing roads or trails, in existing facilities, in existing recreation sites, or in areas where such activities are allowed. Subject to the foregoing condition, examples include but are not limited to:

(i) Issuance of an outfitting and guiding permit for mountain biking on NFS trails that are not closed to mountain biking;

(ii) Issuance of a permit to host a competitive motorcycle event;

(iii) Issuance of an outfitting and guiding permit for backcountry skiing;

(iv) Issuance of a permit for a one-time use of existing facilities for other recreational events; and

(v) Issuance of a campground concession permit for an existing campground that has previously been operated by the Forest Service.

(e) * * *

(3) Approval, modification, or continuation of special uses that require less than 20 acres of NFS lands. Subject to the preceding condition, examples include but are not limited to:

(i) Approving the construction of a meteorological sampling site;

(ii) Approving the use of land for a one-time group event;

(iii) Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;

(iv) Approving the use of land for a utility corridor that crosses a national forest;

(v) Approving the installation of a driveway or other facilities incidental to use of a private residence; and

(vi) Approving new or additional communication facilities, associated improvements, or communication uses at a site already identified as available for these purposes.

* * * * *

(20) Activities that restore, rehabilitate, or stabilize lands occupied by roads and trails, including unauthorized roads and trails and National Forest System roads and National Forest System trails, to a more natural condition that may include removing, replacing, or modifying drainage structures and ditches, reestablishing vegetation, reshaping natural contours and slopes, reestablishing drainage-ways, or other activities that would restore site productivity and reduce environmental impacts. Examples include but are not limited to:

(i) Decommissioning a road to a more natural state by restoring natural contours and removing construction fills, loosening compacted soils, revegetating the roadbed and removing ditches and culverts to reestablish natural drainage patterns;

(ii) Restoring a trail to a natural state by reestablishing natural drainage patterns, stabilizing slopes, reestablishing vegetation, and installing water bars; and

(iii) Installing boulders, logs, and berms on a road segment to promote naturally regenerated grass, shrub, and tree growth.

(21) Construction, reconstruction, decommissioning, relocation, or disposal of buildings, infrastructure, or other improvements at an existing administrative site, as that term is defined in section 502(1) of Public Law 109–54 (119 Stat. 559; 16 U.S.C. 580d note). Examples include but are not limited to:

(i) Relocating an administrative facility to another existing administrative site;

(ii) Construction, reconstruction, or expansion of an office, a warehouse, a lab, a greenhouse, or a fire-fighting facility;

(iii) Surface or underground installation or decommissioning of water or waste disposal system infrastructure;

(iv) Disposal of an administrative building; and

(v) Construction or reconstruction of communications infrastructure.

(22) Construction, reconstruction, decommissioning, or disposal of buildings, infrastructure, or improvements at an existing recreation site, including infrastructure or improvements that are adjacent or connected to an existing recreation site and provide access or utilities for that site. Recreation sites include but are not limited to campgrounds and camping areas, picnic areas, day use areas, fishing sites, interpretive sites, visitor centers, trailheads, ski areas, and observation sites. Activities within this category are intended to apply to facilities located at recreation sites managed by the Forest Service and those managed by concessioners under a special use authorization. Examples include but are not limited to:

(i) Constructing, reconstructing, or expanding a toilet or shower facility;

(ii) Constructing or reconstructing a fishing pier, wildlife viewing platform, dock, or other constructed feature at a recreation site;

(iii) Installing or reconstructing a water or waste disposal system;

(iv) Constructing or reconstructing campsites;

(v) Disposal of facilities at a recreation site;

(vi) Constructing or reconstructing a boat landing;

(vii) Replacing a chair lift at a ski area;

(viii) Constructing or reconstructing a parking area or trailhead; and

(ix) Reconstructing or expanding a recreation rental cabin.

(23) Road management activities on up to 8 miles of NFS roads and associated parking areas. Activities under this category cannot include construction or realignment. Examples include but are not limited to:

(i) Rehabilitating an NFS road or parking area where management activities go beyond repair and maintenance;

(ii) Shoulder-widening or other safety improvements within the right-of-way for an NFS road; and

(iii) Replacing a bridge along an NFS road.

(24) Construction and realignment of up to 2 miles of NFS roads and associated parking areas. Examples include but are not limited to:

(i) Constructing an NFS road to improve access to a trailhead or parking area;

(ii) Rerouting an NFS road to minimize resource impacts; and

(iii) Improving or upgrading the surface of an NFS road to expand its capacity.

(25) Forest and grassland management activities with a primary purpose of meeting restoration objectives or increasing resilience. Activities to improve ecosystem health, resilience, and other watershed and habitat conditions may not exceed 2,800 acres.

(i) Activities to meet restoration and resilience objectives may include, but are not limited to:

(A) Stream restoration, aquatic organism passage rehabilitation, or erosion control;

(B) Invasive species control and reestablishment of native species;

(C) Prescribed burning;

(D) Reforestation;

(E) Road and/or trail decommissioning (system and non-system);

(F) Pruning;

(G) Vegetation thinning; and

(H) Timber harvesting.

(ii) The following requirements or limitations apply to this category:

(A) Projects shall be developed or refined through a collaborative process that includes multiple interested persons representing diverse interests;

(B) Vegetation thinning or timber harvesting activities shall be designed to achieve ecological restoration objectives, but shall not include salvage harvesting as defined in Agency policy; and

(C) Construction and reconstruction of permanent roads is limited to 0.5 miles. Construction of temporary roads is limited to 2.5 miles, and all temporary roads shall be decommissioned no later than 3 years after the date the project is completed. Projects may include repair and maintenance of NFS roads and trails to prevent or address resource impacts; repair and maintenance of NFS roads and trails is not subject to the above mileage limits.

* * * * *

James E. Hubbard,

Under Secretary, Natural Resources and Environment.

[FR Doc. 2020–25465 Filed 11–18–20; 8:45 am]

BILLING CODE 3411–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2019–0401; FRL–10016–18–Region 10]

Air Plan Approval; ID, Incorporation by Reference Updates and Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the State Implementation Plan (SIP) revisions submitted by Idaho on June 5, 2019 and May 27, 2020. The submitted revisions update the incorporation by reference of specific Federal requirements and clarify source permitting requirements. The EPA finds that the changes are consistent with Clean Air Act requirements.

DATES: This final rule is effective December 21, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2019–0401. 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 the disclosure of which 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 at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kristin Hall (15–H13), EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle, WA 98101, (206) 553–6357, *hall.kristin@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, it refers to the EPA.

Table of Contents

I. Background
II. Final Action
III. Incorporation by Reference
IV. Statutory and Executive Order Reviews

I. Background

On June 5, 2019 and May 27, 2020, Idaho submitted SIP revisions to update the incorporation by reference of Federal regulations and clarify permitting requirements. We proposed to approve the revisions on September 11, 2020 (85 FR 56196). The reasons for our proposed approval are included in the proposal and will not be restated here. The public comment period for our proposal closed on October 13, 2020. We received no public comments and are finalizing our action as proposed.

II. Final Action

The EPA is approving and incorporating by reference revisions to the Idaho SIP submitted on June 5, 2019, and May 27, 2020. Once effective, the Idaho SIP will include the following regulations:

- IDAPA 58.01.01.006.108, definition of ''Significant'' (State effective 4/11/2019);
- IDAPA 58.01.01.107, Incorporation by Reference, except section 107.03.f through 107.03.p (State effective 3/30/2020);
- IDAPA 58.01.01.221, Category I Exemption (State effective 4/11/2019);
- IDAPA 58.01.01.222, Category II Exemption (State effective 4/11/2019); and
- IDAPA 58.01.01.404, Procedure for Issuing Permits (State effective 4/11/2019).

The EPA is also approving Idaho's request to remove the following regulations from the Idaho SIP:

- IDAPA 58.01.01.845, Rules for Control of Sulfur Oxide Emissions from Sulfuric Acid Plants (State effective 5/1/1994);
- IDAPA 58.01.01.846, Emission Limits (State effective 4/5/2000);
- IDAPA 58.01.01.847, Monitoring and Testing (State effective 5/1/1994); and
- IDAPA 58.01.01.848, Compliance Schedule (State effective 4/5/2000).

III. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR

51.5, the EPA is finalizing the incorporation by reference of Idaho regulatory provisions as described in section II of this preamble. Also, in this document, the EPA is removing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, we are finalizing the removal of Idaho regulatory provisions from incorporation by reference as described in section II of this preamble. The EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully Federally-enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

IV. Statutory and Executive Order Reviews

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

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

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and it will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 19, 2021. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 2, 2020.

Christopher Hladick,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart N—Idaho

■ 2. Amend § 52.670, in the table in paragraph (c) by:

■ a. Revising the entries ''006'', ''107'', ''221'', ''222'', and ''404''; and

■ b. Removing the entries ''845'', ''846'', ''847'', and ''848''.

The revisions read as follows:

§ 52.670 Identification of plan.

* * * * *

(c) * * *

[1] 62 FR 27968 (May 22, 1997).

EPA APPROVED IDAHO REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanations
Idaho Administrative Procedures Act (IDAPA) 58.01.01—Rules for the Control of Air Pollution in Idaho				
*	*	*	*	*
006	General Definitions	4/11/2019, 4/11/2015, 4/4/2013, 3/30/2007, 4/11/2006, 7/1/2002, 4/5/2000, 3/20/1997, 5/1/1994.	11/19/2020, [Insert **Federal Register** citation].	Except Section 006.49, 006.50, 006.51, 006.66, 006.67, 006.68.b, 006.116, and 006.118.
*	*	*	*	*
107	Incorporation by Reference	3/20/2020	11/19/2020, [Insert **Federal Register** citation].	Except Section 107.03.f through 107.03.p.
*	*	*	*	*
221	Category I Exemptions	4/11/2019	11/19/2020, [Insert **Federal Register** citation].	
222	Category II Exemptions	4/11/2019	11/19/2020, [Insert **Federal Register** citation].	
*	*	*	*	*
404	Procedure for Issuing Permits.	4/11/2019	11/19/2020, [Insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

[FR Doc. 2020–24692 Filed 11–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0498; FRL–10015–31–Region 9]

Air Quality Implementation Plan; California; Calaveras County Air Pollution Control District and Mariposa County Air Pollution Control District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing revisions to the Calaveras County Air Pollution Control District (CCAPCD) and the Mariposa County Air Pollution Control District (MCAPCD) portions of the California State Implementation Plan (SIP). In this action, we are approving two rules, one submitted by the CCAPCD and the other by the MCAPCD, governing the issuance of permits for stationary sources, focusing on the preconstruction review and permitting of major sources and major modifications under part D of title I of the Clean Air Act (CAA or ''the Act'').

DATES: Theses rules will be effective on December 21, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2019–0498. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Amber Batchelder, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4174 or by email at *batchelder.amber@epa.gov.*

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

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I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. Proposed Action

On July 20, 2020 (85 FR 43785), the EPA proposed to approve the following rules into the California SIP.

TABLE 1—SUBMITTED RULES

District	Rule or regulation No.	Rule title	Adopted	Submitted [1]
Calaveras County APCD	Rule 428	NSR Requirements for New and Modified Major Sources in Nonattainment Areas.	03/12/19	04/05/19
Mariposa County APCD	Regulation XI	NSR Requirements for New and Modified Major Sources in the Mariposa County Air Pollution Control District.	03/12/19	04/05/19

On April 12, 2019, the EPA determined that the California SIP submittals listed above in Table 1 met the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.[2]

For areas designated nonattainment for one or more National Ambient Air Quality Standards (NAAQS), the applicable SIP must include preconstruction review and permitting requirements for new or modified major stationary sources of such nonattainment pollutant(s) under part D of title I of the Act, commonly referred to as Nonattainment New Source Review (NNSR). The rules listed in Table 1 contain the Districts' respective NNSR permit programs applicable to new and modified major sources located in areas designated nonattainment for any ozone NAAQS. These rules also contain the Districts' respective requirements for the review of new major stationary sources or major modifications in a designated nonattainment area that may have an impact on visibility in any mandatory Class I Federal Area in accordance with 40 CFR 51.307. We proposed to approve these rules into the California SIP because we determined that they comply with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received two comments, which are included in the docket for this action. We do not consider these comments to be germane or relevant to this action, thus these comments are not adverse to this action. Moreover, the comments lack the required specificity to the proposed SIP revisions and the relevant CAA requirements, and do not address the specific regulations or provisions in question or recommend an action on the SIP submission different from what EPA proposed. Therefore, we are finalizing our action as proposed.

III. EPA Action

No comments were submitted that change our assessment of the rules as described in our proposed action. We continue to find that CCAPCD Rule 428 and MCAPCD Regulation XI satisfy the relevant requirements for a CAA NNSR program for ozone, as well as the associated visibility requirements for sources subject to review under such a program in accordance with 40 CFR 51.307. Therefore, as authorized in section 110(k)(3) and 301(a) of the Act, the EPA is finalizing approval of CCAPCD Rule 428 and MCAPCD Regulation XI. This action incorporates the submitted rules into the California SIP. In conjunction with the EPA's SIP approval of the Districts' respective visibility programs for sources subject to the NNSR program, this action also revises the scope of the visibility Federal Implementation Plan (FIP) at 40 CFR 52.28 in California so that this FIP no longer applies to sources located in the CCAPCD and MCAPCD that are subject to these District visibility programs, while clarifying that the FIP continues to apply in these and other areas within California to sources located on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the rules listed in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available electronically through *https://www.regulations.gov* and in hard copy at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

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, the 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 3, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide 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).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will

[1] Each submittal was transmitted to the EPA via a letter from the California Air Resources Board (CARB) dated April 3, 2019.

[2] See letter dated April 12, 2019 from Elizabeth J. Adams, US EPA Region 9, to Richard Corey, CARB, regarding the April 5, 2019 submittal of CCAPCD Rule 428; and letter dated April 12, 2019 from Elizabeth J. Adams, US EPA Region 9, to Richard Corey, CARB, regarding the April 5, 2019 submittal of MCAPCD Regulation XI.

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 January 19, 2021. 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

Administrative practice and procedure, Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 21, 2020.

John Busterud,

Regional Administrator, Region IX.

For reasons set out in the preamble, EPA amends 40 CFR part 52, chapter I, to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(544) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(544) The following regulations were submitted on April 5, 2019 by the Governor's designee as an attachment to a letter dated April 3, 2019.

(i) *Incorporation by reference.*

(A) Calaveras County Air Pollution Control District.

(*1*) Rule 428, ''NSR Requirements for New and Modified Major Sources in Nonattainment Areas,'' adopted on March 12, 2019.

(*2*) [Reserved]

(B) Mariposa County Air Pollution Control District.

(*1*) Regulation XI, ''NSR Requirements for New and Modified Major Sources in the Mariposa County Air Pollution Control District,'' adopted on March 12, 2019.

(*2*) [Reserved]

(ii) [Reserved]

* * * * *

■ 3. Section 52.281 is amended by revising paragraph (d) to read as follows:

§ 52.281 Visibility protection.

* * * * *

(d) The provisions of § 52.28 are hereby incorporated and made part of the applicable plan for the State of California, except for the air pollution control districts listed below. The provisions of § 52.28 remain the applicable plan for any Indian reservation lands, and any other area of Indian country where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, located within the State of California, including any such areas located in the air pollution control districts listed below.

(1) Monterey County air pollution control district,

(2) Sacramento County air pollution control district,

(3) Calaveras County air pollution control district, and

(4) Mariposa County air pollution control district.

* * * * *

[FR Doc. 2020–23922 Filed 11–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–055; FRL–10016–32–Region 5]

Air Plan Approval; Ohio; Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing the removal of the air pollution nuisance rule from the Ohio State Implementation Plan (SIP) using a Clean Air Act (CAA) error correction provision. EPA has determined that this rule was not relied upon by Ohio to demonstrate implementation, maintenance or enforcement of any national ambient air quality standard (NAAQS). Upon the effective date of this action, the nuisance rule will no longer be part of the Ohio SIP.

DATES: This final rule is effective on December 21, 2020.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2020–0055. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (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 either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Rachel Rineheart, Environmental Engineer, at (312) 886–7017 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–7017, *rineheart.rachel@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. What is the background for this action?

The CAA was first enacted in 1970. Section 110(a)(1) required each state to submit to EPA a SIP that provided for the implementation, maintenance and enforcement of the NAAQS. In the 1970s and early 1980s, thousands of state and local agency regulations were submitted to EPA for incorporation into SIPs, ostensibly to fulfill the new Federal requirements. In many cases, states submitted entire regulatory air pollution programs, including many elements not required by the CAA. Due to time and resource constraints, EPA's review of these submittals focused primarily on the rules addressing the new substantive requirements of the CAA, and we approved many other

elements into the SIP with minimal review. We now recognize that some of these elements may be appropriate for state and local agencies to adopt and implement, but should not become federally enforceable SIP requirements; these include rules that prohibit air pollution nuisances. Such rules generally have no connection to the purposes for which SIPs are developed and approved, namely the implementation, maintenance, and enforcement of the NAAQS.

Ohio rule AP–2–07, ''Air pollution nuisances prohibited,'' was approved by EPA into the Ohio SIP on April 15, 1974. *See* 39 FR 13542. Subsequently, Ohio amended and renumbered the rule as OAC 3745–15–07 and submitted it as a revision to the SIP. EPA approved the amended rule on August 13, 1984. *See* 49 FR 32182. OAC 3745–15–07 prohibits the ''emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, odors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property.''

On March 23, 2020, EPA proposed, under the authority of section 110(k)(6) of the CAA, to remove Ohio's nuisance rule from the Ohio SIP because it does not have a reasonable connection to the attainment and maintenance of the NAAQS and EPA erred in approving it as part of the Ohio SIP.

II. Response to Comments Received on the Proposed Rule

EPA received some comments that were political in nature or that where otherwise beyond the scope of this action (*i.e.,* related to climate change, water quality, or other non-NAAQS related issues), and EPA will not be responding to these comments. Adverse comments that were germane to the action and EPA's response to those comments are summarized below.

A. Extension of Comment Period

EPA's notice of proposed rulemaking (NPRM) was published in the **Federal Register** on March 23, 2020, with a 30-day comment period ending April 22, 2020. *See 85 FR 16309.* The timing of publication coincided with the Ohio Department of Health Director's Stay at Home Order, issued on March 22, 2020. EPA received four requests for an extension to the public comment period citing difficulties in communicating with and organizing interested parties, limited access to supporting information, and lack of childcare due to the COVID–19 pandemic and the Stay at Home Order. Three requests sought a 60-day extension and one request sought an extension to May 13, 2020. On April 22, 2020, EPA granted a 30-day extension to the comment period to May 22, 2020. *See 85 FR 22378.* No additional requests for extension were received.

B. Comments Supporting the Removal of Ohio's Nuisance Rule From the SIP

EPA received comments in support of EPA's NPRM from the Ohio Chamber of Commerce, the Ohio Chemistry Technology Council, The Ohio Manufacturers' Association, API Ohio, and the Ohio Oil and Gas Association.

C. Comments Opposing the Removal of Ohio's Nuisance Rule From the SIP

EPA received comments opposing the removal of the Ohio nuisance rule from the Sierra Club, the Ohio Environmental Council, Ohio Citizen Action, Altman Newman Co. LPA, the National Resources Defense Council, and more than 1800 individual commenters who submitted their comments as part of a letter-writing campaign. The following discussion provides a summary of the comments received and EPA's response to each comment.

Comment 1: Commenters had requested a 60-day extension of the April 22, 2020, deadline for comments, while EPA granted a 30-day extension until May 22, 2020. The commenters state: ''During the revised comment period there has been no opportunity for neighbors and community groups to learn about this action, to meet face-to-face to discuss its implications, or to even seek public records because public offices have been closed and unable to produce documents. Furthermore, the press has been understandably focused on the immediately life-threatening pandemic. These circumstances have had a particularly devastating impact on the rights of poor and minority communities to learn of EPA's proposed action and to comment on citizen concerns.''

Response: SIPs are rulemaking actions under the Administrative Procedure Act, which does not specify a period for public comment. However, a 30-day period is consistent with most SIP actions proposed by EPA and with the intent of Congress as reflected in CAA section 307(h) (42 U.S.C. 7607(h)), which governs certain Federal administrative proceedings. It should be noted that EPA is not required to specifically notify any particular entity of its rulemaking actions; notification of all parties is accomplished through publications in the **Federal Register**. EPA published the NPRM to remove Ohio's nuisance rule in the **Federal Register** and initially provided 30 days for public comment. As stated previously, the publication of EPA's NPRM coincided with the Stay at Home Order in Ohio due to the COVID–19 pandemic. Based on the generalized concerns identified by commenters, including difficulty communicating with interested parties and issues with childcare, EPA granted a 30-day extension of the comment period. Although generally claiming, for example, that during the extended comment period there has been ''no opportunity'' to ''seek public records because public offices have been closed,'' the commenters did not identify any public records that would have been sought or explained how such records might have been relevant, and have made no showing of any attempt to obtain any such records. Moreover, EPA's original NPRM and NPRM extension did not limit the ability of any interested party to request an additional extension based on updated or more detailed concerns, but no additional request for extension was received after the NPRM 30-day extension.

Comment 2: EPA cannot lawfully eliminate Ohio Admin. Code 3745–15–07 from Ohio's State Implementation Plan through the CAA's error correction mechanism.

Response: Section 110(k)(6) of the CAA provides EPA with the authority to make corrections to actions that are subsequently found to be in error. *Alabama Environmental Council* v. *Administrator,* 711 F.3d 1277, 1286 (11th Cir. 2013) (''110(k)(6) provides an avenue for correcting a SIP revision approved in error''); see also *Ass'n of Irritated Residents* v. *EPA,* 790 F.3d 934, 948 (9th Cir. 2015) (110(k)(6) is a ''broad provision'' enacted to provide the EPA with an avenue to correct errors). The key provisions of section 110(k)(6) for present purposes are that the Administrator has the authority to ''determine'' when a SIP approval was ''in error,'' and when the Administrator does so, may then revise the SIP approval ''as appropriate,'' in the same manner as the prior action, and do so without requiring any further submission for the state. *Id.* at 1288. Moreover, CAA section 110(k)(6) ''confers discretion on the EPA to decide if and when it will invoke the statute to revise a prior action.'' *Id.;* 790 F.3d at 948 (section 110(k)(6) grants

''EPA the discretion to decide when to act pursuant to that provision'').[1]

While CAA section 110(k)(6) provides EPA with the authority to correct its own ''error,'' nowhere does this provision or any other provision in the CAA define what qualifies as ''error.'' Thus, EPA believes that the term should be given its plain language, everyday meaning, which includes all unintentional, incorrect or wrong actions or mistakes.

EPA has used CAA section 110(k)(6) as authority to make substantive corrections to remove a variety of provisions from SIPs that are not related to the attainment or maintenance of NAAQS or any other CAA requirement. *See, e.g.,* ''Approval and Promulgation of Implantation Plans; Kentucky: Approval of Revisions to the State Implementation Plan,'' 75 FR 2440 (January 15, 2010) (correcting the SIP by removing a provision, approved in 1982, used to address hazardous or toxic air pollutants); ''Approval and Promulgation of Implementation Plans; New York,'' 73 FR 21546 (April 22, 2008) (issuing a direct final rule to correct a prior SIP by removing a general duty ''nuisance provision'' that had been approved in 1984); ''Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans,'' 63 FR 34641 (June 27, 1997) (correcting five SIPs by deleting a variety of administrative provisions concerning variances, hearing board procedures, and fees that had been approved during the 1970s).

Comment 3: The proposed rule lacks any basis for the assertion that the air pollution nuisance rule in Ohio's SIP was approved in error and thus fails to meet the plain text requirements for application of 110(k)(6).

Response: The NPRM published on March 23, 2020, 85 FR 16309, states that EPA is ''proposing to remove Ohio's nuisance rule from the Ohio SIP because it does not have a reasonable connection to the attainment and maintenance of the NAAQS,'' and that the ''prior approval of OAC 3745–15–07 into the Ohio SIP was in error.'' In addition, the NPRM stated that the Ohio Environmental Protection Agency (Ohio EPA) had confirmed that Ohio did not rely on and did not intend to rely on the provision for purposes of attainment or maintenance of the NAAQS.

CAA section 110(k)(6) does not define the term ''error.'' EPA believes that the term should be given its plain language, common meaning, such that an error is a mistake or an incorrect, wrong, or inaccurate action. Under section 110(k)(6) EPA must make an error determination and provide the ''the basis thereof.'' There is no indication that this is a substantial burden for the Agency to meet. To the contrary, the requirement is met if EPA clearly articulates the error and the basis thereof. *Ass'n of Irritated Residents,* 790 F.3d at 948; *see also Alabama Environmental Council,* 711 F.3d at 1287–1288 (EPA must ''articulate an 'error' and provide 'the basis' '' of its error determination, citing with approval EPA's error articulation in another EPA action at 76 FR 25178 (May 3, 2011)).

Here, EPA articulated its error and provided the basis thereof: SIPs provide for the implementation, maintenance, and enforcement of the NAAQS; the Ohio nuisance rule is not associated with the implementation, maintenance, or enforcement of the NAAQS; and EPA's previous approval in the SIP of the rule was erroneous. EPA's exclusion from the SIP of a nuisance provision unrelated to attainment and maintenance of the NAAQS is consistent with previous Agency practice. EPA has removed nuisance provisions from several SIPs, including those for the State of Michigan, 64 FR 7790, Commonwealth of Kentucky (Jefferson County portion), 66 FR 53657, and the State of Nevada, 69 FR 54006. Additionally, EPA has issued final rules declining to approve nuisance provisions into SIPs. (See 45 FR 73696, 46 FR 11843, 46 FR 26303 and 63 FR 51833.)[2]

Comment 4: EPA's approval of the Ohio nuisance rule was purposeful and not in error as demonstrated by the August 13, 1984, 49 FR 32182, approval of revisions to the nuisance rule and subsequent comments from EPA on title V permits issued in Ohio which state that the nuisance rule is an applicable requirement under the SIP. Furthermore, inclusion of the nuisance rule is so integral to the SIP that it has been included in every title V permit issued and every permit issued by Ohio since adoption.

Response: The permit comments related to the Ohio nuisance rule are correct in that the rule is currently in the SIP and therefore an ''applicable requirement'' under the title V operating permit program. Confirmation of the fact that the rule is part of the SIP in the permitting process has no bearing on the appropriateness of that rule for inclusion in the SIP. The determination of whether a state rule is appropriate for inclusion in the SIP is beyond the scope of the permitting process. Inclusion of the Ohio nuisance rule in state permits does not demonstrate that the rule is integral to the SIP which is limited in scope by the CAA to the implementation, maintenance, and enforcement of the NAAQS. To the contrary, as noted, the Ohio EPA indicated that the nuisance rule was not intended to address the attainment or maintenance of the NAAQS.

The fact that EPA approved a revision to the Ohio nuisance rule in 1984 does not make approval any less in error; rather, it merely indicates that EPA unfortunately repeated its error. Nor is it material whether the error was intentional (or, per the commenters, ''purposeful'') or inadvertent. It was erroneous for EPA to approve, as part of the SIP, the non-NAAQS related nuisance rule, and EPA has the authority under section 110(k)(6) to correct that error.

Comment 5: States have the right to create regulations that are more stringent than the Federal requirements.

Response: EPA does not dispute a state's right to create requirements that, as a matter of state law, are more stringent than the Federal requirements. Congress affirmed this principle in section 116 of the CAA. This does not, however, alter the fact that the requirements contained in SIP provisions are limited in scope by section 110(a) of the CAA. SIPs must provide for the implementation, maintenance, and enforcement of the NAAQS. Ohio's nuisance rule has no nexus to these statutorily prescribed requirements.

Comment 6: The record for the proposed action states that EPA was taking action to promote the novel doctrine of ''regional consistency.'' Such a doctrine completely contradicts the well-established principle that SIPs are tailored by states to meet their specific

[1] CAA section 110(k)(6) was added to the CAA as part of the CAA Amendments of 1990. Prior to the addition of that subsection, there was no express provision in section 110 for EPA to correct erroneous actions, on its own initiative and without further State action. Indeed, prior to the addition of 110(k)(6), the United States Court of Appeals for the Third Circuit had held that EPA lacked the authority to modify a SIP to correct its mistakes, unless it followed the then-existing revision procedure involving State review and other action. *Concerned Citizens of Bridesburg* v. *EPA,* 836 F.2d 777 (1987). Although there is no statement in the legislative history of the CAA Amendments of 1990 that Congress specifically responded to *Concerned Citizens* in enacting 110(k)(6), it is telling that the addition 110(k)(6) effectively overruled that decision.

[2] Moreover, it is EPA's longstanding position that measures to control non-criteria pollutants may not legally be made part of the SIP. See February 9, 1979, memorandum ''Status of State/Local Air Pollution Control Measures Not Related to NAAQS,'' from Michael A. James, Associate General Counsel Air, Noise and Radiation Division.

air pollution needs and desired protections.

Response: EPA believes that the commenter's reference to ''the record'' refers to a January 30, 2020, email from John Mooney, Acting Director, Air and Radiation Division, EPA, Region 5, to Robert Hodanbosi, Chief, Air Pollution Control, Ohio EPA (January email) that was placed in the docket for this rulemaking. It notes that similar provisions had already been removed from the SIPs of other Region 5 states, ''because states did not rely on those provisions for attainment and maintenance of the NAAQS.'' The purpose of the email was to inquire whether Ohio had relied on its nuisance rule in attainment and maintenance of the NAAQS before proceeding with an error correction. The reference in the January email to other state actions merely notes that EPA has reached a similar conclusion in other rulemaking actions.

Comment 7: The public cannot precisely tell what the question asked regarding Ohio EPA's reliance on the nuisance rule for ''attainment'' or ''maintenance'' in the January email means.

Response: The January email and the Ohio EPA response were included in the docket for the proposed rulemaking. The January email was clear in its request that Ohio EPA confirm that it had not relied upon the nuisance rule in any aspect related to the attainment or maintenance of a NAAQS. In Ohio EPA's response, it specifically states that it had not relied on the nuisance rule for ''SIP planning, nonattainment designations, redesignation requests, maintenance plans, and determination of nonattainment areas or their boundaries.'' EPA finds that Ohio EPA clearly understood the question being asked and clearly identified what was meant by ''attainment'' and ''maintenance'' in its response to EPA.

Comment 8: Commenters provided a declaration from William M. Auberle, a former official with the Regional Air Pollution Control Agency (RAPCA). Mr. Auberle states that he has direct knowledge of the inclusion of the Ohio nuisance rule in the Ohio SIP, that the nuisance rule is an important regulatory tool in achieving and maintaining the NAAQS, and that he personally used the nuisance rule while an official with RAPCA as an enforcement tool for achieving and maintaining the NAAQS.

Response: RAPCA is a bureau of the Division of Environmental Health within Public Health—Dayton and Montgomery County. It is a county agency that contracts with the Ohio EPA to enforce state and local air pollution control regulations in a six-county region of Ohio. EPA does not dispute that state and local agencies may have used the nuisance rule to achieve reductions in criteria pollutants or the importance of the rule as a tool for local authorities in the protection of public health and welfare. However, using the nuisance rule to achieve criteria pollutant reductions is not equivalent to relying on the rule for SIP purposes, which may include SIP planning, nonattainment designations, redesignation requests, maintenance plans, and determination of nonattainment areas or their boundaries. Furthermore, Ohio EPA, the state agency responsible for development and implementation of the SIP, has stated that it did not find ''any instances of the nuisance rule, OAC 3745–15–07, being relied upon, or intended to be relied upon, for attainment or maintenance of any NAAQS.''

Comment 9: Congress intended citizen suits to be an integral part of CAA enforcement, including SIP enforcement. The NPRM ignores the important role of citizen suits in CAA enforcement.

Response: Congress limited the scope of SIPs required under section 110 of the CAA to the implementation, maintenance, and enforcement of the NAAQS. The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it does not support such implementation, maintenance, and enforcement. This rulemaking action does not invalidate the Ohio law or affect its applicability to Ohio sources. Facilities located in Ohio are still subject to the state nuisance rule. While removal of this rule from the SIP would preclude its enforcement in Federal courts, it has no impact on the authority to bring citizen suits in state courts under state law.

Comment 10: Commenters state that the NPRM would harm already vulnerable Ohioans by eliminating an important environmental justice tool. Commenters also raise concerns with the potential impact on other sensitive populations such as children, the elderly, and individuals with various health issues including respiratory illnesses.

Response: The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it is not related to the implementation, maintenance, and enforcement of the NAAQS. This rulemaking action does not invalidate the Ohio law or affect its applicability to Ohio sources. Facilities located in Ohio are still subject to the state nuisance rule. EPA supports programs and activities that promote enforcement of health and environmental statutes in areas with minority populations and low-income populations and the protection of children, the elderly, and other vulnerable populations.

Comment 11: Several commenters note recent studies linking particulate matter pollution to an increased incidence of COVID–19 infection and the potential for increased adverse outcomes in areas with higher levels of air pollution. Commenters state that considering the current pandemic, EPA should not be relaxing air pollution requirements at this time.

Response: The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it is not an element of a plan for the implementation, maintenance, and enforcement of the NAAQS. Consideration of the impacts of air pollution on COVID–19 cases is beyond the scope of section 110 of the CAA and, thus, beyond the scope of this rulemaking. Furthermore, this rulemaking action does not invalidate the Ohio nuisance law or affect its applicability to Ohio sources, which remain subject to the rule as a matter of state law.

Comment 11: The following comment was made by over 1800 individuals through a letter-writing campaign.

''I oppose the rollback of the nuisance provision of Ohio's Clean Air Act regulations.

The nuisance provision ensures that threats to Ohioans' health and safety are prohibited, no matter what, and allows Ohio residents to take local pollution problems into their own hands and protect their communities by taking polluters to court. Without this provision, it will be more difficult for Ohioans to address local pollution problems.

Eliminating this provision also destroys an important tool that gives both regulators and Ohio residents flexibility to address serious health concerns based on new scientific developments.''

Response: The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it is not an element of a plan for the implementation, maintenance, and enforcement of the NAAQS. This rulemaking action does not invalidate the Ohio nuisance law, affect its applicability to Ohio sources or preclude citizen suits in state court.

III. What action is EPA taking?

EPA has determined that OAC 3745–15–07 was not relied upon by Ohio to

demonstrate the implementation, maintenance, or enforcement of the NAAQS. Consequently, EPA finds that its prior approval of OAC 3745–15–07 into the Ohio SIP was in error. To correct this error, EPA is removing OAC 3745–15–07 from the approved Ohio SIP pursuant to section 110(k)(6) of the CAA, and codifying this removal by revising the appropriate paragraph under 40 CFR part 52, subpart KK, 52.1870 (Identification of Plan).

IV. Incorporation by Reference

In this document, EPA is amending regulatory text that includes incorporation by reference. As described in the amendments to 40 CFR part 52 set forth below, EPA is removing provisions of the EPA-Approved Ohio Regulations from the Ohio SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. EPA has made, and will continue to make the SIP generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

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

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

In addition, 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 January 19, 2021. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 26, 2020.

Kurt Thiede,

Regional Administrator, Region 5.

For reasons set out in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

§ 52.1870 [Amended]

■ 2. In § 52.1870, the table in paragraph (c) is amended by removing the entry for ''3745–15–07'' under ''Chapter 3745–15 General Provisions on Air Pollution Control''.

[FR Doc. 2020–24065 Filed 11–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0127; FRL–10014–90–Region 9]

Air Plan Approval; California; Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). These revisions concern emissions of volatile organic compounds (VOCs) from the surface coating operations of plastic parts and products. We are approving a local rule to regulate these emission sources under the Clean Air Act (CAA or the ''Act''), and we are approving a negative

declaration for a subcategory of a control techniques guidelines (CTG) source in the SMAQMD.

DATES: This rule will be effective on December 21, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2019–0127. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Arnold Lazarus, EPA Region IX, (415) 972–3024, *lazarus.arnold@epa.gov.*

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

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I. Proposed Action

On July 23, 2020 (85 FR 44496), the EPA proposed to approve the following rule and negative declaration, listed in Table 1, into the California SIP.

TABLE 1—SUBMITTED RULE AND NEGATIVE DECLARATION

Local agency	Rule No.	Rule title	Adopted	Submitted
SMAQMD	468	Surface Coating of Plastic Parts and Products	03/22/2018	05/23/2018
SMAQMD	.....	Negative Declaration for ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings,'' EPA–453/R–08–003, September 2008 (Pleasure Craft Coating Portion Only).	03/22/2018	6/11/2018

We proposed to approve this rule and negative declaration because we determined that they comply with the relevant CAA requirements. Our proposed action contains more information on the rule, the negative declaration and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

Pursuant to section 110(k)(3) of the Act, and for the reasons set forth in the proposed rule and related technical support documents, the EPA is fully approving this rule and negative declaration into the California SIP.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the SMAQMD rule described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this 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 3, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 19, 2021. 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, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 25, 2020.

John Busterud,

Regional Administrator, Region IX.

For the reasons stated in the preamble, the EPA amends, part 52, Chapter I, Title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(518)(i)(C) and (c)(543) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(518) * * *

(i) * * *

(C) Sacramento Metropolitan Air Quality Management District.

(*1*) Rule 468, ''Surface Coating of Plastic Parts and Products,'' adopted on March 22, 2018.

(*2*) [Reserved]

* * * * *

(543) Negative declaration for following AQMD was submitted on June 11, 2018 by the Governor's designee.

(i) [Reserved]

(ii) Additional materials.

(A) Sacramento Metropolitan Air Quality Management District.

(*1*) Negative Declaration for ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings,'' EPA–453/R–08–003, September 2008 (Pleasure Craft Coating Portion Only), adopted March 22, 2018.

(*2*) [Reserved]

(B) [Reserved]

■ 3. Section 52.222 is amended by adding paragraph (a)(2)(v) to read as follows:

§ 52.222 Negative declarations.

(a) * * *

(2) * * *

(v) Negative Declaration for ''Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings,'' EPA–453/R–08–003, September 2008 (Pleasure Craft Coating Portion Only) submitted on June 11, 2018 and adopted on March 22, 2018.

* * * * *

[FR Doc. 2020–23552 Filed 11–18–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 201112–0303]

RIN 0648–BK19

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Regulatory Amendment 27; Correction

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

ACTION: Final rule; correcting amendment.

SUMMARY: NMFS corrects the final rule that implemented management measures described in Regulatory Amendment 27 (Regulatory Amendment 27) to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP), which published in the **Federal Register** on January 27, 2020. That final rule modified management measures for commercially-caught red porgy in the South Atlantic exclusive economic zone (EEZ). In that final rule, NMFS inadvertently neglected to remove a regulation prohibiting the sale and purchase of red porgy during the months of January through April. The purpose of this correcting amendment is to fix that error.

DATES: This correction is effective November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Mary Vara, Southeast Regional Office, NMFS, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: On January 27, 2020, NMFS published a final rule in the **Federal Register** (85 FR 4588) to implement revisions to commercial management measures contained in Regulatory Amendment 27 that included regulatory revisions for South Atlantic red porgy, among other measures for snapper-grouper species. That final rule became effective on February 26, 2020.

Correction

In the regulatory text of the final rule for Regulatory Amendment 27, NMFS inadvertently neglected to remove a prohibition on the sale and purchase of red porgy during the months of January through April in 50 CFR 622.192(f) that NMFS said it was removing.

The discussions in Regulatory Amendment 27, as well as the associated proposed and final rules, were clear that the existing measure that prohibits the sale and purchase of red porgy from January through April was being removed. Thus, through this correcting amendment, NMFS corrects 50 CFR 622.192 by removing paragraph (f).

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator (AA) has determined that this final rule is consistent with Regulatory Amendment 27, the Snapper-Grouper FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant under Executive Order 12866. This final rule is not an Executive Order 13771 regulatory action because this final rule is not significant under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds good cause to waive prior notice and opportunity for additional public comment because it would be unnecessary and contrary to the public interest. This correcting amendment removes an incorrect restriction applicable to the sale and purchase of red porgy during the months of January through April. Providing prior notice and opportunity for public comment is unnecessary and contrary to the public interest because the final rule implementing Regulatory Amendment 27 that explained it would be removing this restriction was already subject to notice and public comment, and further opportunity for public comment would delay the removal of the sale and purchase restriction for red porgy during January through April, which remains in the regulations in error. Further, this correction is a non-substantive change and retaining the incorrect restriction will cause confusion among the affected fishermen and law enforcement.

For the same reasons, the AA also finds good cause, pursuant to 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date for this correcting amendment, because this non-substantive correction will prevent confusion about the sale and purchase of red porgy each year during January through April.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, this rule is exempt from the procedures of the Regulatory Flexibility Act. Accordingly, no Regulatory Flexibility Analysis is required and none has been prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 622

Commercial, Fisheries, Fishing, Red porgy, South Atlantic.

Dated: November 12, 2020.

Samuel D. Rauch III,

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

Accordingly, 50 CFR part 622 is corrected by making the following correcting amendment:

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.*

§ 622.192 [Amended]

■ 2. In § 622.192, remove and reserve paragraph (f).

[FR Doc. 2020–25498 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 85, No. 224

Thursday, November 19, 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 HOMELAND SECURITY

8 CFR Parts 215, 217, 231, and 235

19 CFR Parts 4 and 122

[Docket No. DHS–2008–0039]

RIN 1601–AA34

Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure; United States Visitor and Immigrant Status Indicator Technology Program (''US–VISIT'')

AGENCY: Department of Homeland Security.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This notice announces that DHS is withdrawing a notice of proposed rulemaking published in the **Federal Register** on April 24, 2008 which proposed to require commercial air and vessel carriers to collect biometric information from certain aliens departing the United States and submit this information to the Department of Homeland Security (DHS) within a certain timeframe.

DATES: The notice of proposed rulemaking is withdrawn on November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Michael Hardin, Director, Entry/Exit Policy and Planning, Office of Field Operations, U.S. Customs and Border Protection, by phone at (202) 325–1053 or via email at *michael.hardin@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On April 24, 2008, DHS published a notice of proposed of rulemaking (2008 NPRM) in the **Federal Register** (73 FR 22065) proposing a biometric exit program at air and sea ports that would require commercial air and vessel carriers to collect biometric data from aliens and submit this information to DHS within a certain timeframe. The proposed rule set out certain technical requirements and a substantive performance standard for the transmission of biometric data, but provided the carriers with some discretion in the manner of collection and submission of biometric data, including latitude in determining the location of the biometric data collection within the port of entry.

DHS received 118 comments from the public in response to the 2008 NPRM. Most of the comments opposed the adoption of the proposed rule due to issues of cost and feasibility. Among other things, commenters suggested that biometric collection should be a purely governmental function, that requiring air carriers to collect biometrics was not feasible and would unfairly burden air carriers and airports, and that the highly competitive air industry could not support a major new process of biometric collection on behalf of the government.

After consideration of these comments and the results of various biometric exit pilots conducted in 2009,[1] DHS concluded that the process described in the 2008 NPRM was not feasible for implementing a biometric exit program at air and sea ports. After the 2008 NPRM was published, DHS developed a new approach for implementing a biometric exit program based on a facial recognition system that is efficient, accurate, and unobtrusive. Concurrently with this notice, DHS is publishing an NPRM (''2020 NPRM'') that proposes to amend the regulations to enable the implementation of a biometric entry-exit system based on the new approach described in further detail in the 2020 NPRM. Based on the comments received in response to the 2008 NPRM and DHS's new approach to implementing a biometric entry-exit system as set forth in the 2020 NPRM, DHS has decided to withdraw the 2008 NPRM.

Executive Order 13771

The withdrawal of the 2008 NPRM qualifies as a deregulatory action under Executive Order 13771. *See* OMB's Memorandum titled ''Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017).

Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

Conclusion

Accordingly, DHS withdraws the notice of proposed rulemaking published in the **Federal Register** (73 FR 22065) on April 24, 2008.

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

[FR Doc. 2020–24706 Filed 11–18–20; 8:45 am]

BILLING CODE 9111–14–P

[1] For more information on the biometric exit pilots conducted in 2009, see Section III.D.2 of the NPRM referenced later in this paragraph.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 33

[Docket No. FAA–2020–0894; Notice No. 33–19–01–SC]

Special Conditions: magniX USA, Inc., magni250 and magni500 Model Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for magniX USA, Inc. (magniX), magni250 and magni500 model engines that operate using electrical technology installed on the aircraft for use as an aircraft engine. These engines have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards applicable to aircraft engines. The design feature is the use of an electric motor, controller, and high-voltage systems as the primary source of propulsion for an aircraft. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions

contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send comments on or before December 21, 2020.

ADDRESSES: Send comments identified by Docket No. FAA–2020–0894 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *http://www.regulations.gov/,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact we received about this proposal.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this Notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this Notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this Notice. Submissions containing CBI should be sent to Gary Horan, AIR–6A1, Engine and Propeller Standards Branch, Aircraft Certification Service, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7164; *gary.horan@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Gary Horan, AIR–6A1, Engine and Propeller Standards Branch, Aircraft Certification Service, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7164; *gary.horan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the proposed special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments. The FAA may change these proposed special conditions based on the comments received.

Background

On June 4, 2019, magniX applied for a type certificate for its magni250 and magni500 model electric engines. The FAA has not previously type certificated an engine that uses electrical technology for propulsion of the aircraft. Electric propulsion technology is substantially different from the technology used in previously certificated turbine and reciprocating engines; therefore, these engines introduce new safety concerns that need to be addressed in the certification basis.

There is a growing interest within the aviation industry to utilize electric propulsion technology. As a result, international agencies and industry stakeholders formed a new committee under ASTM International Committee F39 to identify the appropriate technical criteria for aircraft engines using electrical technology that has not been previously certificated for aircraft propulsion systems. ASTM International, formerly known as American Society for Testing and Materials, is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services. ASTM International published ASTM F3338–18, *Standard Specification for Design of Electric Propulsion Units for General Aviation Aircraft,* in December 2018.[1] The FAA used the technical criteria from the ASTM standard and engine information from magniX to develop special conditions to establish an equivalent level of safety to that required by title 14, Code of Federal Regulations (14 CFR) part 33.

Type Certification Basis

Under the provisions of 14 CFR 21.17(a)(1), generally, magniX must show that magni250 and magni500 model engines meet the applicable provisions of part 33 in effect on the date of application for a type certificate.

If the Administrator finds that the applicable airworthiness regulations (*e.g.,* 14 CFR part 33) do not contain adequate or appropriate safety standards for the magni250 and magni500 model engines because of a novel or unusual design feature, special conditions may be prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other engine model that incorporates the same novel or unusual design feature, these special conditions would also apply to the other engine model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the magni250 and magni500 model engines must comply with the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The magni250 and magni500 model engines will incorporate the following novel or unusual design features:

An electric motor, controller, and high-voltage systems that are used as the primary source of propulsion for an aircraft.

Discussion

Part 33 Developed for Gas-Powered Turbine and Reciprocating Engines

Aircraft engines make use of an energy source to drive mechanical systems that provide propulsion for the

[1] *https://www.astm.org/Standards/F3338.htm.*

aircraft. Energy can be generated from various sources such as petroleum and natural gas. The turbine and reciprocating aircraft engines certified under part 33 use aviation fuel for an energy source. The reciprocating and turbine engine technology that was anticipated in the development of part 33 converts air and fuel to energy using an internal combustion system, which generates heat and mass flow of combustion products for turning shafts that are attached to propulsion devices such as propellers and ducted fans. Part 33 regulations set forth standards for these engines and mitigate potential hazards resulting from failures and malfunctions. The nature, progression, and severity of engine failures are tied closely to the technology that is used to design and manufacture aircraft engines. These technologies involve chemical, thermal, and mechanical systems. Therefore, the existing engine regulations in part 33 address certain chemical, thermal, and mechanically induced failures that are specific to air and fuel combustion systems operating with cyclically loaded high-speed, high-temperature, and highly-stressed components.

magniX's Proposed Electric Engines Are Novel or Unusual

The existing part 33 airworthiness standards for aircraft engines date back to 1965. These airworthiness standards are based on fuel-burning reciprocating and turbine engine technology. The magni250 and magni500 model engines are not turbine or reciprocating engines. These engines have a novel or unusual design feature, which is the use of electrical sources of energy instead of fuel to drive the mechanical systems that provide propulsion for aircraft. The aircraft engine is also exposed to chemical, thermal, and mechanical operating conditions, unlike those observed in internal combustion systems. Therefore, part 33 does not contain adequate or appropriate safety standards for the magni250 and magni500 model engine's novel design feature.

magniX's proposed aircraft engines will operate using electrical power instead of air and fuel combustion to propel the aircraft. These electric engines will be designed, manufactured, and controlled differently than turbine or reciprocating aircraft engines. They will be built with an electric motor, controller, and high-voltage systems that draw energy from electrical storage or generating systems. The electric motor is a device that converts electrical energy into mechanical energy by electric current flowing through wire coils in the motor producing a magnetic field that interacts with the magnets on the rotating shaft. The controller is a system that consists of two main functional elements: The motor controller and an electric power inverter to drive the motor.[2] The high voltage system is a combination of wires and the connectors that couple the motor and the controller.

In addition, the technology required to produce these high-voltage and high-current electronic components introduces potential hazards that do not exist in turbine and reciprocating aircraft engines. For example, high-voltage transmission lines, electromagnetic shields, magnetic materials, and high-speed electrical switches are necessary to use the physical properties essential to the electric engine. However, this technology also exposes the aircraft to potential failures that are not common to gas-powered turbine and reciprocating engines, which could adversely affect safety.

magniX's Electric Engines Require a Mix of Part 33 Standards and Special Conditions

Although the electric aircraft engines proposed by magniX use novel or unusual design features that are not addressed in the existing part 33 airworthiness standards, there are some basic similarities in configuration and function that require similar provisions to prevent hazards that are common to aircraft engines using air and fuel combustion (*e.g.,* fire, uncontained high-energy debris, and loss of thrust control). However, the primary failure concerns and the probability of exposure to common hazards are different for the proposed electric aircraft engines. This creates a need to develop special conditions to ensure the engine's safety and reliability.

The requirements in part 33 ensure the design and construction of aircraft engines, including the engine control systems, are proper for the engine type design and operating limits. However, part 33 does not fully address the use of aircraft engines like magniX's, which operate using electrical technology as the primary means of propelling the aircraft. This necessitates the development of special conditions to provide adequate airworthiness standards for these aircraft engines.

The requirements in part 33, subpart B, are applicable to reciprocating and turbine aircraft engines. Subparts C and D are applicable to reciprocating aircraft engines. Subparts E through G are applicable to turbine aircraft engines. As such, subparts B through G do not adequately address the use of aircraft engines that operate using electrical technology. This necessitates the development of special conditions to ensure a level of safety commensurate with these subparts, as those regulatory requirements do not contain adequate or appropriate safety standards for aircraft engines that operate using electrical technology to propel the aircraft.

The special conditions that the FAA proposes for magniX's engine design include:

Applicability: Proposed special condition no. 1 would require magniX to comply with 14 CFR part 33, except for those airworthiness standards specifically and explicitly applicable only to reciprocating and turbine aircraft engines.

Engine Ratings and Operating Limitations: Proposed special condition no. 2 would require magniX, in addition to compliance with 14 CFR 33.7(a), to establish engine operating limits related to the power, torque, speed, and duty cycles specific to the magni250 and magni500 model engines. The duty or duty cycle is a statement of the load(s) to which the engine is subjected, including, if applicable, starting, no-load and rest, and de-energized periods, including their durations or cycles and sequence in time.

Materials: Proposed special condition no. 3 would require magniX to comply with 14 CFR 33.15, which sets requirements for the suitability and durability of materials used in the engine, and which would otherwise be applicable only to reciprocating and turbine aircraft engines.

Fire Protection: Proposed special condition no. 4 would require magniX to comply with 14 CFR 33.17, which sets requirements to protect the engine and certain parts and components of the airplane against fire, and which would otherwise be applicable only to reciprocating and turbine aircraft engines. Additionally, this proposed special condition would require magniX to ensure the high-voltage electrical wiring interconnect systems that connect the controller to the motor are protected against arc-faults. An arc-fault is a high power discharge of electricity between two or more conductors. This discharge generates heat, which can break down the wire's insulation and trigger an electrical fire. Arc-faults can range in power from a few amps up to thousands of amps and are highly variable in strength and duration.

[2] Sometimes this entire system is referred to as an inverter. Throughout this document, it will be referred to as the controller.

Durability: Proposed special condition no. 5 would require the proposed engine design and construction to ensure safe engine operation between maintenance intervals, overhaul periods, and mandatory actions. This proposed condition would also require magniX to develop maintenance instructions and scheduling information.

Engine Cooling: Proposed special condition no. 6 would require magniX to comply with 14 CFR 33.21, which requires the engine design and construction to provide necessary cooling, and which would otherwise be applicable only to reciprocating and turbine aircraft engines. Additionally, this proposed special condition would require magniX to document the cooling system monitoring features and usage in the engine installation manual, in accordance with § 33.5, if cooling is required to satisfy the safety analysis described in proposed special condition no. 17. Loss of adequate cooling to an engine that operates using electrical technology can result in rapid overheating and abrupt engine failure with critical consequences to safety.

Engine Mounting Attachments and Structure: Proposed special condition no. 7 would require magniX and the proposed design to comply with 14 CFR 33.23, which requires the applicant to define, and the proposed design to withstand, certain load limits for the engine mounting attachments and related engine structure. These requirements would otherwise be applicable only to reciprocating and turbine aircraft engines.

Accessory Attachments: Proposed special condition no. 8 would require the proposed design to comply with 14 CFR 33.25, which sets certain design, operational, and maintenance requirements for the engine's accessory drive and mounting attachments, and which would otherwise be applicable only to reciprocating and turbine aircraft engines.

Overspeed: Proposed special condition no. 9 would require magniX to establish by test, validated analysis, or a combination of both, that—(1) the rotor overspeed must not result in a burst, rotor growth, or damage that results in a hazardous engine effect; (2) rotors must possess sufficient strength margin to prevent burst; and (3) operating limits must not be exceeded in-service. The proposed special condition associated with rotor overspeed is necessary because of the differences between turbine engine technology and the technology of these electric engines. Turbine speed is driven by hot air expansion and is impacted by the aerodynamic loads on the rotor blades. Therefore, the speed or overspeed is not directly controlled in turbine engines. The speed of an electric engine is directly controlled by the electric field created by the controller. The failure modes that can lead to overspeed between turbine engines and these engines are vastly different, and therefore this special condition is necessary.

Engine Control Systems: Proposed special condition no. 10(b) would require magniX to ensure that these engines do not experience any unacceptable operating characteristics (such as unstable speed or torque control) or exceed any of their operating limitations.

The FAA originally issued § 33.28 at amendment 33–15 to address the evolution of the means of controlling the fuel supplied to the engine, from carburetors and hydro-mechanical controls to electronic control systems. These electronic control systems grew in complexity over the years, and as a result, the FAA amended § 33.28 at amendment 33–26 to address these increasing complexities. The controller that forms the controlling system for these electric engines is significantly simpler than the complex control systems used in modern turbine engines. The current regulations for engine control are inappropriate for electric engine control systems; therefore, the proposed special condition no. 10(b) associated with controlling these engines is necessary.

Proposed special condition no. 10(c) would require magniX to develop and verify the software and complex electronic hardware used in programmable logic devices, using proven methods that ensure it can provide the accuracy, precision, functionality, and reliability commensurate with the hazard that is being mitigated by the logic. RTCA DO–254, *Design Assurance Guidance for Airborne Electronic Hardware,* dated April 19, 2000,[3] distinguish between complex and simple electronic hardware.

Proposed special condition no. 10(d) would require data from assessments of all functional aspects of the control system to prevent errors that could exist in software programs that are not readily observable by inspection of the code. Also, magniX must use methods that will result in the expected quality that ensures the engine control system performs the intended functions throughout the declared operational envelope.

The environmental limits referred to in proposed special condition no. 10(e) include temperature, vibration, high-intensity radiated fields (HIRF), and others addressed in RTCA DO–160G, *Environmental Conditions and Test Procedures for Airborne Electronic/Electrical Equipment and Instruments.*[4] Accordingly, proposed special condition 10(e) would require magniX to document the environmental limits to which the system has been qualified in the engine installation instructions.

Proposed special condition no. 10(f) would require magniX to evaluate various control system failures to assure that these failures will not lead to unsafe conditions. The FAA issued Advisory Circular, AC 33.28–3, *Guidance Material For 14 CFR 33.28, Engine Control Systems,* on May 23, 2014.[5] Paragraph 6–2 of this AC provides applicants with guidance on defining an engine control system failure when showing compliance with the requirements of 14 CFR 33.28. AC 33.28–3 also includes objectives for the integrity requirements, criteria for a loss of thrust (or power) control (LOTC/LOPC) event, and an acceptable LOTC/LOPC rate. As with other topics within these proposed special conditions, the failure rates that apply to electric engines were not established when the FAA issued this AC.

The phrase ''in the full-up configuration'' used in proposed special condition no. 10(f)(2) refers to a system without any fault conditions present. The electronic control system must, when in the full-up configuration, be single fault-tolerant, as determined by the Administrator, for electrical, electrically detectable, and electronic failures involving LOPC events.

The term ''local'' in the context of ''local events'' used in proposed special condition no. 10(f)(4) means failures or malfunctions leading to events in the intended aircraft installation such as fire, overheat, or failures leading to damage to engine control system components. These local events must not result in a hazardous engine effect due to engine control system failures or malfunctions.

Proposed special condition no. 10(g) would require magniX to conduct a safety assessment of the control system to support the safety analysis in special condition no. 17. This control safety assessment provides failures and rates

[3] *https://my.rtca.org/NC__Product?id=a1B36000001IcjTEAS.*

[4] *https://my.rtca.org/NC__Product?id=a1B36000001IcnSEAS.*

[5] *https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_33_28-3.pdf.*

of these failures that can be used at the aircraft safety assessment level.

Proposed special condition no. 10(h) requires magniX to provide appropriate protection devices or systems to ensure that engine operating limitations will not be exceeded in-service.

Proposed special condition no. 10(i) is necessary to ensure the controllers are self-sufficient and isolated from other aircraft systems. The aircraft-supplied data supports the analysis at the aircraft level to protect the aircraft from common mode failures that could lead to major propulsion power loss. The exception ''other than power command signals from the aircraft'' noted in proposed special condition no. 10(i) is based on the FAA's determination that there are no reasonable means for the engine controller to determine the validity of any in-range signals from this system. In many cases, the engine control system can detect a faulty signal from the aircraft. The engine control system typically accepts the power command signal as a valid value.

The term ''independent'' in the context of ''fully independent engine systems'' referenced in proposed special condition no. 10(i) means the controllers should be self-sufficient and isolated from other aircraft systems or provide redundancy that enables it to accommodate aircraft data system failures. In the case of loss, interruption, or corruption of aircraft-supplied data, the engine must continue to function in a safe and acceptable manner without unacceptable effects on thrust or power, hazardous engine effects, or inability to comply with the operation demonstrations in proposed special condition no. 25.

The term ''accommodated'' in the context of ''detected and accommodated'' referenced in proposed special condition 10(i)(2) is to assure that once a fault has been detected, that the system continues to function safely.

Proposed special condition no. 10(j) would require magniX to show that the loss of electric power from the aircraft will not cause the electric engine to malfunction in a manner hazardous to the aircraft. The total loss of electric power to the electric engine may result in an engine shutdown.

Instrument Connection: Proposed special condition no. 11 would require magniX to comply with 14 CFR 33.29(a), (e), (f), and (g), which set certain requirements for the connection and installation of instruments to monitor engine performance. The remaining requirements in section 33.29 apply only to technologies used in reciprocating and turbine aircraft engines.

Instrument connections (wires, wire insulation, potting, grounding, connector designs) present opportunities for unsafe features to be present on the aircraft. Proposed special condition no. 11 would require the safety analysis to include potential hazardous effects from failure of instrument connections to function properly. The outcome of this analysis might identify the need for design enhancements or additional Instructions for Continued Airworthiness (ICA) to ensure safety.

Stress Analysis: Section 33.62 requires applicants to perform a stress analysis on each turbine engine. This regulation is explicitly applicable only to turbine engines and turbine engine components, and not appropriate for the magniX magni250 and magni500 model engines. However, the FAA proposes that a stress analysis particular to these electric engines is necessary.

Proposed special condition no. 12 would require a mechanical, thermal, and electrical stress analysis to show there is a sufficient design margin to prevent unacceptable operating characteristics. Also, the applicant must determine the maximum stresses in the engine by tests, validated analysis, or a combination thereof, and show that they do not exceed minimum material properties.

Critical and Life-Limited Parts: Proposed special condition no. 13 would require magniX to show whether rotating or moving components, bearings, shafts, static parts, and non-redundant mount components should be classified, designed, manufactured, and managed throughout their service life as critical or life-limited parts.

The engineering plan referenced in proposed special condition no. 13(b)(1) would require magniX to establish activities for managing documents, practices, and procedures that govern key design criteria essential to part airworthiness. The engineering plan would be required to contain methods for verifying the characteristics and qualities assumed in the design data using methods that are suitable for the part criticality. The engineering plan flows information from engineering to manufacturing about the criticality of key attributes that affect the airworthiness of the part. The plan also includes a reporting system that flows problematic issues that develop in engines while they operate in service so the design process can address them. For example, the effect of environmental influences on engine performance might not be consistent with the assumptions used to design the part. The impact of ice slab ingestion on engine parts might not be fully understood until the engine ingests the specific ice quantities and shapes that the airplane sheds. During the pre-certification activities, magniX must ensure the engineering plan is complete, available, and acceptable to the Administrator before the engine is certified.

The term ''low-cycle fatigue'' referenced in proposed special condition no. 13(a)(2) is a decline in material strength from exposure to cyclic stress at levels beyond the stress threshold the material can sustain indefinitely. This threshold is known as the material endurance limit. Low-cycle fatigue typically causes a part to sustain plastic or permanent deformation during the cyclic loading and can lead to cracks, crack growth, and fracture. Engine parts that operate at high temperatures and high-mechanical stresses simultaneously can experience low-cycle fatigue coupled with creep. Creep is the tendency of a metallic material to permanently move or deform when it is exposed to the extreme thermal conditions created by hot combustion gasses and substantial physical loads such as high rotational speeds and maximum thrust. Conversely, high-cycle fatigue is caused by elastic deformation, small strains caused by alternating stress, and a much higher number of load cycles compared to the number of cycles that cause low-cycle fatigue.

The term ''manufacturing definition'' referenced in proposed special condition no. 13(b)(2) is the collection of data required to translate documented engineering design criteria into physical parts and verify that the parts comply with the properties established by the design data. Since engines are not intentionally tested to failure during a certification program, there are inherent expectations for performance and durability guaranteed by the documents and processes used to execute production and quality systems required by § 21.137. These systems limit the potential manufacturing outcomes to parts that are consistently produced within design constraints.

The manufacturing plan and service management plan ensure essential information from the engineering plan, such as the design characteristics that ensure the integrity of critical and life-limited parts, is consistently produced and preserved over the lifetime of those parts. The manufacturing plan includes special processes and production controls to prevent inclusion of manufacturing-induced anomalies, which can degrade the part's structural integrity. Examples of manufacturing-induced anomalies are material

contamination, unacceptable grain growth, heat affected areas, and residual stresses. The service management plan has provisions for enhanced detection and reporting of service-induced anomalies that can cause the part to fail before it reaches its life limit or service limit. Anomalies can develop in service from improper handling, unforeseen operating conditions, and long-term environmental effects. The service management plan ensures important information that might affect the assumptions used to design a part is incorporated into the design process to remove unforeseen potential unsafe features from the engine.

Lubrication System: Proposed special condition no. 14 would require magniX to ensure the lubrication system is designed to function properly between scheduled maintenance intervals and prevent contamination of the engine bearings. This proposed condition would also require magniX to demonstrate the unique lubrication attributes and functional capability of the magni250 and magni500 model engine design.

The corresponding part 33 regulations include provisions for lubrication systems used in reciprocating and turbine engines. The part 33 requirements account for safety issues associated with specific reciprocating and turbine engine system configurations. These regulations are not appropriate for the magniX magni250 and magni500 model engines. For example, these engines do not have a crankcase or lubrication oil sump. The bearings are sealed, so they do not require an oil circulation system. The lubrication system in these engines is also independent of the propeller pitch control system. Therefore, proposed special condition no. 14 incorporates only certain requirements from the part 33 regulations.

Power Response: Proposed special condition no. 15 would require the design and construction of the magni250 and magni500 model engines to enable an increase (1) from the minimum power setting to the highest-rated power without detrimental engine effects, and (2) from the minimum obtainable power while in-flight and on the ground to the highest-rated power within a time interval for safe operation of the aircraft.

The engine control system governs the increase or decrease in power in combustion engines to prevent too much (or too little) fuel from being mixed with air before combustion. Due to the lag in rotor response time, improper fuel/air mixtures can result in engine surges, stalls, and exceedances above rated limits and durations. Failure of the engine to provide thrust, maintain rotor speeds below burst thresholds, and temperatures below limits have the potential for detrimental effects to the aircraft. Similar detrimental effects are possible in the magni250 and magni500 model engines, but the causes are different. Electric engines with reduced power response time can experience insufficient thrust to the aircraft, shaft over-torque, and over-stressed rotating components, propellers, and critical propeller parts. Therefore, this special condition is necessary.

Continued Rotation: Proposed special condition no. 16 would require magniX to design the magni250 and magni500 model engines such that, if the main rotating systems continue to rotate after the engine is shut down while in-flight, this continued rotation will not result in any hazardous engine effects.

The main rotating system of the magniX magni250 and magni500 model engines consists of the rotors, shafts, magnets, bearings, and wire windings that convert electrical energy to shaft torque. This rotating system must continue to rotate after the power source to the engine is shut down. The safety concerns associated with this proposed special condition are substantial asymmetric aerodynamic drag that can cause aircraft instability, loss of control, and reduced efficiency, and result in a forced landing or inability to continue safe flight.

Safety Analysis: Proposed special condition no. 17 would require magniX to comply with 14 CFR 33.75(a)(1), (a)(2), and (a)(3), which require the applicant to conduct a safety analysis of the engine, and which would otherwise be applicable only to turbine aircraft engines. Additionally, this proposed special condition would require magniX to assess its engine design to determine the likely consequences of failures that can reasonably be expected to occur. The failure of such elements and associated prescribed integrity requirements must be stated in the safety analysis.

A primary failure mode is the manner in which a part is most likely going to fail. Engine parts that have a primary failure mode, a predictable life to the failure and a failure consequence that results in a hazardous effect are life-limited or critical parts. Some life-limited or critical engine parts can fail suddenly in their primary failure mode from prolonged exposure to normal engine environments such as temperature, vibration, and stress. Due to the consequence of failure, these parts are not allowed to be managed by on-condition or probabilistic means because the probability of failure cannot be sensibly estimated in numerical terms. Therefore, the parts are managed by compliance with integrity requirements such as mandatory maintenance (life limits, inspections, inspection techniques) to ensure the qualities, features, and other attributes that prevent the part from failing in its primary failure mode are preserved throughout its service life. For example, if the number of engine cycles to failure are predictable and can be associated with specific design characteristics, such as material properties, then the applicant can manage the engine part with life limits.

Ingestion: Proposed special condition no. 18 would require magniX to ensure that these engines will not experience unacceptable power loss or hazardous engine effects from ingestion. The associated regulation for turbine engines, 14 CFR 33.76, is based on potential damage from birds being ingested into the turbine engine that has an inlet duct, which directs air into the engine for combustion, cooling, and thrust. In contrast, these electric engines do not use an inlet for those purposes.

An ''unacceptable'' power loss, as used in proposed special condition no. 18(a), is one in which the power or thrust required for safe flight of the aircraft becomes unavailable to the pilot. The specific amount of power loss that is required for safe flight depends on the aircraft configuration, speed, altitude, attitude, atmospheric conditions, phase of flight, and other circumstances where the demand for thrust is critical to safe operation of the aircraft.

Liquid Systems: Proposed special condition no. 19 would require magniX to ensure that liquid systems used for lubrication or cooling of engine components are designed and constructed to function properly. Also, if a liquid system is not self-contained, the interfaces to that system would be required to be defined in the engine installation manual. Liquid systems for the lubrication or cooling of engine components can include heat exchangers, pumps, fluids, tubing, connectors, electronic devices, temperature sensors and pressure switches, fasteners and brackets, bypass valves, and metallic chip detectors. These systems allow the electric engine to perform at extreme speeds and temperatures for durations up to the maintenance intervals without exceeding temperature limits or predicted deterioration rates.

Vibration Demonstration: Proposed special condition no. 20 would require

magniX to ensure (1) the engine is designed and constructed to function throughout its normal operating range of rotor speeds and engine output power without inducing excessive stress caused by engine vibration, and (2) the engine design undergoes a vibration survey.

The vibration demonstration is a survey that characterizes the vibratory attributes of the engine and verifies the stresses from vibration do not impose excessive force or result in natural frequency responses on the aircraft structure. The vibration demonstration also ensures internal vibrations will not cause engine components to fail. Excessive vibration force occurs at magnitudes and forcing functions or frequencies, which may result in damage to the aircraft. Stress margins to failure add conservatism to the highest values predicted by analysis for additional protection from failure caused by influences beyond those quantified in the analysis. The result of the additional design margin is improved engine reliability that meets prescribed thresholds based on the failure classification. The amount of margin needed to achieve the prescribed reliability rates depends on an applicant's experience with a product. The FAA considers the reliability rates when deciding how much vibration is ''excessive.''

Overtorque: Proposed special condition no. 21 would require magniX to demonstrate that the engine is capable of continued operation without the need for maintenance if it experiences a certain amount of overtorque.

The electric engine proposed by magniX converts electrical energy to shaft torque, which is used for propulsion. The electric motor, controller, and high-voltage systems control the engine torque. When the pilot commands power or thrust, the engine responds to the command and adjusts the shaft torque to meet the demand. During the transition from one power or thrust setting to another, there is a small delay, or latency, in the engine response time. While the engine dwells in this time interval, it can continue to apply torque until the command to reduce the torque is applied by the engine control. The amount of overtorque the FAA permits during operation depends on how well the applicant demonstrates the engine's capability to remain operational without the need for maintenance action. Therefore, this special condition is necessary.

Calibration Assurance: Proposed special condition no. 22 would require magniX to subject the engine to calibration tests, to establish its power characteristics and the conditions both before and after the endurance and durability demonstrations specified in proposed special condition nos. 23 and 26. The calibration test requirements specified in § 33.85 only apply to the endurance test specified in § 33.87, which is applicable only to turbine engines. The FAA proposes that the methods used for accomplishing those tests for turbine engines is not the best approach for electric engines. The calibration tests in § 33.85 have provisions applicable to ratings that are not relevant to the magniX magni250 and magni500 model engines. Proposed special condition no. 22 would allow magniX to demonstrate the endurance and durability of the electric engine either together or independently, whichever is most appropriate for the engine qualities being assessed. Consequently, the proposed special condition applies the calibration requirement to both the endurance and durability tests.

Endurance Demonstration: Proposed special condition no. 23 would require magniX to perform an endurance demonstration test that is acceptable to the Administrator. The Administrator will evaluate the extent to which the test exposes the engine to failures that could occur when the engine is operated at up to its rated values, to determine if the test is sufficient to show the engine design will not exhibit unacceptable effects in-service, such as significant performance deterioration, operability restrictions, engine power loss or instability, when it is run for sustained periods at extreme operating conditions.

Temperature Limit: Proposed special condition no. 24 would require magniX to ensure the engine can endure operation at its temperature limits plus an acceptable margin. An ''acceptable margin,'' as used in the proposed special condition, is the amount of temperature above that required to prevent the least-capable engine allowed by the type design from failing due to temperature-related causes when operating at the most extreme thermal conditions.

Operation Demonstration: Proposed special condition no. 25 would require the engine to demonstrate safe operating characteristics throughout its declared flight envelope and operating range. Engine operating characteristics define the range of functional and performance values the magniX magni250 and magni500 model engines can achieve without incurring hazardous effects. They are requisite capabilities of the type design that qualify the engine for installation into aircraft and determine aircraft installation requirements. The primary engine operating characteristics are assessed by the tests and demonstrations that would be required by these special conditions. Some of these characteristics are shaft output torque, rotor speed, power consumption, and engine thrust response. The engine performance data magniX will use to certify the engine must account for installation loads and effects. These are aircraft-level effects that could affect the engine characteristics that are measured in a test cell. These effects could result from elevated inlet cowl temperatures, extreme aircraft maneuvers, flowstream distortion, and hard landings. An engine that is run in a test facility could demonstrate more capability for some operating characteristics than it will when operating on an aircraft and potentially decrease the engine ratings and operating limits. Therefore, the installed performance defines the engine performance capabilities.

Durability Demonstration: Proposed special condition no. 26 would require magniX to subject the engine to a durability demonstration. The durability demonstration must show that each part of the engine is designed and constructed to minimize the development of any unsafe condition of the system between overhaul periods or between engine replacement intervals if overhaul is not defined. Durability is the ability of an engine, in the fully deteriorated state, to continue generating rated power or thrust, retain adequate operating margins, and retain sufficient efficiency that enables the aircraft to reach its destination. The amount of deterioration an engine can experience is restricted by operating limitations and managed by the ICA. Section 33.90 specifies how maintenance intervals are established; it does not include provisions for an engine replacement. Electric engines and turbine engines deteriorate differently; therefore, magniX will use different test effects to establish overhaul periods or engine replacement intervals if no maintenance is specified.

System and Component Tests: Proposed special condition no. 27 would require magniX to show that the systems and components of the engine would perform their intended functions in all declared engine environments and operating conditions.

Sections 33.87 and 33.91, which are specifically applicable to turbine engines, have conditional criteria to decide if additional tests will be required after the engine tests. The criteria are not suitable for electric

engines. Part 33 associates the need for additional testing with the outcome of the § 33.87 endurance test because it is designed to address safety concerns in combustion engines. For example, § 33.91(b) establishes a need for temperature limits and additional testing where the endurance test does not fully expose internal components to thermal conditions that verify the desired operating limits. A safety concern for electric engines is extreme temperatures. The FAA proposes that the § 33.87 endurance test might not be the best way to achieve the highest thermal conditions for all the electronic components of electric engines because heat is generated differently in electronic systems than it is in turbine engines. There are also additional safety considerations that need to be addressed in the test. Therefore, proposed special condition no. 27 would be a performance-based requirement that allows magniX to determine how to challenge the electric engine and to determine the appropriate limitations that correspond to the technology.

Rotor Locking Demonstration: Proposed special condition no. 28 would require the engine to demonstrate reliable rotor locking performance and that no hazardous effects will occur if the engine uses a rotor locking device to prevent shaft rotation.

Some engine designs enable the pilot to prevent a propeller shaft or main rotor shaft from turning while the engine is running or the aircraft is in-flight. This capability is needed for some installations that require the pilot to confirm functionality of certain flight systems before takeoff. The proposed magniX engine installations are not limited to vehicles that will not require rotor locking. Section 33.92 prescribes a test that may not include the appropriate criteria to demonstrate sufficient rotor locking capability for these engines; therefore, this special condition is necessary.

The proposed special condition does not define ''reliable'' rotor locking, but would allow magniX to classify the hazard (major/minor) and assign the appropriate quantitative criteria that meet the safety objectives required by § 33.75.

Teardown Inspection: Proposed special condition no. 29 would require magniX to perform either a teardown evaluation or a non-teardown evaluation based on the criteria provided in proposed special condition no. 29(a) or (b).

Proposed special condition no. 29(b) includes restrictive criteria for ''non-teardown evaluations'' to account for electric engines, sub-assemblies, and components that cannot be disassembled without destroying them. Some electrical and electronic components like magniX's are constructed in an integrated fashion that precludes the possibility of tearing them down without destroying them. Sections 33.55 and 33.93 do not contain similar requirements because reciprocating and turbine engines can be disassembled for inspection.

Containment: Proposed special condition no. 30 would require the engine to provide containment features that protect against likely hazards from rotating components unless magniX can show, by test or validated analysis, that the margin to rotor burst does not justify the need for containment features. Rotating components in electric engines are typically disks, shafts, bearings, seals, orbiting magnetic components, and the assembled rotor core. However, if the margin to rotor burst does not unconditionally rule out the possibility of a rotor burst, then the condition would require magniX to assume a rotor burst could occur and provide case features that will contain the failed rotors. In addition, magniX must also determine the effects of subsequent damage precipitated by the main rotor failure and characterize any fragments that are released forward or aft of the containment features. The fragment energy levels, trajectories, and size must be documented in the installation manual because the aircraft will need to account for the effects of a rotor failure in the aircraft design. The intent of this special condition is to prevent hazardous engine effects from structural failure of rotating components and the rotating parts that are built into them.

Operation with a Variable Pitch Propeller or Fan: Proposed special condition no. 31 would require magniX to conduct functional demonstrations, including feathering, negative torque, negative thrust, and reverse thrust operations, as applicable, based on the propeller or fan's variable pitch functions that are planned for use on these electric engines, with a representative propeller. The tests prescribed in § 33.95, for engines operating with variable pitch propellers, are based on the operating characteristics of turbine engines, which include thrust response times, engine stall, propeller shaft overload, loss of thrust control, and hardware fatigue. The electric engines proposed by magniX have different operating characteristics that substantially affect their susceptibility to these and other potential failures. Since magniX's proposed electric engines may be installed with a variable pitch propeller, the proposed special condition associated with the operation with a variable pitch propeller or fan is necessary.

General Conduct of Tests: Proposed special condition no. 32 would require magniX to (1) include scheduled maintenance in the engine ICA before certification; (2) include any maintenance, in addition to the scheduled maintenance, that was needed during the test to satisfy the requirement; and (3) conduct any additional tests that the Administrator finds necessary warranted by the test results.

For example, certification endurance test shortfalls might be caused by omitting some prescribed engine test conditions or from accelerated deterioration of individual parts arising from the need to force the engine to operating conditions that drive the engine above the engine cycle values of the type design. If an engine part fails during a certification test, the entire engine might be subjected to penalty runs with a replacement or newer part design installed on the engine to meet the test requirements. Also, the maintenance performed to replace the part so that the engine could complete the test would be included in the engine ICA. In another example, if the applicant replaces a part before completing an engine certification test because of a test facility failure and can substantiate the part to the Administrator through bench testing, they might not need to substantiate the part design using penalty runs with the entire engine.

The term ''excessive'' is used to describe the frequency of unplanned engine maintenance and the frequency unplanned test stoppages to address engine issues that prevent the engine from completing the tests in proposed special condition nos. 32(b)(1) and (2), respectively. Excessive frequency is an objective assessment from the FAA's analysis of the amount of unplanned maintenance needed for an engine to complete a certification test. The FAA's assessment may include the reasons for the unplanned maintenance, such as the effects test facility equipment may have on the engine, the inability to simulate a realistic engine operating environment, and the extent to which an engine requires modifications to complete a certification the test. In some cases, the applicant may be able to show that unplanned maintenance has no effect on the certification test results, or they might be able to attribute the problem to the facility or test-enabling equipment that is not part of the type design. In these cases, the ICA will not

be affected. However, if magniX cannot reconcile the amount of unplanned service, then the FAA may consider the unplanned maintenance required during the certification test to be ''excessive,'' prompting the need to add the unplanned maintenance to mandatory ICA in order to comply with the certification requirements.

These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards for reciprocating and turbine aircraft engines.

Applicability

As discussed above, these proposed special conditions are applicable to the magniX magni250 and magni500 model engines. Should magniX apply at a later date for a change to the type certificate to include another model on the same type certificate incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only magniX magni250 and magni500 model engines. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 33

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for magniX USA, Inc., magni250 and magni500 model engines. The applicant must also comply with the certification procedures set forth in 14 CFR part 21.

1. Applicability

Unless otherwise noted in these special conditions, the design must comply with the airworthiness standards for aircraft engines set forth in 14 CFR part 33, except those airworthiness standards specifically and explicitly applicable only to reciprocating and turbine aircraft engines.

2. Engine Ratings and Operating Limits

In addition to § 33.7(a), the design must comply with the following:

Ratings and operating limitations must be established and included in the type certificate data sheet based on:

(a) Power, torque, speed, and time for:

(1) Rated maximum continuous power; and

(2) Rated maximum temporary power and associated time limit.

(b) The duty cycle and the rating at that duty cycle. The manufacturer must declare the duty cycle or cycles in the engine certificate data sheet.

3. Materials

The engine design must comply with 14 CFR 33.15.

4. Fire Protection

The engine design must comply with 14 CFR 33.17.

In addition, high-voltage electrical wiring interconnect systems must be protected against arc-faults. Any non-protected electrical wiring interconnects must be analyzed to show that arc-faults do not cause a hazardous engine effect.

5. Durability

The engine design and construction must minimize the development of an unsafe condition of the engine between maintenance intervals, overhaul periods, or mandatory actions described in the applicable Instructions for Continued Airworthiness (ICA).

6. Engine Cooling

The engine design and construction must comply with 14 CFR 33.21. In addition, if cooling is required to satisfy the safety analysis as described in special condition no. 17, the cooling system monitoring features and usage must be documented in the engine installation manual.

7. Engine Mounting Attachments and Structure

The engine mounting attachments and related engine structure must comply with 14 CFR 33.23.

8. Accessory Attachments

The engine must comply with 14 CFR 33.25.

9. Overspeed

(a) A rotor overspeed must not result in a burst, rotor growth, or damage that results in a hazardous engine effect, as defined in special condition no. 17(d)(2). Compliance with this paragraph must be shown by test, validated analysis, or a combination of both. Applicable assumed speeds must be declared and justified.

(b) Rotors must possess sufficient strength with a margin to burst above certified operating conditions and above failure conditions leading to rotor overspeed. The margin to burst must be shown by tests, validated analysis, or a combination of both.

(c) The engine must not exceed the speed operational limitations that could affect rotor structural integrity.

10. Engine Control Systems

(a) Applicability.

The requirements of this paragraph apply to any system or device that controls, limits, monitors, or protects engine operation and is necessary for the continued airworthiness of the engine.

(b) Engine control.

The engine control system must ensure the engine does not experience any unacceptable operating characteristics or exceed any of its operating limitations.

(c) Design assurance.

The software and complex electronic hardware, including programmable logic devices, must be—

(1) Designed and developed using a structured and systematic approach that provides a level of assurance for the logic commensurate with the hazard associated with the failure or malfunction of the systems in which the devices are located; and

(2) Substantiated by a verification methodology acceptable to the Administrator.

(d) Validation.

All functional aspects of the control system must be substantiated by tests, analysis, or a combination thereof, to show that the engine control system performs the intended functions throughout the declared operational envelope.

(e) Environmental limits.

Environmental limits that cannot be adequately substantiated by endurance demonstrations, validated analysis, or a combination thereof, must be demonstrated by the system and component tests in special condition no. 27.

(f) Engine control system failures.

The engine control system must—

(1) Have a maximum rate of Loss of Power Control (LOPC) that is suitable for the intended application;

(2) When in the full-up configuration, be single-fault tolerant, as determined by the Administrator, for electrical, electrically detectable, and electronic failures involving LOPC events;

(3) Not have any single failure that result in hazardous engine effects; and

(4) Not have any likely failure or malfunction that lead to local events in the intended aircraft installation.

(g) System safety assessment.

This assessment must identify faults or failures that affect normal operation,

together with the predicted frequency of occurrence of these faults or failures.

(h) Protection systems.

The design and function of the engine control devices and systems, together with engine instruments, operating instructions and maintenance instructions, must ensure that engine operating limitations will not be exceeded in-service.

(i) Aircraft-supplied data.

Any single failure leading to loss, interruption, or corruption of aircraft-supplied data (other than power command signals from the aircraft), or aircraft-supplied data shared between engine systems within a single engine or between fully independent engine systems must—

(1) Not result in a hazardous engine effect, as defined in special condition no. 17(d)(2), for any engine installed on the aircraft; and

(2) Be able to be detected and accommodated by the control system.

(j) Engine control system electrical power.

The engine control system must be designed such that the loss, malfunction, or interruption of the control system electrical power source will not result in a hazardous engine effect, as defined in special condition no. 17(d)(2), the unacceptable transmission of erroneous data, or continued engine operation in the absence of the control function.

11. Instrument Connection

The applicant must comply with 14 CFR 33.29(a), (e), (f), and (g). In addition, as part of the system safety assessment of special condition no. 10(g), the applicant must assess the possibility and subsequent effect of incorrect fit of instruments, sensors, or connectors. Where practicable, the applicant must take design precautions to prevent incorrect configuration of the system.

12. Stress Analysis

(a) A mechanical, thermal, and electrical stress analysis must show there is a sufficient design margin to prevent unacceptable operating characteristics.

(b) Maximum stresses in the engine must be determined by tests, validated analysis, or a combination thereof, and must be shown not to exceed minimum material properties.

13. Critical and Life-Limited Parts

(a) The applicant must show by a safety analysis or means acceptable to the Administrator, whether rotating or moving components, bearings, shafts, static parts, and non-redundant mount components should be classified, designed, manufactured, and managed throughout their service life as critical or life-limited parts.

(1) *Critical part* means a part that must meet prescribed integrity specifications to avoid its primary failure, which is likely to result in a hazardous engine effect, as defined in special condition no. 17(d)(2) of these special conditions.

(2) *Life-limited part* means a rotor and major structural static part whose failure can result in a hazardous engine effect due to a low-cycle fatigue (LCF) mechanism or any LCF driven mechanism coupled with creep. A life limit is an operational limitation that specifies the maximum allowable number of flight cycles that a part can endure before the applicant must remove it from the engine.

(b) The applicant must establish the integrity of each critical part or life-limited part by providing the following three plans to the Administrator for approval:

(1) An engineering plan that establishes and maintains that the combination of loads, material properties, environmental influences, and operating conditions, including the effects of engine parts influencing these parameters, are sufficiently well-known and predictable by validated analysis, test, or service experience. The engineering plan must ensure each critical part or life-limited part is withdrawn from service at an approved life before hazardous engine effects can occur. The engineering plan must establish activities to be executed both pre- and post-certification. magniX must perform appropriate damage tolerance assessments to address the potential for failure from material, manufacturing, and service-induced anomalies within the approved life of the part. The approved life must be published in the mandatory ICA.

(2) A manufacturing plan that identifies the specific manufacturing definition (drawings, procedures, specifications, etc.) necessary to consistently produce critical or life-limited parts with the attributes required by the engineering plan.

(3) A service management plan that defines in-service processes for maintenance and repair of critical or life-limited parts that maintain attributes consistent with those required by the engineering plan. These processes must become part of the mandatory ICA.

14. Lubrication System

(a) The lubrication system must be designed and constructed to function properly between scheduled maintenance intervals in all flight attitudes and atmospheric conditions in which the engine is expected to operate.

(b) The lubrication system must be designed to prevent contamination of the engine bearings by particle debris.

(c) The applicant must demonstrate by test, validated analysis, or a combination thereof, the unique lubrication attributes and functional capability of (a) and (b).

15. Power Response

The design and construction of the engine must enable an increase—

(a) From the minimum power setting to the highest-rated power without detrimental engine effects; and

(b) From the minimum obtainable power while in-flight and while on the ground to the highest-rated power within a time interval for safe operation of the aircraft.

16. Continued Rotation

If the design allows any of the engine main rotating systems to continue to rotate after the engine is shut down while in-flight, this continued rotation must not result in any hazardous engine effects, as specified in special condition no. 17(d)(2).

17. Safety Analysis

(a) The applicant must comply with § 33.75(a)(1), (a)(2), and (a)(3) using the failure definitions in special condition no. 17(d).

(b) If the failure of such elements is likely to result in hazardous engine effects, then the applicant may show compliance by reliance on the prescribed integrity requirements of § 33.15, special condition no. 9, or special condition no. 13, as determined by analysis. The failure of such elements and associated prescribed integrity requirements must be stated in the safety analysis.

(c) The applicant must comply with 14 CFR 33.75(d) and (e) using the failure definitions in special condition no. 17(d) of this special condition.

(d) Unless otherwise approved by the Administrator, the following definitions apply to the engine effects when showing compliance with this condition:

(1) An engine failure in which the only consequence is the inability to dispatch the aircraft will be regarded as a minor engine effect.

(2) The engine effects in § 33.75(g)(2) are hazardous engine effects with the addition of:

Electrocution of crew, passengers, operators, maintainers, or others.

(3) Any other engine effect is a major engine effect.

18. Ingestion

(a) Ingestion from likely sources (foreign objects, birds, ice, rain, hail) must not result in unacceptable power loss, or in hazardous engine effects as defined by special condition no. 17(d)(2).

(b) If the design of the engine relies on features, attachments, or systems that may be supplied by the installer for the prevention of unacceptable power loss or hazardous engine effects following potential ingestion, then the features, attachments, or systems must be documented in the engine installation manual.

19. Liquid Systems

(a) Each liquid system used for lubrication or cooling of engine components must be designed and constructed to function properly in all flight attitudes and atmospheric conditions in which the engine is expected to operate.

(b) If a liquid system used for lubrication or cooling of engine components is not self-contained, the interfaces to that system must be defined in the engine installation manual.

20. Vibration Demonstration

(a) The engine must be designed and constructed to function throughout its normal operating range of rotor speeds and engine output power, including defined exceedances, without inducing excessive stress in any of the engine parts because of vibration and without imparting excessive vibration forces to the aircraft structure.

(b) Each proposed engine design must undergo a vibration survey to establish that the vibration characteristics of those components that may be subject to induced vibration are acceptable throughout the declared flight envelope and engine operating range for the specific installation configuration. The possible sources of the induced vibration that the survey must assess are mechanical, aerodynamic, acoustical, or electromagnetic. This survey must be shown by test, validated analysis, or a combination thereof.

21. Overtorque

When approval is sought for a transient maximum engine overtorque, the applicant must demonstrate by tests, validated analysis, or a combination thereof, that the engine is capable of continued operation after operating at the maximum engine overtorque condition without maintenance action.

22. Calibration Assurance

Each engine must be subjected to calibration tests to establish its power characteristics and the conditions both before and after the endurance and durability demonstrations specified in special conditions nos. 23 and 26.

23. Endurance Demonstration

The applicant must subject the engine to an endurance demonstration acceptable to the Administrator to demonstrate the limit capabilities of the engine. The endurance demonstration elevates and decreases the engine's power settings, and dwells at the power settings for durations that produce the extreme physical conditions the engine experiences at rated performance levels, operational limits, and at any other conditions or power settings that are required to verify the limit capabilities of the engine.

24. Temperature Limit

The engine design must demonstrate its capability to endure operation at its temperature limits plus an acceptable margin. The applicant must quantify and justify the margin at each rated condition to the Administrator. The demonstration must be repeated for all declared duty cycles and associated ratings.

25. Operation Demonstration

The engine design must demonstrate safe operating characteristics, including but not limited to, power cycling, acceleration, and overspeeding, throughout its declared flight envelope and operating range. The declared engine operational characteristics must account for installation loads and effects.

26. Durability Demonstration

The engine must be subjected to a durability demonstration to show that each part of the engine has been designed and constructed to minimize the development of any unsafe condition of the system between overhaul periods, or between engine replacement intervals if overhaul is not defined. This test must simulate the conditions in which the engine is expected to operate in-service, including typical start-stop cycles.

27. System and Component Tests

The applicant must show that systems and components will perform their intended functions in all declared environmental and operating conditions.

28. Rotor Locking Demonstration

If shaft rotation is prevented by a means to lock the rotor(s), the engine must demonstrate reliable rotor locking performance and that no hazardous effects will occur.

29. Teardown Inspection

The applicant must comply with either (a) or (b) as follows:

(a) Teardown evaluation.

(1) After the endurance and durability demonstrations have been completed, the engine must be completely disassembled. Each engine component must be within service limits and eligible for continued operation in accordance with the information submitted for showing compliance with § 33.4, *Instructions for Continued Airworthiness.*

(2) Each engine component having an adjustment setting and a functioning characteristic that can be established independent of installation on or in the engine must retain each setting and functioning characteristic within the limits that were established and recorded at the beginning of the endurance and durability demonstrations.

(b) Non-Teardown evaluation.

If a teardown is not performed for all engine components, then the life limits for these components must be established based on the endurance and durability demonstrations.

30. Containment

The engine must provide containment features that protect against likely hazards from rotating components as follows—

(a) The design of the case surrounding rotating components must provide for the containment of the rotating components in the event of failure unless the applicant shows that the rotor has a margin to burst that would justify no need for containment features.

(b) If the margin to burst shows the case must have containment features in the event of failure, the case must provide for the containment of the failed rotating components. The applicant must define by test, validated analysis, or combination thereof, and document in the installation manual the energy level, trajectory, and size of any fragments released from damage caused by the main rotor failure that pass forward or aft of the surrounding case.

31. Operation With a Variable Pitch Propeller or Fan

The applicant must conduct functional demonstrations including feathering, negative torque, negative thrust, and reverse thrust operations, as

applicable, with a representative propeller. These demonstrations may be conducted as part of the endurance and durability demonstrations.

32. General Conduct of Tests

(a) Maintenance of the engine may be made during the tests in accordance with the service and maintenance instructions contained in the proposed ICA.

(b) The applicant must subject the engine or its parts to maintenance and additional tests that the Administrator finds necessary if—

(1) The frequency of the service is excessive;

(2) The number of stops due to engine malfunction is excessive;

(3) Major repairs are needed; or

(4) Replacement of a part is found necessary during the tests or as the result of findings from the teardown inspection.

(c) Upon completion of all demonstrations and testing specified in these special conditions, the engine and its components must be—

(1) Within serviceable limits;

(2) Safe for continued operation; and

(3) Capable of operating at declared ratings while remaining within limits.

Issued in Burlington, Massachusetts, on October 19, 2020.

Robert J. Ganley,

Engine and Propeller Standards Branch, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2020–23434 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1016; Airspace Docket No. 20–ASW–9]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Dumas, AR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Billy Free Municipal Airport, Dumas, AR. The FAA is proposing this action as the result of airspace reviews caused by the decommissioning of the Monticello VHF omnidirectional range (VOR) navigation aid as part of the VOR Minimum Operational Network (MON) Program.

DATES: Comments must be received on or before January 4, 2021.

ADDRESSES: Send comments on this proposal to: The U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Telephone: (800) 647–5527, or (202) 366–9826. You must identify the Docket No. FAA–2020–1016; Airspace Docket No. 20–ASW–9, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (770) 404–305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested persons are invited to comment on this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (Docket No. FAA–2020–1016 and Airspace Docket No. 20–ASW–9) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for the address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–1016; Airspace Docket No. 20–ASW–9''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays

at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR part 71) by amending the Class E airspace extending upward from 700 feet above the surface at Billy Free Municipal Airport, Dumas, AR, by removing the Monticello VOR and associated extension from the airspace legal description; and removing the city associated with the airport to comply with changes to FAA Order 7400.2M, Procedures for Handling Airspace Matters.

This action is the result of airspace reviews caused by the decommissioning of the Monticello VOR, which provided navigation information for the instrument procedures this airport, as part of the VOR MON Program.

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

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

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed 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

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 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 Federal Aviation Administration 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.

* * * * *

ASW AR E5 Dumas, AR [Amended]

Billy Free Municipal Airport, AR
(Lat. 33°53′04″ N, long. 91°32′03″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Billy Free Municipal Airport.

Issued in College Park, Georgia, on November 13, 2020.

Matthew N. Cathcart,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2020–25481 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 18 and 74

[Docket No. MSHA–2020–0018]

RIN 1219–AB93

Testing, Evaluation, and Approval of Electric Motor-Driven Mine Equipment and Accessories

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Mine Safety and Health Administration (MSHA) proposes to revise its regulations that sets out the testing, evaluation, and approval requirements for electric motor-driven mine equipment and accessories intended for use in gassy mines. Under this proposal, MSHA will accept voluntary consensus standards (VCS) that are suitable for gassy mining environments and that provide protection against fire or explosion dangers, to replace approval requirements in its regulations. This proposal is intended to promote the use of innovative and advanced technologies that lead to improvements in mine safety and health and to improve the efficiency and effectiveness of MSHA's approval process.

DATES: *Comment date:* Comments must be received or postmarked by midnight Eastern Daylight Savings Time on December 21, 2020.

ADDRESSES: Submit comments and informational materials, identified by RIN 1219–AB93 or Docket No. MSHA–2020–0018, by one of the following methods:

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: zzMSHA-comments@dol.gov.* Include RIN 1219–AB93 or Docket No. MSHA–2020–0018 in the subject line of the message.
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.
- *Hand Delivery or Courier:* MSHA, 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th Floor East.
- *Fax:* (202) 693–9441.

Instructions: All submissions must include RIN 1219–AB93 or Docket No. MSHA–2020–0018. Do not include

personal information that you do not want publicly disclosed; MSHA will post all comments without change, including any personal information provided, to *http://www.regulations.gov* and on MSHA's website at *https://www.msha.gov/regulations/rulemaking.*

Docket: For access to the docket to read comments received, go to *http://www.regulations.gov* or *http://www.msha.gov/currentcomments.asp.* To read background documents, go to *http://www.regulations.gov.* Review comments and background documents in person at the Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452. Sign in at the receptionist's desk on the 4th Floor East, Suite 4E401.

Email Notification: To subscribe to receive email notification when MSHA publishes rulemaking documents in the **Federal Register**, go to *https://public.govdelivery.com/accounts/USDOL/subscriber/new.*

FOR FURTHER INFORMATION CONTACT:

Roslyn B. Fontaine, Deputy Director, Office of Standards, Regulations, and Variances, MSHA, at *fontaine.roslyn@dol.gov* (email), (202) 693–9440 (voice); or (202) 693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801) (Mine Act) requires the Mine Safety and Health Administration (MSHA) to establish requirements for the technical design, construction, and testing of electrical products that must be approved by MSHA prior to use in gassy mines. These regulations are divided into separate parts based on equipment type. Title 30 CFR part 18 (part 18) specifies the procedures and requirements for obtaining MSHA approval, certification, extension, or acceptance of electric motor-driven mine equipment and accessories intended for use in gassy mines.[1] Examples of this equipment include portable two-way radios, remote control units for mining machinery, longwall mining systems, portable oxygen detectors, miner-wearable components for proximity detection systems, and powered air-purifying respirators (PAPRs). MSHA approves, as ''permissible,'' completely assembled electrical equipment, components of electrical equipment, and electrical accessories that manufacturers design, construct, and install to meet MSHA's requirements.

Requirements in part 18, including associated tests, are to ensure that such equipment will not cause a fire or explosion (30 CFR 18.4). Applicants must design electrical equipment so that it will not cause a fire or explosion, using at least one of two recognized methods. One way is to design equipment so that it cannot produce a spark strong enough, or temperatures sufficient, to ignite a hazardous gas such as flammable methane-air mixtures. Alternatively, applicants may house the equipment in enclosures that will withstand internal explosions of methane-air mixtures without damage to, or excessive distortion of, its walls or covers, and without ignition of surrounding methane-air mixtures or discharge of flame from inside to outside the enclosure.

Before electric motor-driven equipment or accessories can be used in gassy mines in the U.S., they must first have been approved for such use by MSHA. Those seeking MSHA approval (applicants) are typically product designers and manufacturers of the equipment or accessories. MSHA's approval process includes testing and evaluation of the products, either by MSHA or by an independent laboratory. Applicants that use an independent laboratory to conduct testing or evaluation must submit the results to MSHA for review, along with written evidence of the laboratory's independence and current recognition by a laboratory accrediting organization.

When MSHA receives an application for approval of a completely assembled electrical machine or accessory for use in gassy mines, MSHA reviews the application using the following steps. First, MSHA examines the documents in the application to determine whether the applicant has met the technical requirements of the provisions of part 18. MSHA also checks each drawing and specification in the application against these requirements and, for some products, samples of the product or parts of the product. MSHA may disassemble and examine parts of the product for conformity to the drawings and specifications. Second, after MSHA verifies that an applicant's product complies with the design and construction requirements, MSHA tests the product to determine whether it performs according to the approval requirements. MSHA issues an approval if the product passes the tests and meets all of MSHA's technical and safety requirements.

Once a product is approved, the applicant is becomes an approval holder and must place an MSHA approval marking on the product to indicate that the product is approved for use in gassy mines.

The use of the MSHA approval marking obligates the approval holder to maintain the quality of the completely assembled product according to the technical requirements upon which its approval was based. If an approval holder wants to modify an approved product and maintain its approval, then the approval holder must submit its proposed changes to MSHA. If MSHA approves the changes, the Agency issues either an extension of approval or a notice of acceptance of the modified product to the approval holder.

II. Regulatory Review and Reform Comments

In 2018, the Agency announced its intent to review existing regulations to assess compliance costs and reduce regulatory burden. As part of this review, MSHA sought stakeholders' assistance in identifying those regulations that could be repealed, replaced, or modified without reducing miners' safety or health. MSHA published on its website (*https://www.msha.gov/provide-or-view-comments-msha-regulations-repeal-replace-or-modify*) a notice that the Agency is seeking assistance in identifying regulations for review. All comments are posted on the Agency's website.

As a result of this solicitation, MSHA received a number of recommendations regarding MSHA's product approval regulations. One commenter recommended that MSHA replace part 18 with a modified set of regulations to provide a clearer and timelier path for approval of new technologies that will improve the health and safety of miners. The commenter noted that many products approved for use under international consensus standards in other countries could not be approved for use by MSHA under part 18. The commenter stated that international coal companies outside the United States may use products designed and manufactured to these international consensus standards, and thus may have access to the latest health and safety technology in their mining operations.

MSHA acknowledges the benefits of using VCS and proposes that VCS replace existing MSHA requirements as discussed below.

[1] MSHA's approval regulations (30 CFR parts 6, 7, 18, 19, 20, 22, 23, 27, and 28) govern the process through which manufacturers may obtain MSHA approval, certification, extension, or acceptance of certain electrical products for use in underground mines. Each of these separate approval actions has specific application procedures and technical requirements for testing and evaluation. Along with ''approval,'' the terms ''certification,'' ''extension,'' and ''acceptance'' also denote MSHA approval.

Two commenters suggested that MSHA adopt the International Electrotechnical Commission (IEC) 60079 standards for use in approvals of electrical mining equipment, including methane detectors. These IEC standards address the safety of equipment used in explosive gaseous atmospheres. One commenter stated that the IEC series of standards has been adopted by many other countries for use in approving electrical mining equipment for use in explosive atmospheres. For example, Australia uses the IEC 60079 standards with national deviations that are called the ANZEx 60079 standards. For approvals issued under part 18, MSHA agrees and is proposing to adopt VCS that provide protection against fire and explosion dangers.

One commenter suggested that MSHA provide clearly-defined requirements in part 18 for equipment approvals and certifications based on standards that are maintained and updated by industry experts and technical committees. The commenter stated that regularly updating the standards would improve the safety of electrical mining equipment and that allowing the standards to keep pace with technology (through more recent versions of the standards) would improve the safety and health of miners in the U.S.

MSHA agrees with these comments and would use the appropriate rulemaking process with solicitation of public comment to adopt VCS developed by standard-setting bodies that plan, develop, establish, or coordinate standards through agreed-upon, transparent, and deliberate procedures. MSHA further agrees that continuing to adopt VCS as they are maintained and updated through the agreed-upon, transparent, and deliberate procedures, can promote the availability of technologically advanced equipment for use in U.S. mines, thus improving mine safety and health.

III. Discussion of Proposed Rule

A. Voluntary Consensus Standards

MSHA proposes to incorporate by reference 14 VCS—8 American National Standards Institute (ANSI) approved and 6 IEC approved—in their entirety and without modification, to replace existing approval criteria in part 18 for products covered by the incorporated VCS.[2] MSHA has determined that these VCS (1) are suitable for gassy mining environments and (2) will provide protection against fire or explosion dangers, if substituted in their entirety for MSHA approval requirements specified in part 18, subparts B through E. The existing MSHA subparts B through E requirements would continue to apply to those electrical components not covered by one of the 14 VCS.

Table 1 below lists the U.S. and international VCS that MSHA proposes to incorporate by reference in part 18. As discussed below in the section-by-section analysis, the ANSI standards are based on the similarly-numbered IEC standards. The ANSI and IEC standards on particular topics are generally similar but not identical, as the ANSI standards include modifications of the IEC standards and U.S.-specific requirements (U.S. deviations). IEC standards are prepared and maintained by subject matter experts, using a rigorous and well-defined process. Similarly, the U.S. deviations are developed by nationally-recognized and vetted experts and are approved as American National Standards only if the appropriate procedures are followed.

MSHA believes this approach would promote in U.S. mines the availability of technologically advanced equipment that protects miners against the risk of fire or explosion dangers. Many products conforming to these VCS are broadly recognized across various industries and in other countries as providing an appropriate level of safety for miners and others in work environments with hazards similar to those encountered in the mining industry. The proposed changes would allow the introduction of products that further mine safety but that MSHA could not otherwise approve because they do not conform to the existing requirements in part 18.

This proposal is also consistent with the Office of Management and Budget's (OMB) Circular A–119 (Jan. 27, 2016 (81 FR 4673)), which establishes policy guidance for Federal agencies. Circular A–119, based on the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 3701 *et seq.*) (Transfer Act), section 12(d), directs Federal agencies to use technical standards developed or adopted by VCS bodies to carry out policies or activities. Additionally, Circular A–119 directs agencies to use VCS in lieu of government-unique standards, except where inconsistent with law or otherwise impractical. The intent of the policy guidance in Circular A–119 is to minimize agency reliance on government-unique standards to decrease the burden of complying with agency regulations and promote efficiency and economic competition through harmonization of standards. (See *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf*). Consistent with Circular A–119, the use of VCS would streamline the MSHA approval process and make it more effective and efficient for applicants by decreasing the reliance on government-unique standards.

While this proposal lists 14 VCS for MSHA to incorporate by reference, the Agency is interested in whether the proposal should be expanded to include other VCS. Please provide rationale, with definitive data and explanation of how this would improve safety, for your position.

The VCS are summarized in the discussion related to § 18.102.

TABLE 1—VOLUNTARY CONSENSUS STANDARDS

ANSI/UL 60079–0 Ed. 7, Explosive Atmospheres—Part 0: Equipment—General Requirements (Group I) (2019). This standard provides the general requirements for the construction, testing, and marking of electrical equipment intended for use in explosive atmospheres.
ANSI/UL 60079–1 Ed. 7, Standard for Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures "d" (Group I, Level of Protection 'da') (2015). This standard contains specific requirements for the construction and testing of electrical equipment, with the Type of Protection flameproof (FP) enclosure designated "d" intended for use in explosive gas atmospheres.
ANSI/ISA 60079–11[1] (12.02.01)—2014 Standard for Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety "i" (Group I, Level of Protection 'ia') (2014). This standard specifies the construction and testing of intrinsically safe apparatus intended for use in an explosive atmosphere and for associated apparatus, which is intended for connection to intrinsically safe circuits that may enter such atmospheres. This type of protection is applicable to electrical equipment in which the electrical circuits themselves are incapable of causing an explosion in the surrounding explosive atmospheres.

[2] MSHA has participated on Technical Advisory Groups to the U.S. National Committee (USNC) of the IEC for the past several years. The USNC of the IEC is an integrated body of ANSI. MSHA staff have provided comments on proposed changes to IEC standards for electrical equipment for use in hazardous locations. This includes standards for intrinsic safety, flameproof enclosures, and encapsulated assemblies.

TABLE 1—VOLUNTARY CONSENSUS STANDARDS—Continued

ANSI/UL 60079–11 [1] Ed. 6, Standard for Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety "i" (Group I, Level of Protection 'ia') (2013). This standard specifies the construction and testing of intrinsically safe apparatus intended for use in an explosive atmosphere and for associated apparatus, which is intended for connection to intrinsically safe circuits that may enter such atmospheres. This type of protection is applicable to electrical equipment in which the electrical circuits themselves are incapable of causing an explosion in the surrounding explosive atmospheres.
ANSI/UL 60079–18, Ed. 4, Standard for Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation 'm' (Group I, Level of Protection 'ma') (2015). This standard provides the specific requirements for the construction, testing, and marking of electrical equipment, parts of electrical equipment, and components not intended to be used alone, with the Type of Protection encapsulation "m" intended for use in explosive gas atmospheres or explosive dust atmospheres.
ANSI/ISA 60079–25 [1] (12.02.05)–2011 Standard for Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems (Group I, Level of Protection 'ia') (2011). This standard contains the specific requirements for construction and assessment of intrinsically safe electrical systems, intended for use, as a whole or in part, in hazardous locations. A system approved under this standard is comprised of equipment or components approved to the 60079–11 standard, interconnected to form a system.
ANSI/UL 60079–25 [1] Ed. 2, Standard for Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems (Group I, Level of Protection 'ia') (2011). This standard contains the specific requirements for construction and assessment of intrinsically safe electrical systems, intended for use, as a whole or in part, in hazardous locations. A system approved under this standard is comprised of equipment or components approved to the 60079–11 standard, interconnected to form a system.
ANSI/UL 60079–28 Ed. 2, Standard for Explosive Atmospheres—Part 28: Protection of Equipment and Transmission Systems Using Optical Radiation (Group I, Equipment Protection Level 'Ma') (2017). This standard contains the requirements and testing of equipment emitting optical radiation intended for use in explosive atmospheres. It also covers equipment located outside the explosive atmosphere but which generates optical radiation that is intended to enter an explosive atmosphere.
IEC 60079–0, Ed. 7, Explosive atmospheres—Part 0: Equipment—General requirements (Group I) (2017). This standard provides the general requirements for the construction, testing, and marking of electrical equipment intended for use in explosive atmospheres.
IEC 60079–1 Ed. 7, Standard for Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures "d" (Group I, Level of Protection 'da') (2014). This standard contains specific requirements for the construction and testing of electrical equipment, with the Type of Protection flameproof (FP) enclosure designated "d" intended for use in explosive gas atmospheres.
IEC 60079–11, Ed. 6, Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety "i" (Group I, Level of Protection 'ia') (2011). This standard specifies the construction and testing of intrinsically safe apparatus intended for use in an explosive atmosphere and for associated apparatus, which is intended for connection to intrinsically safe circuits that may enter such atmospheres. This type of protection is applicable to electrical equipment in which the electrical circuits themselves are incapable of causing an explosion in the surrounding explosive atmospheres.
IEC 60079–18, Ed. 4.1, Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation 'm' (Group I, Level of Protection 'ma') (2017). This standard provides the specific requirements for the construction, testing, and marking of electrical equipment, parts of electrical equipment, and components not intended to be used alone, with the Type of Protection encapsulation "m" intended for use in explosive gas atmospheres or explosive dust atmospheres.
IEC 60079–25 Ed. 3, Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems (Group I, Level of Protection 'ia') (2020). This standard contains the specific requirements for construction and assessment of intrinsically safe electrical systems, intended for use, as a whole or in part, in hazardous locations. A system approved under this standard is comprised of equipment or components approved to the 60079–11 standard, interconnected to form a system.
IEC 60079–28 Ed. 2, Standard for Explosive Atmospheres—Part 28: Protection of Equipment and Transmission Systems Using Optical Radiation (Group I, Equipment Protection Level 'Ma') (2015). This standard contains the requirements and testing of equipment emitting optical radiation intended for use in explosive atmospheres. It also covers equipment located outside the explosive atmosphere but which generates optical radiation that is intended to enter an explosive atmosphere.

[1] For VCS that begin with ANSI/UL and ANSI/ISA and follow with a common number, the versions are identical (co-sponsored and co-published by UL LLC (UL) and the International Society of Automation (ISA)).

B. Availability of Voluntary Consensus Standards To Be Incorporated by Reference

The 14 VCS to be incorporated by reference are publicly available and below is the availability information. A copy of each standard proposed to be incorporated by reference is available for inspection at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452 and at MSHA, Approval and Certification Center, 765 Technology Drive, Triadelphia, WV 26059.

Copies of standards produced by IEC may be obtained from the International Electrotechnical Commission (IEC), 3 rue de Varembé, 1st Floor, P.O. Box 131, CH–1211 Geneva 20, Switzerland, Tel: +41 22 919 0211, and are available for purchase at the IEC website (*www.iec.ch*).

Copies of standards produced by the ISA, may be obtained from the International Society of Automation (ISA), 67 T.W. Alexander Drive, P.O. Box 12277, Research Triangle Park, NC 27709, Tel: (919) 549–8411, and are also available for purchase at the ISA website (*www.isa.org*).

Copies of standards produced by UL, may be obtained from UL LLC (UL), Comm 2000, 151 Eastern Avenue, Bensenville, IL 60106, Tel: (888) 853–3503, and are also available for purchase at the UL website (*www.ul.com*).

Copies of each of the 14 VCS may also be obtained from ANSI at the American National Standards Institute (ANSI), 1899 L Street NW, 11th Floor, Washington, DC 20036, Tel: (202) 293–8020, and online at ANSI's website (*www.ansi.org*).

Additionally, during the public comment period of this proposed rule, a free, read-only copy of each of the VCS is available for public inspection on ANSI's Standards Connect portal, which is accessible to anyone who registers at *https://www.surveymonkey.com/r/DQVJYMK.*

C. Implementation Dates for Voluntary Consensus Standards

MSHA proposes the following dates for the implementation of the voluntary consensus standard requirements under part 18, also referenced in Table 2 below.

For the period that starts on [effective date of the final rule] and ends on [12 months after the effective date of the final rule]:

- New applications for approval may meet either subparts B through E requirements, or the requirements of the VCS listed in this part;
- Applications for approval in process may meet either subparts B through E requirements, or the

requirements of the VCS listed in this part; [3] and

• Applications for formal extensions of approval or certification may meet the requirements under which the last approval, certification, or formal extension was issued by MSHA, or the requirements of the VCS listed in this part.

Starting on [date 12 months after the effective date of the final rule]:

• New applications for approval must meet the requirements of the VCS listed in this part unless no VCS listed in this part apply; and

• Applications for formal extensions of approval or certification may meet the requirements under which the last approval, certification, or formal extension was issued by MSHA, or meet the requirements of the VCS listed in this part.

TABLE 2—IMPLEMENTATION DATES FOR VCS

Implementation date	Types of applications	Requirements to be used
For a 12-month period starting on [effective date of final rule].	New applications for approval	Either part 18, subparts B through E, or voluntary consensus standards.
	Applications for approval in process	Either part 18, subparts B through E, or voluntary consensus standards.
	Applications for changes to existing approved equipment.	Requirements under which the last approval, certification, or formal extension was issued by MSHA, or voluntary consensus standards.
Starting on [date 12 months after the effective date of the final rule].	New applications for approval	Voluntary consensus standards, and part 18, subparts B through E, if no listed voluntary consensus standard applies.
	Applications for changes to existing approved equipment.	Requirements under which the last approval, certification, or formal extension was issued by MSHA, or voluntary consensus standards.

D. Conforming Changes

The proposed rule also makes technical changes to 30 CFR part 74 (part 74) regarding the approval requirements for Coal Mine Dust Sampling Devices to conform to the proposed changes in part 18.

IV. Section-by-Section Analysis

A. Section 18.2—Definitions

The proposed rule would revise the definition for ''permissible equipment.'' The proposed rule also would add definitions for ''voluntary consensus standard'' and ''voluntary consensus standards body.''

The definition for ''permissible equipment'' would be revised to remove the reference to the Mining Enforcement and Safety Administration (MESA). MESA and all its responsibilities were transferred to MSHA in 1978 under the Mine Act. The reference to MESA is no longer necessary (43 FR 12314, March 24, 1978).

The proposed rule would add two new terms and definitions to § 18.2. One is ''voluntary consensus standard'' that references a safety standard developed or adopted by a standard-setting organization. Another is ''voluntary consensus standards body'' that means a domestic or international standard-setting organization that plans, develops, establishes, or coordinates VCS using agreed-upon procedures that are consistent with the Transfer Act and Circular A–119.

Under Circular A–119, a voluntary consensus standards body is recognized if it develops VCS in accordance with the following attributes: Openness, balance of interest, due process, an appeals process, and consensus. This standards body also must adopt, publish, and make available to the public the VCS it adopts. Lastly, the voluntary consensus standards body must maintain each voluntary consensus standard through a schedule of review. As a Federal agency, MSHA relies upon OMB guidance in determining whether to incorporate by reference a voluntary consensus standard.

B. Section 18.6—Applications

Currently, § 18.6(e) requires that each drawing an applicant submits as part of the approval application under part 18 include a warning stating that changes in design must be authorized by MSHA before they are applied to approved equipment. This assures that all approval holders understand the importance of the approval for equipment safety and the impact any changes, made by any parties, have on the approval. MSHA proposes to remove this requirement because MSHA specifies in the approval letter sent to applicants that approval holders cannot make changes to designs without MSHA approval. The Agency has determined that the drawing-warning requirement is unnecessary because MSHA ensures throughout the approval process that approval holders are aware of their responsibility to notify MSHA of changes to approved equipment.

C. Section 18.15—Changes After Approval or Certification

Currently, § 18.15 requires approval holders to submit an application to extend an approval if they want to change any feature of approved equipment or a certified component. Under § 18.15(c), MSHA proposes to add new paragraphs (c)(1) and (2).

Proposed paragraph (c)(1) would allow the application for a change after approval or certification to be made based on the requirements in subparts B through E or the VCS, whichever of these requirements applied to the last approval, certification, or formal extension issued by MSHA. Proposed paragraph (c)(2) would allow an application for a change after approval or certification to be made using the VCS listed in proposed § 18.102 that apply to those components if the applicant chooses to use the VCS requirements even though the last approval, certification, or formal extension issued by MSHA was based on subparts B through E requirements. If no VCS requirements listed in this part apply to a component, then subparts B through E requirements would apply.

Thus, under these proposed changes, approval holders would have the option to make changes based on either the last approval, certification, or formal

[3] Applicants whose applications for approval use subparts B through E requirements and are under MSHA review at the time the final rule becomes effective may resubmit their applications using the VCS if they so choose.

extension issued by MSHA, or the VCS listed in this part, so that they could make a decision that suits them best. MSHA solicits comments on this aspect of the proposal.

D. Section 18.101—Acceptance and Use of Voluntary Consensus Standards

MSHA proposes to add a new subpart F, Voluntary Consensus Standards, consisting of proposed §§ 18.101 through 18.103.

Proposed § 18.101 is a new section that allows applicants to seek approval under part 18 for designs of electrical machines, accessories, or components that conform to the requirements in the VCS listed in proposed § 18.102. The VCS listed in proposed § 18.102 would apply to many of the components of the completely assembled equipment.

Under this proposal, applications for approval would require specifications to meet the VCS listed in this part, or existing subparts B through E requirements, or both, depending on the types of components in the fully assembled machines and accessories. Powered air-purifying respirators are examples of fully assembled machines that may be approved using only VCS requirements. However, certain completely assembled equipment such as longwall mining systems, continuous mining machines, shuttle cars, and roof-bolters, would not be covered entirely by any VCS of which MSHA is aware. For example, a continuous mining machine is made up of several components such as motors, lights, explosion proof enclosures, and other types of electrical components that are parts of the completely assembled machine. For this type of machine, some components will be subject to VCS requirements and other components will be subject to the subparts B through E requirements for MSHA approval.

Under proposed § 18.101(a), MSHA would replace the requirements specified in subparts B through E for components, accessories, and completely assembled electrical machines with applicable VCS that are suitable for gassy mining environments and that provide protection against fire or explosion dangers.

In proposed paragraph (b), MSHA is providing a transition period for the optional use of VCS for an applicant who submits an application within the first 12 months after the final rule becomes effective. In proposed paragraphs (b)(1) and (2), the applicant may choose to use either the subparts B through E requirements for any components or the VCS listed in proposed § 18.102 for components to which the listed VCS apply.

In proposed paragraph (c), once the 12-month transition period ends, MSHA would require the use of VCS in new applications for approval. Proposed paragraph (c)(1) would require applicants to use the VCS listed in proposed § 18.102 for components to which the listed VCS apply. In proposed paragraph (c)(2), MSHA would allow applicants to use subparts B through E requirements for a component to which no VCS listed in proposed § 18.102 would apply.

MSHA believes that a 12-month transition period will provide manufacturers, approval holders, and applicants enough time to make design and build changes necessary to meet the required specifications of the VCS for new applications.

MSHA requires marking requirements to indicate that a product is approved for use in gassy mines under § 18.11, subpart A. MSHA recognizes that the proposed VCS include non-technical requirements, such as marking requirements. Some of the markings required under § 18.11 may overlap with some of the markings required by the VCS; however, required VCS markings are not necessary for an approval. MSHA will provide the applicant with the required markings upon approval of an application. Therefore, the MSHA marking requirements in § 18.11, subpart A, would still apply to approved products. The MSHA marking on an approved product would continue to signify to the end users that the product is safe for use in gassy mines.

MSHA believes that the use of VCS under proposed § 18.101 will promote the use of innovative and advanced technologies that lead to improvements in mine safety and health. MSHA expects that the use of VCS would provide applicants and manufacturers with additional product design options for products and equipment with potential use in the mining industry without sacrificing the safety assurances associated with approvals. The use of VCS may also provide applicants and manufacturers access to other markets for products and equipment they currently only sell to the U.S. mining industry. Given the small U.S. market for products that the mining industry uses, designing products to meet MSHA-specific approval criteria can be costly, and in some cases may be financially prohibitive, for manufacturers who produce products for broader commercial use. The proposed changes would allow the introduction of products that conform to the VCS requirements and that further mine safety, but that MSHA could not otherwise approve because the Agency does not currently recognize VCS requirements.

Further, MSHA has determined the VCS that the Agency proposes to incorporate by reference are developed in accordance with the following attributes: Openness, balance of interest, due process, an appeals process, and consensus. The use of VCS would make technologically advanced equipment available for use in U.S. mines in a quicker and more cost-effective manner, which could improve miner safety and health.

E. Section 18.102—Approved Voluntary Consensus Standards

Proposed § 18.102 is a new section. Proposed paragraph (a) establishes that MSHA has determined that the list in proposed paragraph (b) is suitable for gassy mining environments and will provide the protection against fire or explosion dangers if used in their entirety to replace MSHA approval requirements specified in subparts B through E.

The design of the electrically operated equipment must comply with the Types of Protection and Levels of Protection in the relevant VCS, as specified in proposed paragraph (b).

In proposed paragraph (b), MSHA would incorporate by reference the VCS listed in this section.

Proposed paragraphs (b)(1) through (3) include the VCS and specify the category of equipment (Group) and Level of Protection applicable to approvals.

These standards are from three sources. For the IEC standards listed in proposed paragraph (b)(1), the source is the International Electrotechnical Commission. For American National Standards listed in proposed paragraphs (b)(2) and (3), the two sources are the International Society for Automation (ISA) and UL LLC (UL). The IEC approves and publishes consensus-based International Standards and manages conformity assessment systems for electric and electronic products, systems and services, collectively known as electrotechnology. ANSI approves the American National Standards and supports the U.S. voluntary standards and conformity assessment system. In the case of the standards that begin with ANSI/ISA or ANSI/UL and follow with a common number, the ISA and UL versions are identical (co-sponsored and co-published). For example, ANSI/ISA 60079–11 and ANSI/UL 60079–11 refer to the same voluntary consensus standard with the specified Types of

Protection and Levels of Protection indicated.

Either ANSI or the IEC has approved all of the standards listed in proposed § 18.102. In the discussion below, ''60079–0,'' ''60079–1,'' ''60079–11,'' ''60079–18,'' ''60079–25,'' and ''60079–28'' refer to all three numbered versions of the VCS established by IEC, ISA, and UL.

Typically, the voluntary consensus standard-setting bodies base the ANSI standards on similarly-numbered International IEC standards. The ANSI standards are modifications of the IEC standards and include U.S. deviations and encompass both additional and deleted information. Experts prepare and maintain IEC standards using a rigorous and well-defined process. Similarly, the U.S. deviations are developed by nationally-recognized and vetted experts and are approved as American National Standards only if the appropriate procedures are followed.

The listed ANSI standards are interdependent with each other and with the NEC. Also, the listed IEC standards are interdependent with each other. For intrinsically safe devices, for example, 60079–0 provides the general requirements, and 60079–11 supplements and modifies the general requirements of 60079–0 (with documented exceptions). Similarly, for intrinsically safe systems, the 60079–25 standard supplements and modifies the general requirements of 60079–0 and the intrinsic safety standard 60079–11. For encapsulated electrical equipment, the 60079–18 standard also supplements and modifies the general requirements of 60079–0. For equipment and transmission systems using optical radiation, the 60079–28 standard also supplements and modifies the general requirements of 60079–0.

The 60079–0 standard provides the general requirements for the construction, testing, and marking of electrical equipment intended for use in explosive atmospheres.

The 60079–1 standard contains specific requirements for the construction and testing of electrical equipment, with the Type of Protection flameproof (FP) enclosure designated ''d'' intended for use in explosive gas atmospheres.

Similarly, 60079–11 specifies the construction and testing of intrinsically safe apparatus intended for use in an explosive atmosphere and for associated apparatus, which is intended for connection to intrinsically safe circuits that may enter such atmospheres.

Also, 60079–18 provides the specific requirements for the construction, testing, and marking of electrical equipment, parts of electrical equipment, and components not intended to be used alone, with the Type of Protection encapsulation ''m'' intended for use in explosive gas atmospheres or explosive dust atmospheres.

The 60079–25 standard contains the specific requirements for construction and assessment of intrinsically safe electrical systems, intended for use, as a whole or in part, in hazardous locations. A system approved under this standard is comprised of equipment or components approved to the 60079–11 standard, interconnected to form a system.

Finally, 60079–28 contains the requirements of equipment emitting optical radiation intended for use in explosive atmospheres. It also covers equipment located outside the explosive atmosphere but which generates optical radiation that is intended to enter an explosive atmosphere.

The listed standards apply to equipment for use in all explosive atmospheres and locations that are likely to include those hazardous atmospheres. For the risk of ignition associated with gas concentrations, electrical equipment is divided into two broad categories: Group I and Group II.

Group I electrical equipment is intended for use in mines susceptible to firedamp, a flammable gas found in coal mines. Group II electrical equipment is intended for use in places with an explosive gas atmosphere, other than mines susceptible to firedamp. Both the ANSI and IEC standards note that firedamp consists mainly of methane, but also contains small quantities of other gases, such as nitrogen, carbon dioxide, and hydrogen, and sometimes ethane and carbon monoxide. The terms ''firedamp'' and ''methane'' are used frequently in mining practice as synonyms. In further discussions below, only the term ''methane'' will be used for simplicity.

The protections in these standards for Group I electrical equipment account for the ignition of both methane and coal dust, along with enhanced physical protection for equipment used underground. Thus, in this proposed rulemaking, MSHA proposes to use the requirements associated for Group I equipment in the listed standards.

As explained above, Group II electrical equipment is intended for use in places with an explosive gas atmosphere other than mines susceptible to methane. Also, Group II electrical equipment is subdivided according to the nature of the explosive gas atmosphere for which it is intended. Group II subdivisions are as follows: IIA, a typical gas is propane; IIB, a typical gas is ethylene; and IIC, a typical gas is hydrogen. Because gassy mines where coal dust is commonly present may vary from the environments in which Group II electrical equipment is intended to operate, this proposed rule does not allow the use of Group II requirements in the listed standards.

The standards further define various ''Types of Protection,'' such as intrinsic safety. These ''Types of Protection'' are subdivided into ''Levels of Protection'' that differentiate the likelihood of the equipment becoming a source of ignition. For example, Type of Protection ''intrinsic safety i'' is defined by National Fire Protection Association (NFPA) 70, National Electrical Code (NEC), as Type of Protection where any spark or thermal effect is incapable of causing ignition of a mixture of flammable or combustible material in air under prescribed test conditions. In U.S. industries other than mining, and in mines internationally, the required Level of Protection is defined by the exposure to the hazard. These hazardous locations are divided into Zones, based on the level of exposure to the hazard. There are three such Zones defined in the NFPA 70, NEC, which is based on international standards. For explosive gases, for example, a Zone 0 location has ignitable concentrations of flammable gases or vapors either continuously present or present for long periods of time. A Zone 0 location, by definition, requires the highest protection levels against fire or explosion for equipment when used in Zone 0 atmospheres. The likelihood of exposure to flammable gases or vapors is lower in Zone 1 locations, and is further reduced in Zone 2 locations. Therefore, Zones 1 and 2 locations have reduced Levels of Protection requirements for equipment used in these locations compared to the Level of Protection for equipment used in Zone 0 locations. The NFPA 70, NEC subdivides Type of Protection ''intrinsic safety i'' into Levels of Protection ''ia,'' ''ib,'' and ''ic'' and designates that Level of Protection ''ia'' is appropriate for Zone 0, ''ib'' is appropriate for Zone 1, and ''ic'' is appropriate for Zone 2. Thus, Level of Protection ''ia'' is the highest Level of Protection.

To simplify the selection of electrical equipment for a given purpose, the standards also incorporate ''Equipment Protection Levels,'' or EPLs. These EPLs are assigned to equipment based on its likelihood of becoming a source of ignition and distinguishing the differences between explosive atmosphere types. For example, EPL G is intended for explosive gas

atmospheres, EPL D is intended for explosive dust atmospheres, and EPL M is intended for explosive atmospheres in mines susceptible to methane. The EPLs are further subdivided into protection levels Ga, Da, and Ma for very high protection suitable for a two-fault scenario; Gb, Db, and Mb for high protection suitable for a single fault scenario; and Gc and Dc for enhanced protection to minimize ignition risk. Thus, EPLs Ga, Da, and Ma are the highest protection levels for explosive gas atmospheres, dust atmospheres, and mine atmospheres susceptible to methane, respectively.

In 2018, researchers at the National Institute for Occupational Safety and Health (NIOSH) presented a paper to the Institute of Electrical and Electronics Engineers'(IEEE) Industry Applications Society titled ''Intrinsically Safe Systems: Equivalency of International Standards Compared to U.S. Mining Approval Criteria.'' [4] The researchers concluded that the relative Level of Protection afforded miners by the application of the ANSI/ISA 60079 two-fault intrinsically safe (IS) standard is a safe alternative to MSHA's requirements when such electrical equipment is installed in mines. They also concluded that the use of such equipment would provide at least an equivalent level of safety as that provided by equipment approved under MSHA criteria. MSHA is proposing to allow the use of the latest versions of the ANSI and IEC intrinsic safety standards.

The ''two-fault IS standard'' to which the NIOSH researchers refer above is the 60079–11 standard, Level of Protection ''ia.'' This means that the researchers concluded, for intrinsically safe equipment and associated apparatuses, Level of Protection ''ia'' in the 60079–0, 60079–11, and 60079–25 standards provide miners with protection against fire and explosion dangers. The researchers subsequently concluded that the use of such equipment would provide at least an equivalent level of safety as that provided by equipment approved to MSHA criteria.[5] MSHA agrees with this conclusion. Thus, because the NIOSH researchers have determined that Level of Protection ''ia'' provides miners with protection against fire and explosion, MSHA is proposing to require that manufacturers seeking approval using the incorporated VCS conform to the ''ia'' Level of Protection where designated in this proposal.

Further, as discussed above, NFPA 70, NEC notes that intrinsic safety is the designated Type of Protection ''ia'' (intrinsic safety) for use in Zone 0 locations. The only other types of protection that NFPA 70, NEC allows for use in Zone 0 is Type of Protection ''da'' (flameproof enclosures) as defined in 60079–1 and Type of Protection ''ma'' (encapsulation) as defined in the 60079–18 standard. MSHA believes that ''ia,'' ''da,'' and ''ma'' will provide the necessary Level of Protection for miners because the NEC allows ''ia,'' ''da,'' and ''ma'' for use in Zone 0. MSHA has allowed encapsulated assemblies to be approved under part 18, since 2009, as noted in MSHA's Encapsulation Criteria, ACRI2010.[6] ACRI2010 was based, in part, on the requirements of 60079–18 in place at the time it was created. MSHA has received no reports that encapsulated assemblies tested and evaluated to ACRI2010 have failed to provide the intended protection.

MSHA is proposing to include the 60079–1 standard for FP enclosures, but only Level of Protection ''da'' which is suitable for use in Zone 0 locations. Level of Protection ''da'' is applicable only to catalytic sensors of portable combustible gas detectors. Levels of Protection ''db'' and ''dc'' are not being included because they do not provide miners with suitable protection against fire and explosion in gassy mines.

MSHA proposes to include the 60079–18 standard (Level of Protection ''ma'') based on the following: (1) MSHA's experience with ACRI2010 and (2) the fact that the hazardous locations community allows the use of ''ma'' equipment in Zone 0, coupled with the determination by NIOSH researchers that the only other Level of Protection allowed in Zone 0 (''ia'') provides miners protection against fire and explosion. Similarly, the 60079–28 standard (Equipment Protection Level Ma) is included based on the same factors.

In conclusion, the proposed rule would allow for the use of the latest versions of the ANSI and IEC standards for intrinsic safety (''ia''), flameproof catalytic sensors (''da''), and encapsulation (''ma'') as they apply to Group I (Zone 0) (mining) equipment.

MSHA is interested in whether the proposal should be expanded to include other VCS. Please provide the rationale, with definitive data and explanation, for your position.

In summary, MSHA proposes to incorporate by reference the IEC standards in proposed paragraph (b)(1) and the ANSI standards in proposed paragraphs (b)(2) and (3), which are appropriate for use in Zone 0 locations. MSHA has determined that the VCS in proposed § 18.102 would provide protection against fire or explosion if used in their entirety to replace MSHA approval requirements specified in subparts B through E. However, the marking requirements in subpart A of this part would not be superseded by the requirements specified in the proposed VCS. The marking requirement in the existing rule would be included in the approval marking requirements as specified in § 18.11, subpart A.

F. Section 18.103—Review and Update of Applicable Voluntary Consensus Standards

Proposed § 18.103 is a new section about updating the existing list of VCS. To ensure timely updating of the list in § 18.102, MSHA would review more recent editions of the listed VCS and determine whether to accept them. Also, MSHA may review other VCS that are not listed in § 18.102 and determine whether they are suitable for gassy mining environments and provide protection against fire and explosion dangers. After such thorough reviews, MSHA would use the appropriate rulemaking process to publish an updated list of VCS that the Agency would accept to replace approval requirements in subparts B through E in part 18. MSHA also may remove a standard from the list in § 18.102 if it is withdrawn by a voluntary consensus standards body or for other reasons.

MSHA is aware that manufacturers of approved products currently used in mines may wish to design and manufacture products to more recent versions of MSHA-accepted VCS to keep products up-to-date for improvements and marketability.

Under proposed § 18.103, MSHA would consider updates and alternatives to existing standards that promote the efficiency and effectiveness of the MSHA approval process, which could lead to the use of innovative and advanced technologies in U.S. mines and to improvements in mine safety and health.

Conforming Amendments

This proposal would require conforming amendments to Coal Mine Dust Sampling Devices in existing part 74 based on the proposed changes in part 18.

[4] William Calder, David P. Snyder, John F. Burr, Intrinsically Safe Systems: Equivalency of International Standards Compared to U.S. Mining Approval Criteria, DOI 10.1109/TIA.2018.2804322, IEEE Transactions on Industry Applications.

[5] *Ibid.*

[6] *https://arlweb.msha.gov/techsupp/acc/application/acri2010.pdf.*

Part 74—Coal Mine Dust Sampling Devices

MSHA proposes to change cross-references in §§ 74.5(b) and 74.11(d) for evaluation and testing for permissibility of Coal Mine Dust Sampling Devices from § 18.68 to part 18. This change in part 74 would conform to the proposed changes in part 18 and would allow the use of MSHA-designated VCS for the approval of coal mine dust sampling devices.

V. Regulatory Economic Analysis

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

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Currently, MSHA or an independent laboratory conducts the testing and evaluation of electrical products for which applicants seek MSHA approval for use in gassy mines. For new approval applications, this proposal would allow applicants to use either existing MSHA requirements or VCS for the first 12 months after the final rule becomes effective. After 12 months, MSHA will require new applicants to (1) use VCS requirements that apply to the components of the electrical machine or accessory and (2) use existing MSHA requirements for the components of the electrical machine or accessory to which no listed VCS apply. Under current regulations, costs to approve equipment are defined as transfers and not E.O. 12866 costs. In this case, costs represent MSHA's costs recovered from approval applicants via a fee.

Under the proposed rule, it is unlikely that the number of approval requests will change much. Based on discussions with past applicants, MSHA understands that many products submitted to MSHA for approval have been accepted using VCS for mining outside the U.S. or for other industries (*e.g.,* oil and gas extraction) that have similar safety standards. Applicants submitting these types of products for MSHA approval would likely experience substantially lower approval costs. Because their products already meet VCS listed in this proposed rule and would no longer need to meet MSHA-specific requirements, no additional technical drawings, documentation, and testing would be necessary beyond that submitted elsewhere for VCS approval.

Some current approval holders may incur costs because of the requirement to use VCS after the 12-month transition period.[7] For those requesting new approvals, the costs would be mostly attributable to the approval holder having to create new design and build specifications using VCS requirements instead of using already existing design and build specifications based on part 18, subparts B through E, requirements. By contrast, current approval holders that are requesting only a minor modification of an approval should not incur costs, because they would be allowed to choose to use the requirements (either part 18, subparts B through E, or VCS) under which the last approval, certification, or formal extension was issued by MSHA. Based on discussions between MSHA and applicants during past approvals, MSHA concludes that a small number of current approval holders may decide not to stay in the mining market.

This proposed rule will provide benefits to both manufacturers of electrical products and the consumers of those products—mine operators and miners. Currently, some products that use modern technologies that could improve the safety and health of miners are not being introduced into the U.S. mining market. One reason may be that technical requirements set by MSHA differ from those that apply in other countries. These MSHA-specific technical requirements may slow, or even prevent, these new technologies from being implemented in U.S. underground mines. Use of VCS to replace MSHA-specific requirements would likely reduce the overall design and approval costs for many manufacturers; as a result, manufacturers introducing new technologies may experience fewer barriers for product market entry into the mining industry.

This proposed rule would not affect currently approved equipment, as it would allow manufacturers and mine operators to continue to sell or purchase all currently approved equipment. If at a future date, a current approval holder wishes to alter approved equipment, the application could comply with the requirements on which the approval was based or with the VCS requirements listed in this part.

Therefore, MSHA does not anticipate that manufacturers will have difficulties in meeting these requirements. MSHA's acceptance of VCS would provide more choices of mining products to mine operators and miners, as these VCS are used by the broader market. MSHA does not anticipate problems in manufacturing or purchasing products that meet VCS, as such products are already in use in markets outside of U.S. mining.

In summary, under this proposal, approval holders would not be required to alter equipment or incur any new costs for existing approvals. New applicants may choose the standards most beneficial to them during the 12-month transition period. For those applicants whose products already meet VCS requirements, they would likely experience either no new costs, or cost reductions. Overall, net costs are more likely to go down than up.

The Agency is interested in whether the proposal to include VCS may result in cost differences for applicants due to the proposal to eliminate subparts B through E requirements for new approvals. Please provide the rationale, with definitive data and explanation, for your position.

Under E.O. 12866, a significant regulatory action is one meeting any of a number of specified conditions, including the following:

- Having an annual effect on the economy of $100 million or more;
- Creating a serious inconsistency or interfering with an action of another agency;
- Materially altering the budgetary impact of entitlements or the rights of entitlement recipients; or
- Raising novel legal or policy issues.

MSHA has determined that this is a not a significant regulatory action under E.O. 12866.

B. E.O. 13771: Reducing Regulation and Controlling Regulatory Costs, and E.O. 13924: Regulatory Relief To Support Economic Recovery

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this proposed rule is not significant under E.O. 12866. As discussed above, the proposed use of VCS would have minimal total costs, but it would have the benefit of streamlining product approval and providing greater flexibility to potential market entrants and therefore MSHA believes it will be deregulatory.

[7] Applicants may choose to use VCS for new approvals for the first 12 months after the effective date of the final rule. After 12 months, new applications for approval must use VCS, if applicable.

MSHA also believes the proposal meets policy goals of E.O. 13924: It reflects the efforts of businesses to comply with often-complex approval regulations, and it provides businesses with the confidence that requesting approvals covered by this proposal will allow them to meet a single set of standards as they plan product development for global markets.

VI. Feasibility

Economic feasibility is related to an entire industry rather than individual firms. In the E.O. 12866 and E.O. 13563 section above, MSHA discussed that global manufacturers of products for mining already successfully use the VCS for mining outside the U.S. The proposal would provide MSHA and most manufacturers increased flexibility for approval of existing or new equipment for use in gassy mines. Although some businesses might choose not to seek new approvals, MSHA could not identify any product that would likely leave the U.S. market without the availability of an alternative. MSHA has concluded that the requirements of the proposed rule would be both technologically and economically feasible.

VII. Regulatory Flexibility Act; Small Business Regulatory Enforcement Fairness Act; and E.O. 13272

MSHA has analyzed the overall compliance cost impact of the proposed rule on small entities. No current approval holder would be required to make a product change due to this proposal. A small entity would make application for an extension or new approval only if the financial benefit outweighs new costs. For new product approvals, the existing MSHA approval requirement costs would be replaced by compliance costs of the VCS. Because MSHA cannot know what products would be submitted for approval, it is not possible to quantify how much different the costs would be. Based on the discussions between MSHA and applicants described previously, MSHA believes the MSHA standards to be more burdensome, and the Agency projects cost reductions for some small entities. For E.O. 13272 considerations of the applicable statutes, there are no new mandated direct costs of this proposed rule. MSHA proposes to certify that the rule would not have a significant economic impact on a substantial number of small entities. Therefore, the Agency is not required to develop an initial regulatory flexibility analysis.

VIII. Paperwork Reduction Act of 1995

The Paperwork Reduction Act (PRA) provides for the Federal Government's collection, use, and dissemination of information. The goals of the PRA include minimizing paperwork and reporting burdens and ensuring the maximum possible utility from the information that is collected (44 U.S.C. 3501). There are no new information collections associated with this proposed rule.

IX. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

MSHA has reviewed the proposed rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that this proposed rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments. Since the proposed rule does not have any costs, the rule is not a major rule under the Unfunded Mandates Reform Act of 1995. Accordingly, the Unfunded Mandates Reform Act of 1995 requires no further Agency action or analysis.

B. E.O. 13132: Federalism

The proposed rule does not have ''federalism implications'' because it would 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.'' Accordingly, under E.O. 13132, no further Agency action or analysis is required.

C. E.O. 12630: Government Actions and Interference With Constitutionally Protected Property Rights

The proposed rule does not implement a policy with takings implications. Accordingly, under E.O. 12630, no further Agency action or analysis is required.

D. E.O. 12988: Civil Justice Reform

The proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, to minimize litigation and undue burden on the Federal court system. Accordingly, the rule meets the applicable standards provided in section 3 of E.O. 12988, Civil Justice Reform.

E. E.O. 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have ''tribal implications'' because it would not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' Accordingly, under E.O. 13175, no further Agency action or analysis is required.

F. E.O. 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to publish a statement of energy effects when a rule has a significant energy action that adversely affects energy supply, distribution, or use. MSHA has reviewed this proposed rule for its energy effects. There are no costs associated with this proposed rule. For the energy analysis, this rule would not exceed the relevant criteria for adverse impact.

G. Congressional Review Act

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

List of Subjects

30 CFR Part 18

Incorporation by reference, Mine safety and health, Reporting and recordkeeping requirements.

30 CFR Part 74

Mine safety and health, Occupational safety and health.

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006, MSHA proposes to amend chapter I of title 30 of the Code of Federal Regulations as follows:

PART 18—ELECTRIC MOTOR-DRIVEN MINE EQUIPMENT AND ACCESSORIES

■ 1. The authority citation for part 18 continues to read as follows:

Authority: 30 U.S.C. 957, 961.

■ 2. Amend § 18.2 by:

■ a. Revising the definition for ''Permissible equipment''; and

■ b. Adding in alphabetical order the definitions for ''Voluntary consensus

standard'' and ''Voluntary consensus standards body.''

The revision and additions read as follows:

§ 18.2 Definitions.

* * * * *

Permissible equipment means a completely assembled electrical machine or accessory for which an approval has been issued.

* * * * *

Voluntary consensus standard means a safety standard that:

(1) Is developed or adopted by a voluntary consensus standards body; and

(2) Prescribes safety requirements applicable to equipment for which applicants are seeking approval, certification, extension, or acceptance under this part.

Voluntary consensus standards body means a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using agreed-upon procedures that are consistent with the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 3710) and the Office of Management and Budget's Circular A–119 (Jan. 27, 2016).

§ 18.6 [Amended]

■ 3. Amend § 18.6 by removing the third sentence in paragraph (e).

■ 4. Amend § 18.15 by revising paragraph (c) to read as follows:

§ 18.15 Changes after approval or certification.

* * * * *

(c) An application for a formal extension of approval or certification must have a list of new or revised drawings, specifications, and information related to the changes to be added to those already on file for the original approval or certification. MSHA will issue a formal extension of approval or certification to a completely assembled electrical machine or accessory, if each component of such electrical machine or accessory:

(1) Meets the requirements applied to the last approval, certification, or extension thereof; or

(2) Meets voluntary consensus standard requirements listed in this part that apply to those components if the applicant chooses to use the requirements of the voluntary consensus standards.

* * * * *

■ 5. Add subpart F, consisting of §§ 18.101 through 18.103, to read as follows:

Subpart F—Voluntary Consensus Standards

Sec.
18.101 Acceptance and use of voluntary consensus standards.
18.102 Approved voluntary consensus standards.
18.103 Review and update of applicable voluntary consensus standards.

§ 18.101 Acceptance and use of voluntary consensus standards.

(a) MSHA will accept voluntary consensus standards that are suitable for gassy mining environments and that provide protection against fire or explosion, if used in their entirety and without modification to replace the requirements in subparts B through E of this part.

(b) For applications submitted on or after [effective date of final rule] until [date 12 months after the effective date of final rule], an approval will be issued in accordance with subpart A of this part for a completely assembled electrical machine or accessory, if each component of such electrical machine or accessory:

(1) Meets the requirements in subparts B through E of this part; or

(2) Meets voluntary consensus standard requirements listed in this part that apply to those components.

(c) For applications submitted on or after [date 12 months after the effective date of the final rule], an approval will be issued in accordance with subpart A of this part for a completely assembled electrical machine or accessory, if the components of such machine or accessory:

(1) Meet the requirements of the voluntary consensus standards listed in this part that apply to those components; and

(2) Meet the requirements of subparts B through E of this part that apply to components if no voluntary consensus standard listed in this part applies.

§ 18.102 Approved voluntary consensus standards.

(a) MSHA has determined that the provisions associated with the Group and Levels of Protection provisions of the voluntary consensus standards listed in paragraph (b) of this section are suitable for gassy mining environments and will provide the protection for against fire or explosion if used in their entirety and without modification to replace the requirements in subparts B through E of this part.

(b) Certain material is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at U.S. Department of Labor, Mine Safety and Health Administration, 765 Technology Drive, Triadelphia, WV 26059, Tel: (304) 547–0400, and is available from the sources indicated in this paragraph (b). It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov* or go to *www.archives.gov/federal-register/cfr/ibr-locations.html.*

(1) International Electrotechnical Commission (IEC), 3 rue de Varembé, 1st Floor, P.O. Box 131, CH–1211 Geneva 20, Switzerland, Tel: +41 22 919 0211 (*https://www.iec.ch/*).

(i) IEC 60079–0, Ed. 7, Explosive atmospheres—Part 0: Equipment—General requirements (Group I), dated December 13, 2017;

(ii) IEC 60079–1 Ed. 7, Standard for Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures ''d'' (Group I, Level of Protection 'da'), dated June 27, 2014;

(iii) IEC 60079–11, Ed. 6, Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety ''i'' (Group I, Level of Protection 'ia'), dated June 30, 2011;

(iv) IEC 60079–18, Ed. 4.1, Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation ''m'' (Group I, Level of Protection 'ma'), dated August 25, 2017;

(v) IEC 60079–25 Ed. 3, Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems (Group I, Level of Protection 'ia'), dated June 26, 2020; and

(vi) IEC 60079–28 Ed. 2, Standard for Explosive Atmospheres—Part 28: Protection of Equipment and Transmission Systems Using Optical Radiation (Group I, Equipment Protection Level 'Ma'), dated May 27, 2015.

(2) International Society of Automation (ISA), 67 T.W. Alexander Drive, P.O. Box 12277, Research Triangle Park, NC 27709, Tel: (919) 549–8411 (*https://www.isa.org*).

(i) ANSI/ISA 60079–11 (12.02.01)—2014 Standard for Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety ''i'' (Group I, Level of Protection 'ia'), dated March 28, 2014; and

(ii) ANSI/ISA 60079–25 (12.02.05)—2011 Standard for Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems (Group I, Level of Protection 'ia'), dated December 2, 2011.

(3) UL LLC, Comm 2000, 151 Eastern Avenue, Bensenville, IL 60106, Tel: (888) 853–3503 (*https://www.ul.com*).

(i) ANSI/UL 60079–0 Ed. 7, Explosive Atmospheres—Part 0: Equipment—

General Requirements (Group I), dated March 26, 2019;

(ii) ANSI/UL 60079–1 Ed. 7, Standard for Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures ''d'' (Group I, Level of Protection 'da'), dated September 18, 2015;

(iii) ANSI/UL 60079–11 Ed. 6, Standard for Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety ''i'' (Group I, Level of Protection 'ia'), dated February 15, 2013;

(iv) ANSI/UL 60079–18, Ed. 4, Standard for Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation ''m'' (Group I, Level of Protection 'ma'), dated December 14, 2015;

(v) ANSI/UL 60079–25 Ed. 2, Standard for Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems (Group I, Level of Protection 'ia'), dated December 2, 2011; and

(vi) ANSI/UL 60079–28 Ed. 2, Standard for Explosive Atmospheres—Part 28: Protection of Equipment and Transmission Systems Using Optical Radiation (Group I, Equipment Protection Level 'Ma'), dated September 15, 2017.

(4) The voluntary consensus standards listed in this paragraph (b) may also be obtained from the American National Standards Institute, 1899 L Street NW, 11th Floor, Washington, DC 20036, Tel: (202) 293–8020 (*https://www.ansi.org*).

§ 18.103 Review and update of applicable voluntary consensus standards.

(a) MSHA will review more recent editions of voluntary consensus standards listed in § 18.102 to determine whether they can be used in their entirety and without modification to replace the requirements in subparts B through E of this part.

(b) MSHA may review voluntary consensus standards not listed in § 18.102 to determine whether such standards are suitable for gassy mining environments and whether they provide protection against fire or explosion, if substituted in their entirety and without modification to replace the requirements in subparts B through E of this part.

(c) Following such review and determination, MSHA will use the appropriate rulemaking process to publish a list of voluntary consensus standards that it accepts in lieu of the requirements in subparts B through E of this part.

PART 74—COAL MINE DUST SAMPLING DEVICES

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

Authority: 30 U.S.C. 957.

§§ 74.5 and 74.11 [Amended]

■ 7. In §§ 74.5(b) and 74.11(d), remove ''30 CFR 18.68'' and add in its place the term ''30 CFR part 18.''

David G. Zatezalo,

Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 2020–22589 Filed 11–18–20; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2020–0603]

RIN 1625–AA09

Drawbridge Operation Regulation; Hackensack River, Jersey City, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to modify the operating schedules that govern the new Route 7 Bridge, mile 3.1, crossing the Hackensack River, at Jersey City, NJ. The bridge owner, the New Jersey Department of Transportation (NJDOT), submitted a request to allow the bridge to require four hours advance notice for bridge openings. It is expected that this change to the regulations will create efficiency in drawbridge operations and better serve the needs of the community while continuing to meet the reasonable needs of navigation.

DATES: Comments and related material must reach the Coast Guard on or before January 19, 2021.

ADDRESSES: You may submit comments identified by docket number USCG–2020–0603 using the Federal eRulemaking Portal at *http://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Judy Leung-Yee, Project Officer, First Coast Guard District; telephone 212–514–4336, email *Judy.K.Leung-Yee@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
NJDOT New Jersey Department of Transportation
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code

II. Background, Purpose and Legal Basis

The new Route 7 Bridge at mile 3.1 over the Hackensack River at Jersey City, New Jersey, is currently under construction and will have a vertical clearance of 70 feet at mean high water in the closed position and 135 feet at mean high water in the open position. Horizontal clearance is approximately 158 feet. The existing Route 7 Bridge over the Hackensack River has a vertical clearance of 35 feet at mean high water in the closed position and 135 feet at mean high water in the open position. Horizontal clearance is approximately 158 feet.

The waterway users include recreational and commercial vessels including tugboat/barge combinations.

The existing regulation, 33 CFR 117.723(k) published under **Federal Register** 85 FR 8747, effective April 19, 2020, requires the existing bridge open on signal; except that, from 11 p.m. to 7 a.m., the draw shall open on signal if at least two hours advance notice is given by calling the number posted at the bridge.

In August of 2020, the owner of the bridge, NJDOT, requested a change to the drawbridge operation regulations to the new bridge anticipating lower volume of bridge openings given that the new bridge vertical clearance in the closed position will be double the clearance of the existing bridge.

Under this proposed rule the new draw would open on signal if at least four hours advance notice is given by calling the number posted at the bridge. This rule change will allow for more efficient and economic operation of the bridge while meeting the reasonable needs of navigation. The Coast Guard is proposing this rulemaking under authority in 33 U.S.C. 499.

NJDOT reached out to the maritime stakeholders with the requested change proposed and received no objections.

III. Discussion of Proposed Rule

The bridge logs show that the Route 7 Bridge had 16 openings in 2018, 10 openings in 2019, and 6 openings in 2020 (through 6/19/2020). The Coast Guard proposes to permanently modify the operating regulation.

The proposed rule would allow that the new Route 7 Bridge shall open on signal if at least four hours advance notice is given by calling the number posted at the bridge. Both new and current bridges will operate under the existing operating schedule until the original bridge is demolished/removed at which point this proposed rule will take effect.

It is the Coast Guard's opinion that the proposed rule meets reasonable needs of marine traffic.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

The Coast Guard believes this rule is not a significant regulatory action. The bridge will still open for all vessel traffic after a four-hour advance notice is given. The vertical clearance under the bridge in the closed position is relatively high enough to accommodate most vessel traffic. We believe that this proposed change to the drawbridge operation regulations at 33 CFR 117.723 will meet the reasonable needs of navigation.

B. Impact on Small Entities

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

The new Route 7 Bridge provides 70 feet of vertical clearance at mean high water that should accommodate most of the present vessel traffic except deep draft vessels. The new bridge will open on signal for any vessel when a four hour advance notice is given. While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.A, above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

D. Federalism and Indian Tribal Government

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule promulgates the operating regulations or procedures for drawbridges. Normally, such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal e-Rulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Documents mentioned in this NPRM as being available in this docket and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.723, paragraph (k) to read as follows:

§ 117.723 Hackensack River.

* * * * *

(k) The draw of the Route 7 Bridge, mile 3.1, at Jersey City, shall open on signal if at least four hours advance notice is given by calling the number posted at the bridge.

Dated: November 12, 2020.

T.G. Allan, Jr.,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2020–25396 Filed 11–18–20; 8:45 am]

BILLING CODE 9110–04–P

Notices

Federal Register

Vol. 85, No. 224

Thursday, November 19, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket. No. AMS–FTPP–20–0088]

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)(PRA), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget, for an extension of and revision to the currently approved information collection in support of the reporting and recordkeeping requirements under the Packers and Stockyards Act of 1921, as amended and supplemented (P&S Act). This approval is required under the PRA.

DATES: Comments on this notice must be received by January 19, 2021 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on the internet at *http://www.regulations.gov* or to Brett Offutt, Chief Legal Officer/Policy Advisor, Packers and Stockyards Division, Rm. 2507, 1400 Independence Ave. SW, Washington, DC 20250–3601, or by email to *s.brett.offutt@usda.gov.* All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Contact Jeana M. Harbison, Enforcement Branch Chief, Packers and Stockyards Division at (202) 690–3192, or *jeana.m.harbison@usda.gov;* or Patricia L. Tolle, Supervisory Financial Systems Analyst at 303–375–4274, or *patricia.l.tolle@usda.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Regulations and Related Reporting and Recording Requirements—Packers and Stockyards Division

OMB Number: 0581–0308.

Expiration Date of Approval: February 28, 2021.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The P&S Act and the regulations issued under the P&S Act authorize the collection of information for the purpose of enforcing the P&S Act and regulations and for conducting studies requested by Congress. Through the forms in this information collection, the Fair Trade Practices Program (FTPP), Packers and Stockyards Division (PSD) gathers information that keeps PSD current on the ownership and operations of regulated entities which permit PSD oversight of the regulated entities. For example, PSD gathers information regarding the number of head of livestock purchased and the cost of the livestock to determine if an entity is adequately bonded to protect the livestock sellers. The information regarding the amount of livestock purchased is also consolidated for public reporting in PSD's annual report. Other financial information is gathered to determine if regulated entities are operating while solvent as required by the P&S Act. This information collection is necessary for PSD to monitor and examine financial, competitive, and trade practices in the livestock, meat packing and poultry industries. The purpose of this notice is to solicit comments from the public concerning PSD's information collection.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.73 hours per response.

Respondents: Livestock auction markets, livestock dealers, packer buyers, meat packers, and live poultry dealers.

Estimated Number of Respondents: 14,631.

Estimated Total Annual Responses: Less than 2.5 hours.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 9,035 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–25596 Filed 11–18–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 16, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (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; 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 21, 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.* 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.

Rural Utilities Service

Title: Telecommunications System Construction Policies and Procedures.

OMB Control Number: 0572–0059.

Summary of Collection: The Rural Electrification Act of 1936 (RE Act), 7 U.S.C. 901 *et seq.,* was amended in 2002 by Title IV, Rural Broadband Access, by Farm Security and rural Investment Act, which authorizes Rural Utilities Service (RUS) to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition for facilities and equipment for the provision of broadband service in eligible rural communities in the States and territories of the United States. Title VI of the RE Act requires that loans are granted only to borrowers who demonstrated that they will be able to repay in full within the time agreed. RUS has established certain standards and specification for materials, equipment and construction to assure that standards are maintained; loans are not adversely affected, and loans are used for intended purposes.

Need and Use of the Information: RUS has developed specific forms for borrowers to use when entering into contracts for goods or services. The information collected is used to implement certain provisions of loan documents about the borrower's purchase of materials and equipment and the construction of its broadband system and is provided on an as needed basis or when the individual borrower undertakes certain projects. The standardization of the forms has resulted in substantial savings to borrowers by reducing preparation of the documentation and the costly review by the government.

Description of Respondents: Business or other for-profit; Not-for-profit institutions.

Number of Respondents: 1,432.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 6,609.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–25552 Filed 11–18–20; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Request for Nominations of Members for the Citrus Disease Subcommittee

AGENCY: Office of the Chief Scientist, USDA.

ACTION: Solicitation for membership.

SUMMARY: In accordance with the Federal Advisory Committee Act, the U.S. Department of Agriculture (USDA) announces the opening of the solicitation for nominations to fill vacancies on the National Agricultural Research, Extension, Education, and Economics (NAREEE) Advisory Board—Citrus Disease Subcommittee. There are three vacancies on the Citrus Disease Subcommittee.

DATES: USDA will consider nominations received by December 19, 2020.

ADDRESSES: Due to COVID–19, we ask that you email all correspondence to the email in this notice to ensure receipt of nomination packages. Please email the nominee's name, resume or CV, completed and signed Form AD–755, and any letters of support to *nareee@usda.gov.*

FOR FURTHER INFORMATION CONTACT: Kate Lewis, Director, National Agricultural Research, Extension, Education, and Economics Advisory Board, 1400 Independence Avenue SW, Room 332A, The Whitten Building, Washington, DC 20250–2255; telephone: 202–631–1434 or email: *nareee@usda.gov.* Committee website: *https://nareeeab.ree.usda.gov/.*

SUPPLEMENTARY INFORMATION:

Instructions for Nominations: Nominations are solicited from organizations, associations, societies, councils, federations, groups, and companies that represent a wide variety of food and agricultural interests throughout the country.

Nominees may be considered for the NAREEE Advisory Board and or a subcommittee and may be considered for more than one category and/or subcommittee dependent on the nominee's qualifications. Each nominee must submit a signed form AD–755, ''Advisory Committee Membership Background Information,'' which can be obtained from the contact person above or from: *https://www.ocio.usda.gov/sites/default/files/docs/2012/AD-755%20-%20Approved%20Master%202015.pdf.* A resume or CV should also be submitted. Letters of nomination or support are encouraged.

Nominations are open to all individuals without regard to race, color, religion, sex, national origin, age, mental or physical handicap, marital status, or sexual orientation. To ensure the recommendation of the Advisory Board takes into account the needs of the diverse groups served by the USDA, membership shall include, to the extent practicable, individuals with demonstrated ability to represent the needs of all racial and ethnic groups, women and men, and persons with disabilities.

Please note, individuals may not serve on more than one USDA Federal Advisory Committee. Individuals, who are lobbyists, appointed to committees to exercise their own individual best judgment on behalf of the government (*e.g.*, as Special Government Employees) are ineligible to serve.

All nominees will be carefully reviewed for their expertise, leadership, and relevance. Appointed members will serve two-, or three-year terms in order to properly stagger term rotation. All nominees will be vetted before selection. Appointments to the NAREEE Advisory Board and its subcommittees will be made by the Secretary of Agriculture.

Citrus Disease Subcommittee: The Citrus Disease Subcommittee was established by the Agricultural Act of 2014 (Sec. 7103) to advise the Secretary of Agriculture on citrus research, extension, and development needs, engage in regular consultation and collaboration with USDA and other organizations involved in citrus, and provide recommendations for research and extension activities related to citrus disease. The Citrus Disease Subcommittee will also advise the Department on the research and extension agenda of the Emergency Citrus Disease Research and Extension Program, a grant program of the National Institute of Food and Agriculture. Section 1408(a)(2) of the Agricultural Improvement Act of 2018 amended the membership of the Citrus Disease Subcommittee to increase the number of members from 9 members to

11. Members must be a producer of citrus with representation from the following States: Five members from Arizona or California, five members from Florida, and one member from Texas.

The Citrus Disease Subcommittee is soliciting nominations to fill three vacant positions for membership:

- Two positions to represent Florida, and
- one position to represent California or Arizona.

All nominees will be carefully reviewed for their expertise, leadership, and relevance to a category.

Done at Washington, DC, this day of November 2, 2020.

Steve Censky,

Deputy Secretary, U.S. Department of Agriculture.

[FR Doc. 2020–24925 Filed 11–18–20; 8:45 am]

BILLING CODE 3410–03–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Maine Advisory Committee to the Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Maine Advisory Committee (Committee) will hold a meeting on Thursday, November 19, 2020, at 12:00 p.m. (ET) for the purpose of hearing testimony about digital equity issues in Maine.

DATES: The meeting will be held on Thursday, November 19, 2020, at 12:00 p.m. ET.

ADDRESSES: *Public Call Information:* Dial: 1–800–367–2403; conference ID: 1644409.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ero@usccr.gov* or 202–921–2212.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement 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.

Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Federal Relay Service operator with the conference call-in numbers: 1–800–367–2403; Conference ID: 1644409.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Maine Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Eastern Regional Office at the above email or phone number.

Agenda

Thursday, November 19, 2020 at 12:00 p.m. (ET)

- Welcome/Opening
- Briefing on Digital Equity
- Next Steps
- Other Business
- Public Comment
- Adjournment

Dated: November 13, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–25475 Filed 11–18–20; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Michigan Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Michigan Advisory Committee (Committee) will hold a web-based meeting on Wednesday, December 9, 2020, at 11:00 a.m. Eastern Time for the purpose of discussing the impact of the COVID–19 pandemic on voting rights in the state.

DATES: The meeting will be held on Wednesday, December 9, 2020 at 12:00 p.m. Eastern Time.

Public Call Information: Register online: *https://civilrights.webex.com/civilrights/j.php?MTID=macaec647b9a31877189c30e6956fe258*

Join by phone:

- 800–360–9505 USA Toll Free
- Access code: 199 197 3564

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 202–618–4158.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number or online through the above registration link. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov* in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Programs Unit Office at 202–618–4158.

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 via *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzjPAAQ* under the Commission on Civil Rights, Michigan Advisory Committee link. 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 phone number.

Agenda

Welcome and Roll Call
Discussion: COVID–19 & Voting Rights in Michigan
Public Comment
Adjournment

Dated: November 13, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–25503 Filed 11–18–20; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Management and Organizational Practices Survey—Hospitals (MOPS–HP)

AGENCY: Census Bureau, Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for an additional 60 days of public comment on a proposed new information collection, the Management and Organizational Practices Survey—Hospitals (MOPS–HP). An information collection request (ICR) for the MOPS–HP was submitted to OMB for approval on July 7, 2020 and is currently pending OMB review.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before January 19, 2021.

ADDRESSES: Interested persons are invited to submit written comments by email to *Thomas.J.Smith@census.gov.* Please reference Management and Organizational Practices Survey—Hospitals (MOPS–HP) in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2020–0029, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Edward Watkins at *edward.e.watkins.iii@census.gov* or 301–763–4750.

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to conduct the Management and Organizational Practices Survey-Hospitals (MOPS–HP) for survey year 2020 as a joint project with Harvard Business School. The MOPS–HP will utilize a subset of the Service Annual Survey mail-out sample and will collect data on management practices from Chief Nursing Officers (CNOs) at general medical and surgical hospitals to assist in studying their relationship to clinical and financial performance.

A notice seeking public comment on our plans to conduct this survey was previously published in the **Federal Register** on February 12, 2020, on pages 4623–4624. That notice proposed collecting data for survey years 2019 and 2014, but collection has been adjusted due to the ongoing coronavirus pandemic. The pandemic has further highlighted the relevance of hospital management practices, especially as they relate to hospitals' abilities to respond to shocks to their organization and the health care system. In light of this, the Census Bureau has modified the survey proposal to collect data for reference years 2020 and 2019. This change seeks to directly measure management practices and protocols before and during the pandemic to obtain a better understanding of how hospitals have had to adjust and pivot operations during this public health emergency.

The Census Bureau also plans to include two additional questions in the MOPS–HP content to help improve measurement of hospital preparedness. These questions will provide information on two elements of responsiveness, hospitals' coordinated deployment of frontline clinical workers and hospitals' ability to quickly respond to needed changes in standardized clinical protocols. In an effort to limit respondent burden while adding this content, adjustments were made to keep the total number of questions and estimated burden per response unchanged. The project plan, schedule, and collection strategy are being actively monitored, and adjustments will be made as necessary, as the Census Bureau is cognizant and respectful of the time, resources, and burden placed on CNOs during the pandemic.

After the close of this second comment period, the Census Bureau will submit these planned changes as an amendment to the ICR, which is currently pending review at OMB. Any comments received by the close of the comment period will be summarized and included in the amendment.

Currently, no official statistics on management practices in hospitals exist. Past research shows these practices are related to health care providers' clinical and financial outcomes. This suggests that providing measures on management practices may potentially help the United States health care system, which is challenged by rising health care costs, increased demand from an aging society, and quality objectives. These data would permit users to examine relationships between management practices and financial outcomes using Census Bureau data (*e.g.,* revenues) and relationships with clinical outcomes using external data sources. Additionally, these data would provide hospital administrators and managers information to evaluate their practices in comparison to other hospitals at an aggregate level.

The MOPS–HP content was proposed by external researchers with past experience in surveying hospitals on management practices. Some questions are adapted from the Management and Organizational Practices Survey (MOPS), conducted in the manufacturing sector, allowing for inter-sectoral comparisons. Content for the MOPS–HP includes performance monitoring, financial and clinical targets, and incentives. The 39 questions are grouped into the following sections: Tenure, Management Practices, Management Training, Management of Team Interactions, Staffing and Allocation of Human Resources, Standardized Clinical Protocols, Documentation of Patients' Medical Records, and Organizational Characteristics.

II. Method of Collection

The MOPS–HP sample will consist of approximately 3,200 hospital locations for enterprises classified under General Medical and Surgical Hospitals (NAICS 6221) and sampled in the Service Annual Survey (SAS). The survey will be mailed separately from the 2020 SAS and collected electronically through the Census Bureau's Centurion online reporting system. Respondents will be sent an initial letter with instructions detailing how to log into the instrument and report their information. These letters will be addressed to the location's CNO. In instances where the CNO is not identifiable, the letter will be addressed to the hospital's administrative office with attention to the CNO. Collection is scheduled to begin in the initial months of 2021.

III. Data

OMB Control Number: 0607–XXXX.
Form Number(s): MP–2000.
Type of Review: Regular submission, New Information Collection Request.
Affected Public: General medical and surgical hospitals.
Estimated Number of Respondents: Approximately 3,200.
Estimated Time per Response: 45 minutes.
Estimated Total Annual Burden Hours: 2,400.
Estimated Total Annual Cost to Public: $0. (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)
Respondent's Obligation: Mandatory.
Legal Authority: Title 13 U.S.C., Sections 131 and 182.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–25580 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–47–2020]

Foreign-Trade Zone (FTZ) 49—Newark and Elizabeth, New Jersey; Authorization of Production Activity; Catalent Pharma Solutions (Pharmaceutical Products), Somerset, New Jersey

On July 17, 2020, Catalent Pharma Solutions submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 49T, in Somerset, New Jersey.

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 47166–47167, August 4, 2020). On November 16, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: November 16, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–25542 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–163–2020]

Approval of Subzone Status; Sager Electronics; Carrollton, Texas

On September 17, 2020, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Metroplex International Trade Development Corporation, grantee of FTZ 168, requesting subzone status subject to the existing activation limit of FTZ 168, on behalf of Sager Electronics, in Carrollton, Texas.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (85 FR 60130, September 24, 2020). The FTZ staff examiners reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to establish Subzone 168G was approved on November 16, 2020, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 168's 1,955.59-acre activation limit.

Dated: November 16, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–25579 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–791–826]

Prestressed Concrete Steel Wire Strand From South Africa: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from South Africa is being, or is likely to be, sold in the United States at less than fair value. The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Jerry Huang, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4047.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8, 2020, Commerce postponed the preliminary determination of this investigation, and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is PC strand from South Africa. For a complete description of the scope of the investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.* Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act. Normal value (NV) is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

Commerce calculated an individual estimated weighted-average dumping margin for Scaw Metals Group (Scaw), the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for Scaw is the margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margin exists:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Scaw Metals Group	59.27
All Others	59.27

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondent listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this preliminary determination; (2) if the exporter is not the respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

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

Verification

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

Public Comment

A timeline for the submission of case briefs and written comments will be notified to interested parties at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[6] Note that Commerce has modified certain of its requirements for serving documents

[1] *See Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (*Initiation Notice*).

[2] *See Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from South Africa,'' (Preliminary Decision Memorandum), dated concurrently with, and hereby adopted by, this notice.

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

[5] *See Initiation Notice,* 85 FR at 28606.

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

containing business proprietary information until further notice.[7] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On November 3, 2020, pursuant to 19 CFR 351.210(e), Scaw requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[8] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

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

Notification to Interested Parties

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

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2020–25485 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–837]

Prestressed Concrete Steel Wire Strand From Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Indonesia is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Abdul Alnoor or Drew Jackson, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4554 or (202) 482–4406, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8,

[7] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[8] *See* Scaw's Letter, ''Request to Extend Final Determination,'' dated November 3, 2020.

[1] *See Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (*Initiation Notice*).

2020, Commerce postponed the preliminary determination in this investigation and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is PC Strand from Indonesia. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the *Preamble* to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] No interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* Commerce is not preliminarily modifying the scope language as it appeared in the Initiation Notice. *See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce calculated export prices in accordance with section 772(a) of the Act. Commerce calculated normal value in accordance with section 773 of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences to determine the margin assigned to PT. Bumi Steel Indonesia (PT. Bumi). For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Affirmative Determination of Critical Circumstances, in Part

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily finds that critical circumstances exist for PT. Bumi, but that critical circumstances do not exist for all other producers and exporters in Indonesia, including P.T. Kingdom Indah (Kingdom Indah). For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* dumping margins, and any dumping margins determined entirely under section 776 of the Act.

In this investigation, Commerce preliminarily assigned a rate based entirely on facts available to PT. Bumi. Therefore, the only rate that is not zero, *de minimis* or based entirely on facts otherwise available is the rate calculated for Kingdom Indah. Consequently, the rate calculated for Kingdom Indah is also the rate assigned to all other producers and exporters.

Preliminary Determination

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

Exporter/producer	Estimated weighted-average dumping margin (percent)
P.T. Kingdom Indah	2.96
PT. Bumi Steel Indonesia[6]	** 72.28
All Others	2.96

** (Based on total AFA).

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise from Kingdom Indah and all other producers and exporters, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed in the table above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified in the table above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Section 733(e)(2) of the Act provides that, given an affirmative determination of critical circumstances, any suspension of liquidation shall apply to unliquidated entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of: (a) The date which is 90 days before the date on which the suspension of liquidation was first ordered; or (b) the date on which notice of initiation of the investigation was published. As noted above, Commerce preliminarily finds that critical circumstances exist for imports of subject merchandise produced or exported by PT. Bumi. In accordance with section 733(e)(2)(A) of the Act, the suspension of liquidation shall apply to unliquidated entries of shipments of subject merchandise from PT. Bumi that were entered, or withdrawn from

[2] *Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from Indonesia,'' (Preliminary Decision Memorandum) from James Maeder, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Jeffrey I. Kessler, Assistant Secretary for Enforcement and Compliance, dated concurrently with, and hereby adopted by, this notice.

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

[5] *See Initiation Notice,* 85 FR at 28606.

[6] Also referred to as PT. Bumi Nindyyacipta in this proceeding.

warehouse, for consumption on or after the date which is 90 days before the publication of this notice.

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

Disclosure

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

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, with respect to Kingdom Indah, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required. Because PT. Bumi did not provide information requested by Commerce, and Commerce preliminarily determines PT. Bumi to have been uncooperative, we will not conduct verification of PT. Bumi.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. A timeline for the submission of case briefs and written comments will be announced at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline for case briefs.[7] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On November 2 and 4, 2020, pursuant to 19 CFR 351.210(e), Insteel Wire Products, Sumiden Wire Products Corporation, and Wire Mesh Corp. (collectively, petitioners) and Kingdom Indah requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

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

Notification to Interested Parties

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

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Application of Facts Available and Use of Adverse Inferences
VII. Critical Circumstances

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

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[9] *See* Petitioners' Letter, ''Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine—Petitioners' Request for Postponement of Final Antidumping Determinations,'' dated November 2, 2020; and Kingdom Indah's Letter, ''Prestressed Concrete Steel Wire Strand from Indonesia—Request to Postpone the Final Determination,'' dated November 4, 2020.

VIII. Discussion of the Methodology
IX. Currency Conversion
X. Recommendation

[FR Doc. 2020–25482 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–843]

Prestressed Concrete Steel Wire Strand From Italy: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Italy is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Stephanie Berger, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2483.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The merchandise covered by this investigation is PC strand from Italy. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] However, Commerce received no comments on the scope of this investigation from interested parties. Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. In addition, pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences, to determine the margin assigned to CB Trafilati Acciai S.p.A. (CB). For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Negative Determination of Critical Circumstances

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily finds that critical circumstances do not exist for CB, WBO Italcables Societa Cooperativa (WBO), or all other producers and exporters. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

In this investigation, Commerce preliminarily assigned a rate based entirely on facts available to CB. Therefore, the only rate that is not zero, *de minimis* or based entirely on facts otherwise available is the rate calculated for WBO. Consequently, the rate calculated for WBO is also assigned as the rate for all other producers and exporters.

Preliminary Determination

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

Exporter/Producer	Estimated weighted-average dumping margin (percent)
WBO Italcables Societa Cooperativa	3.67
CB Trafilati Acciai S.p.A	* 19.26
All Others	3.67

* (AFA).

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for

[1] *See Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (*Initiation Notice*).

[2] *See Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from Italy,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

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

[5] *See Initiation Notice*, 85 FR at 28606.

the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

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

Disclosure

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

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required. Because CB did not provide information requested by Commerce, and Commerce preliminarily determines CB to have been uncooperative, we will not conduct verification of CB.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[6] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Parties are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On October 30, 2020, pursuant to 19 CFR 351.210(e), WBO requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[8] On November 2, 2020, the petitioners submitted a letter supporting WBO's request that Commerce postpone the final determination.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

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

Notification to Interested Parties

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

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings

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

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

[8] *See* WBO's Letter, ''Prestressed Concrete Steel Wire Strand from Italy: WBO Italcables Societa Cooperativa's Request to Extend Final Determination,'' dated October 30, 2020.

[9] The petitioners are Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. *See* Petitioners' Letter, ''Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine—Petitioners' Request for Postponement of Final Antidumping Determinations,'' dated November 2, 2020.

7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Application of Facts Available and Use of Adverse Inference
VII. Preliminary Critical Circumstances Finding
VIII. Discussion of the Methodology
IX. Currency Conversion
X. Recommendation

[FR Doc. 2020–25483 Filed 11–18–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–723–001]

Prestressed Concrete Steel Wire Strand From Tunisia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Tunisia is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Eva Kim, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–8283.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8, 2020, Commerce postponed the preliminary determination of this investigation, and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is PC strand from Tunisia. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] However, Commerce received no comments on the scope of this investigation from interested parties. Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

Commerce calculated an individual estimated weighted-average dumping margin for Maklada Industries and Maklada SA (collectively, Maklada), the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for Maklada is the margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Preliminary Determination

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

Exporter/producer	Estimated weighted-average dumping margin (percent)
Maklada Industries/Maklada SA	32.72
All Others	32.72

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-

[1] *See Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (*Initiation Notice*).

[2] *See Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from Tunisia,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

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

[5] *See Initiation Notice,* 85 FR at 28606.

others rate, as follows: (1) The cash deposit rate for the respondent listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not the respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

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

Disclosure

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

Verification

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

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[6] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Parties are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On November 3, 2020, pursuant to 19 CFR 351.210(e), Maklada requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[8] On November 2, 2020, Insteel Wire Products, Sumiden Wire Products Corporation, and Wire Mesh Corp. (collectively, the petitioners) requested that Commerce extend the deadline for issuing its final determinations to not later than 135 days after the date of publication in the **Federal Register** of the preliminary determinations.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; and (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

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

Notification to Interested Parties

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

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

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

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

[8] See Maklada's Letter, ''Antidumping Duty Investigation of Prestressed Concrete Steel Wire Strand From Tunisia: Request to Extend Final Determination,'' dated November 3, 2020.

[9] See Petitioners' Letter, ''Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine—Petitioners' Request for Postponement of Final Antidumping Determinations,'' dated November 2, 2020.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Single Entity Treatment
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Recommendation

[FR Doc. 2020–25487 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–821]

Prestressed Concrete Steel Wire Strand From Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Spain is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Terre Keaton Stefanova or William Miller, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1280 or (202) 482–3906, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is PC strand from Spain. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] However, Commerce received no comments on the scope of this investigation from interested parties. Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act and constructed export price in accordance with section 772(b) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Negative Determination of Critical Circumstances

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily finds that critical circumstances do not exist for Global Special Steel Products S.A.U. (d.b.a. Trenzas y Cables de Acero PSC, S.L. (TYCSA)) or for all other producers or exporters. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

Commerce calculated an individual estimated weighted-average dumping margin for TYCSA, the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for TYCSA is the margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Preliminary Determination

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

[1] *See Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (*Initiation Notice*).

[2] *See Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand From Spain,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

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

[5] *See Initiation Notic*e, 85 FR at 28606.

Exporter/producer	Estimated weighted-average dumping margin (percent)
Global Special Steel Products S.A.U. (d.b.a. Trenzas y Cables de Acero PSC, S.L. (TYCSA))	14.75
All Others	14.75

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondent listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not the respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

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

Disclosure

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

Verification

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

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[6] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Parties are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On October 30, 2020, pursuant to 19 CFR 351.210(e), TYCSA requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[8] On November 2, 2020, the petitioners submitted a letter supporting TYCSA's request that Commerce postpone the final determination.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) TYCSA accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

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

Notification to Interested Parties

This determination is issued and published in accordance with sections

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

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

[8] *See* TYCSA's Letter, ''Antidumping Duty Investigation of Prestressed Concrete Steel Wire Strand from Spain: Request for Postponement of Final Determination and Provisional Measures Period,'' dated October 30, 2020.

[9] The petitioners are Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. *See* Petitioners' Letter, ''Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine—Petitioners' Request for Postponement of Final Antidumping Determinations,'' dated November 2, 2020.

733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Negative Preliminary Determination of Critical Circumstances
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Recommendation

[FR Doc. 2020–25486 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–819]

Prestressed Concrete Steel Wire Strand From Malaysia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Malaysia is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Justin Neuman or Kabir Archuletta, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0486 or (202) 482–2593, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8, 2020, Commerce postponed the preliminary determination of this investigation, and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is PC strand from Malaysia. For a complete description of the scope of this investigation, *see Appendix I.*

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.* Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. In addition, pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied on facts otherwise available, with adverse inferences, to determine the margin assigned to Southern PC Steel Sdn. Bhd. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(A)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

Commerce calculated individual estimated weighted-average dumping margins for the two producers/exporters participating in this investigation, Kiswire Sdn. Bhd. (Kiswire) and Wei Dat Steel Wire Sdn. Bhd. (Wei Dat) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others' rate using a weighted average of the estimated weighted-average dumping

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[1] *See Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (*Initiation Notice*).

[2] *See Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 55413 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from Malaysia,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

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

[5] *See Initiation Notice,* 85 FR 28606.

margins calculated for the individually examined mandatory respondents using each company's publicly ranged values for the merchandise under consideration.[6]

Preliminary Determination

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

Exporter/producer	Estimated weighted-average dumping margin (percent)
Kiswire Sdn. Bhd	3.70
Wei Dat Steel Wire Sdn. Bhd	5.45
Southern PC Steel Sdn. Bhd	*18.93
All Others	4.56

*Adverse Facts Available.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

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

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required. Because Southern PC Steel Sdn. Bhd did not provide information requested by Commerce, and Commerce preliminarily determines Southern PC Steel Sdn. Bhd to have been uncooperative, we will not conduct verification of Southern PC Steel Sdn. Bhd.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[7] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Parties are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information until further notice.[8]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On November 3 and 9, 2020, pursuant to 19 CFR 351.210(e), Wei Dat and Kiswire requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the

[6] With two respondents under examination, Commerce normally calculates: (A) A weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sale values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for producers and exporters not subject to individual examination. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010). For a complete analysis of the data, *see* Memorandum, ''Preliminary Determination Calculation for the 'All-Others' Rate,'' dated concurrently with, and hereby adopted by, this notice.

[7] *See* 19 CFR 351.309; and 19 CFR 351.303 (for general filing requirements).

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[9] *See* Wei Dat's Letter, ''Pre-Stressed Concrete Steel Wire Strand from the Malaysia; Request to Extend Final Determination,'' dated November 3, 2020; *see also* Kiswire's Letter, ''Prestressed Concrete Steel Wire Strand from Malaysia, Case No. A–557–819: Request to Extend Final Determination,'' dated November 9, 2020.

requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

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

Notification to Interested Parties

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

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft^2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Application of Facts Available and Use of Adverse Inference
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Recommendation

[FR Doc. 2020–25484 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–909, A–821–826, A–823–819]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the Republic of Korea, the Russian Federation, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

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

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Joshua DeMoss at (202) 482–3362 (the Republic of Korea (Korea)); Kathryn Turlo at (202) 482–3870 (the Russian Federation (Russia)); Zachary Shaykin at (202) 482–2638 (Ukraine); AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On July 28, 2020, the Department of Commerce (Commerce) initiated less-than-fair-value (LTFV) investigations of imports of Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Czech Republic, Korea, Russia, and Ukraine.[1] Currently, the preliminary determinations are due no later than December 15, 2020.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1)(A)(b)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) The petitioner[2] makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On October 15, 2020, the petitioner submitted a timely request that Commerce postpone the preliminary determinations in the Korea, Russia, and Ukraine LTFV investigations.[3] The petitioner stated that it requests postponement because Commerce will not otherwise have complete questionnaire responses and sufficient information to issue preliminary determinations.[4]

For the reasons stated above and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for the preliminary determinations in the Korea, Russia, and Ukraine LTFV investigations by 50 days (*i.e.,* 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations in the Korea, Russia, and Ukraine LTFV investigations no later than February 3, 2021. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: November 13, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–25575 Filed 11–18–20; 8:45 am]

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[1] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Czech Republic, the Republic of Korea, the Russian Federation, and Ukraine: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 47176 (August 4, 2020).

[2] The petitioner is Vallourec Star, LP.

[3] *See* Petitioner's Letter, ''Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea, Russia, and Ukraine: Request to Extend Preliminary Determinations,'' dated October 15, 2020.

[4] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–823–817]

Prestressed Concrete Steel Wire Strand From Ukraine: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Ukraine is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Cindy Robinson or Eric Greynolds, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3797 or (202) 482–6071, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 13, 2020.[1] On September 8, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now November 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://enforcement.trade.gov/frn/* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The product covered by this investigation is PC strand from Ukraine. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] However, Commerce received no comments on the scope of this investigation from interested parties. Therefore, Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the scope in Appendix I to this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price in accordance with section 772(a) of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Negative Determination of Critical Circumstances

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily finds that critical circumstances do not exist for PJSC PA Stalkanat-Silur (Stalkanat) and all other producers/exporters of PC strand from Ukraine. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

Commerce calculated an individual estimated weighted-average dumping margin for Stalkanat, the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for Stalkanat is the margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Preliminary Determination

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

Exporter/producer	Estimated weighted-average dumping margin (percent)
PJSC PA Stalkanat-Silur	19.32
All Others	19.32

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondent listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this preliminary determination; (2) if the exporter is not the respondent identified

[1] *See Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 28605 (May 13, 2020) (signed and applicable, May 6, 2020). (*Initiation Notice*).

[2] *See Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 84 FR 66151 (September 8, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from Ukraine,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

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

[5] *See Initiation Notice,* 85 FR at 28606.

above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

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

Disclosure

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

Verification

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

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[6] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

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

Parties are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On November 2, 2020, the petitioners requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months in duration.[8]

On November 3, 2020, pursuant to 19 CFR 351.210(e), Stalkanat requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[9] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; and (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination by no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

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

Notification to Interested Parties

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

Dated: November 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

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

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

[8] The petitioners are Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. *See* Petitioners' Letter, ''Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine—Petitioners' Request for Postponement of Final Antidumping Determinations,'' dated November 2, 2020.

[9] *See* Stalkanat's Letter, ''Pre-Stressed Concrete Steel Wire Strand from the Ukraine: Request to Extend Final Determination,'' dated November 3, 2020.

Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Preliminary Critical Circumstances Finding
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Recommendation

[FR Doc. 2020–25488 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA651]

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Caribbean Fishery Management Council (CFMC) will hold the 172nd public meeting (virtual) to address the items contained in the tentative agenda included in **SUPPLEMENTARY INFORMATION**.

DATES: The 172nd CFMC public meeting (virtual) will be held on December 8, 2020, from 1 p.m. to 4:45 p.m., and on December 9, 2020, from 9 a.m. to 12:30 p.m. The meeting will be at AST (U.S. Caribbean time.)

ADDRESSES: You may join the 172nd CFMC public meeting (virtual) via Zoom, from a computer, tablet or smartphone by entering the following address:

Join Zoom Meeting: https://us02web.zoom.us/j/83060685915?pwd=VmVsc1orSUtKck8xYk1XOXNDY1ErZz09.

Meeting ID: 830 6068 5915.
Passcode: 995658.
One tap mobile:

+17879451488, ,83060685915#,,,,,,0#, ,995658# Puerto Rico
+17879667727, ,83060685915#,,,,,,0#, ,995658# Puerto Rico

Dial by your location:

+1 787 945 1488 Puerto Rico
+1 787 966 7727 Puerto Rico
+1 939 945 0244 Puerto Rico

Meeting ID: 830 6068 5915.
Passcode: 995658.

In case there are problems and we cannot reconnect via Zoom, the meeting will continue using GoToMeeting.

You can join the meeting from your computer, tablet or smartphone. *https://global.gotomeeting.com/join/971749317.* You can also dial in using your phone. United States: +1 (408) 650–3123. Access Code: 971–749–317.

FOR FURTHER INFORMATION CONTACT: Miguel Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 398–3717.

SUPPLEMENTARY INFORMATION: The following items included in the tentative agenda will be discussed:

December 8, 2020, 1 p.m.–1:30 p.m.
—Call to Order
—Roll Call
—Adoption of Agenda
—Consideration of 171st Council Meeting Verbatim Transcriptions
—Executive Director's Report

December 8, 2020, 1:30 p.m.–1:45 p.m.
—Five-Year Strategic Plan Update—Michelle Duval

December 8, 2020, 1:45 p.m.–2 p.m.
—Scientific and Statistical Committee (SSC) Report on July 27–28, 2020, Meeting– Richard Appeldoorn
—Ecosystem Conceptual Model (ECM) update
—Constant Catch recommendation

December 8, 2020, 2 p.m.–3:30 p.m.
—Spiny Lobster Framework Amendment—Sarah Stephenson
—Gear Amendment to the Island-Based FMPs, Deep-water Snapper Gear Options Paper—Maria Lopez
—Ecosystem-Based Fishery Management Technical Advisory Panel Report—Sennai Habtes

December 8, 2020, 3:30 p.m.–3:45 p.m.
—St. Croix Territory/Federal Compatible Fishing Regulations—Carlos Farchette

December 8, 2020, 3:45 p.m.–4 p.m.
—Squid Fishing Project—Raimundo Espinoza

December 8, 2020, 4 p.m.–4:20 p.m.
—Assessment of COVID–19 Impact on Commercial Fishing Associations in Puerto Rico—Marcos Hanke

December 8, 2020, 4:20 p.m.–4:30 p.m.
—Queen Conch Rebuilding Plan—Next Steps—NMFS

December 8, 2020, 4:30 p.m.–4:45 p.m.
—Public Comment Period (5-minute presentations)

December 8, 2020, 4:45 p.m.
—Adjourn

December 9, 2020, 9 a.m.–9:15 a.m.
—Deepwater Snappers and Reef Fishes in the U.S. Caribbean: Aging Validation Using Bomb Radiocarbon and Preliminary Longevity Estimates—Virginia Shervette

December 9, 2020, 9:15 a.m.–9:30 a.m.
—Research on Queen Snapper in Puerto Rico—Kate Overly

December 9, 2020, 9:30 a.m.–9:45 a.m.
—Queen triggerfish reproductive biology in the U.S. Caribbean—Jesús Rivera Hernández

December 9, 2020, 9:45 a.m.–10:15 a.m.
—Outreach and Education Advisory Panel Report—Alida Ortíz

December 9, 2020, 10:15 a.m.–11:15 a.m.
—Enforcement (15 minutes each)
—Puerto Rico—Department of Natural and Environmental Resources (DNER)
—U.S.V. I.—Department of Planning and Natural Resources (DPNR)
—U.S. Coast Guard
—NOAA Fisheries Office of Law Enforcement

December 9, 2020, 11:15 a.m.–11:30 a.m.
—Other Business
—Julian Magras Presentation

December 9, 2020, 11:30 a.m.–12:30 p.m.
—Public Comment Period (5-minute presentations)

December 9, 2020, 12:30 p.m.
—Adjourn

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meeting will begin on December 8, 2020, at 1 p.m. AST, and will end on December 9, 2020, at 12:30 p.m. AST. Other than the start time on the first day of the meeting, interested parties should be aware that discussions may start earlier or later than indicated in the agenda, at the discretion of the Chair.

Special Accommodations

Simultaneous interpretation will be provided.

Se proveerá interpretación en español.

Para interpretación en español puede marcar el siguiente número para entrar a la reunión:

US/Canadá: llame al +1–888–947–3988, cuando el sistema conteste, entrar el número 1*999996#.

For English interpretation you may dial the following number to enter the meeting:

US/Canada: call +1–888–947–3988, when the system answers enter the number 2*999996#.

For any additional information on this public virtual meeting, please contact Diana Martino, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone: (787) 226–8849.

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

Dated: November 16, 2020.

Rey Israel Marquez,

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

[FR Doc. 2020–25587 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA654]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Herring Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Wednesday, December 9, 2020 at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/6747145818220045327.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Advisory Panel will meet to review and discuss 2021 work priorities for the Atlantic Herring Fishery Management Plan including: (1) A framework action that considers spawning closures on Georges Bank (GB); (2) development of a formal rebuilding plan for Atlantic herring; (3) review and potentially adjust accountability measures (AMs) in the herring plan; and (4) coordinate with the Mid-Atlantic Fishery Management Council (MAFMC) and Atlantic States Marine Fisheries Commission (ASMFC) on various herring management issues (*i.e.,* river herring and shad (RH/S)). Other business will be discussed, as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: November 16, 2020.

Rey Israel Marquez,

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

[FR Doc. 2020–25588 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA631]

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold meetings of the following: Snapper Grouper Committee; Dolphin Wahoo Committee; Habitat and Ecosystem-Based Management Committee, Mackerel Cobia Committee; Executive Committee (partially Closed Session); and Citizen Science Committee. The meeting week will also include a formal public comment session and a meeting of the Full Council (with a partially Closed Session). Due to public health concerns associated with COVID–19 and current travel restrictions, the meeting originally planned for Wrightsville Beach, NC will be held via webinar.

DATES: The Council meeting will be held from 9 a.m. on Monday, December 7, 2020 until 5 p.m. on Thursday, December 10, 2020.

ADDRESSES: The meeting will be held via webinar. Webinar registration is required. Details are included in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8440 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including agendas, overviews, briefing materials and the meeting registration link will be posted on the Council's website at: *http://safmc.net/safmc-meetings/council-meetings/.*

Public comment: Written comments may be directed to John Carmichael, Executive Director, South Atlantic Fishery Management Council (see *Council address*) or electronically via the Council's website: *https://safmc.wufoo.com/forms/m1ijpb670ziz2jz/.* Comments received by close of business the Monday before the meeting (11/30/20) will be compiled, posted to the website as part of the meeting materials, and included in the administrative record; please use the Council's online form available from the website. Written comments received after the Monday before the meeting must be submitted using the Council's online form available from the website. Comments will automatically be posted to the website and available for Council consideration. Comments received prior to 9 a.m. on Wednesday, December 9, 2020 will be a part of the meeting administrative record.

The items of discussion in the individual meeting agendas are as follows:

Meeting Agenda

Council Session I, Monday, December 7, 2020, 9 a.m. Until 12 p.m. (Closed Session)

The Council will consider appointments for open advisory panel seats, review the composition of the Mackerel Cobia Advisory Panel (AP), and advisory panel policies. A legal briefing on litigation will also be provided if needed.

Council Session II, Monday, December 7, 2020, 1:30 p.m. Until 2:30 p.m. and 5 p.m. Until 6 p.m.

The Council will discuss the Acceptable Biological Catch (ABC) Control Rule including carry-over and phase-in provisions. Beginning at 5 p.m. Council members will receive a presentation on Draft Amendment 14 to the 2006 Consolidated Highly Migratory

Species Fishery Management Plan (FMP) from NOAA Fisheries. The amendment addresses the ABC Control Rule, phase-in and carry over, and annual catch limit (ACL) provisions.

Snapper Grouper Committee, Monday, December 7, 2020, 2:30 p.m. Until 5 p.m. and Tuesday, December 8, 2020 from 8:30 a.m. Until 12 p.m.

The Committee will: Receive an update from NOAA Fisheries on the status of amendments under review; receive an overview of the stock assessment for yellowtail snapper, discuss and provide recommendations for Council consideration; and discuss whether nine snapper grouper species continue to need conservation and management under the Snapper Grouper FMP and consider options. The Committee will review comments provided by Wreckfish Individual Transferable Quota (ITQ) shareholders and dealers regarding Amendment 48 to the Snapper Grouper FMP addressing Wreckfish ITQ Modernization and is scheduled to approve the amendment for public scoping. The Committee will review potential management measures to end overfishing and revise the rebuilding plan for Red Porgy through draft Amendment 50 to the Snapper Grouper FMP and is scheduled to approve the amendment for public scoping. The Committee will receive an options paper addressing catch levels and management measures for greater amberjack.

Habitat Protection and Ecosystem-Based Management Committee, Tuesday, December 8, 2020, 1:30 p.m. Until 5 p.m.

The Committee will: Review Coral Amendment 10 addressing modifications to area closures for the deepwater shrimp fishery; receive an update on the Ecopath with Ecosim Model Review; receive a report from the Habitat Protection and Ecosystem-Based Management Advisory Panel (AP); receive a Fishery Ecosystem Plan (FEP) Roadmap Progress Report, and discuss the development of a Habitat and Ecosystem Program Blueprint.

Dolphin Wahoo Committee, Wednesday, December 9, 2020, 8:30 a.m. Until 12 p.m.

The Committee will receive an update from NOAA Fisheries on the review status of Amendment 12 to the Dolphin Wahoo FMP addressing bullet and frigate mackerel and receive a report from the Dolphin Wahoo AP. The Committee will review draft Amendment 10 to the Dolphin Wahoo FMP with actions that currently address: Revisions to recreational data and catch level recommendations, redefining Optimum Yield in the dolphin fishery, modifications to accountability measures, and other management revisions to the dolphin and wahoo fisheries. The Committee is scheduled to approve the amendment for public hearing.

Mackerel Cobia Committee, Wednesday, December 9, 2020, 1:30 p.m. Until 3:45 p.m.

The Committee will receive a report from the Mackerel Cobia AP, address management measures for Atlantic king mackerel following the recent stock assessment (Framework Amendment 10) and is scheduled to approve the amendment for public scoping. The Committee will consider modifications to catch levels and management measures to end overfishing of Gulf cobia (Amendment 32 to the Coastal Migratory Pelagics FMP).

Formal Public Comment, Wednesday, December 9, 2020, 4 p.m..—Public comment will be accepted via webinar on all items on the Council meeting agenda. Highlighted items scheduled to be approved for public scoping: Amendment 48 to the Snapper Grouper FMP (Wreckfish ITQ Modernization); Amendment 50 to the Snapper Grouper FMP (red porgy); and Framework Amendment 10 to the Coastal Migratory Pelagics FMP. Additionally, Amendment 10 to the Dolphin Wahoo FMP (dolphin wahoo management measures) is scheduled to be approved for public hearings. The Council Chair will determine the amount of time provided to each commenter based on the number of individuals wishing to comment.

Executive Committee, Thursday, December 10, 2020, 8:30 a.m. Until 12 p.m. (Partially Closed Session)

The Committee will conduct the annual performance review for the Council's Executive Director in Closed Session. In Open Session, the Committee will receive an update on the Council's 2021 budget and review the 2021 FMP Work Schedule.

Citizen Science Committee, Thursday, December 10, 2020, 10:30 a.m. Until 12 p.m.

The Committee will review Citizen Science Program Planning efforts, the Citizen Science Program Evaluation Plan, and receive an update on Citizen Science program and projects activities.

Council Session III, Thursday, December 10, 2020, 1:30 p.m. Until 5 p.m.

The Council will receive a report from the Executive Director, an update on development of the proposed approach to determine sector allocations, and an update on climate change scenario planning. The Council will also receive a report from the Council's Scientific and Statistical Committee, if needed, on any items not previously addressed during committee meetings. The Council will receive a report from the Outreach and Communications AP and another from the Southeast Data, Assessment and Review (SEDAR) Steering Committee.

NOAA Fisheries Southeast Fisheries Science Center staff will provide an update on staff restructuring and a report on the status of commercial electronic logbooks.

NOAA Fisheries Southeast Regional Office staff will provide an update on the status of For-Hire Electronic Reporting and the status of their evaluation of bycatch reporting efforts in the South Atlantic. The Council will also receive a Protected Resources report.

The Council will receive reports from the following committees: Snapper Grouper; Mackerel Cobia; Dolphin Wahoo; Habitat Protection and Ecosystem-Based Management; Citizen Science; and Executive. The Council will also address advisory panel appointments.

The Council will receive agency and liaison reports, discuss other business and upcoming meetings, and take action as necessary.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: November 16, 2020.

Rey Israel Marquez,

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

[FR Doc. 2020–25586 Filed 11–18–20; 8:45 am]

BILLING CODE 3510–22–P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia (CSOSA).

ACTION: Notice and request for comments.

SUMMARY: This notice announces the intention of the CSOSA to request that the Office of Management and Budget (OMB) approve the proposed Generic Information Collection request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.'' In accordance with the Paperwork Reduction Act, this notice announces CSOSA's intent to submit this collection to OMB for approval. CSOSA invites the public to comment on this proposed information collection.

DATES: Consideration will be given to all comments received by December 21, 2020.

ADDRESSES: You may submit written comments, identified by ''Collection of Qualitative Feedback on Agency Service Delivery'' to: Rochelle Durant, Program Analyst, Office of General Counsel, Court Services and Offender Supervision Agency for the District of Columbia, 800 North Capitol Street NW, Washington, DC 20002 or to *Rochelle.Durant@csosa.gov.*

Comments submitted in response to this notice may be made available to the public. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and may be made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Rochelle Durant, Program Analyst, Office of General Counsel, Court Services and Offender Supervision Agency for the District of Columbia at *Rochelle.Durant@csosa.gov* or (202) 220–5304.

For content support: Trina Stewart, Supervisory Intergovernmental and Community Affairs Specialist, Court Services and Offender Supervision Agency for the District of Columbia at *Trina.Stewart@csosa.gov* or (202) 220–5526.

SUPPLEMENTARY INFORMATION: Notice and request for public comment on this collection was published in the **Federal Register** on September 8, 2020 at 85 FR 174. The Agency did not receive any comments in response to the 60-day notice published in the **Federal Register**.

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they collect or sponsor. Section 3506(c)(2)(A) of the PRA (944 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 of information to OMB for approval. To comply with this requirement, CSOSA is publishing notice of the proposed collection of information set forth in this document. The proposed information collection activity provides a means to 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, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The Agency has traditionally used paper form surveys as its primary public information collection method. However, to further comply with the goals of the PRA, the Agency recently implemented the use of online electronic survey tools to obtain customer and client feedback regarding Agency programs and supervision support services. *During the COVID–19 pandemic,* the approval from OMB to utilize an electronic option to complete the Agency's standard surveys online was extremely helpful in sustaining our engagement with the community. The contents in the online version and in paper versions of the Agency's surveys will remain identical. Once in person meetings are resumed, CSOSA will continue to offer paper option for respondents who prefer that option.

Similar to the process used for gaining public feedback via the Agency's traditional paper form surveys, the online surveys are forwarded to the meeting participants at the conclusion of an event or program via the participants previously registered email address or at the end of a virtual meeting in the chat box or via a slide with a link that leads to the online survey. The results of the electronic surveys are tallied by the online software and then forwarded to a centralized user account for further evaluation and review or to be merged with any results from completed hard copy paper surveys.

The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

1. The collections are voluntary;

2. The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both

the respondents and the federal government;

3. The collections are non-controversial and do not raise issues of concern to other federal agencies;

4. Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;

5. Personally identifiable information (PII) is collected only to the extent necessary and is not retained;

6. Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;

7. Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

8. Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does 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.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Current Actions: New collection of information.

Type of Review: New Collection.

(1) *Affected Public:* Individuals currently under CSOSA supervision. CSOSA stakeholders including criminal justice system (*e.g.,* judges, law enforcement officers) and community partners.

Estimated Number of Respondents: 540.

Below we provide projected average estimates for the next three years:

Average Expected Annual Number of activities: 18.

Average Number of Respondents per Activity: 30.

Annual Responses: 540.

Frequency of Response: Once per request.

Average Minutes per Response: 10.

Burden Hours: 75.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) whether paper or electronic information collection is preferred and explanation regarding choice; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Rochelle Durant,

Program Analyst, Court Services and Offender Supervision Agency for the District of Columbia.

[FR Doc. 2020–25509 Filed 11–18–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces; Notice of Federal Advisory Committee Meeting

AGENCY: General Counsel of the Department of Defense, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces will take place.

DATES: Open to the public, Friday, December 4, 2020, from 11:00 a.m. to 11:30 a.m. EST.

ADDRESSES: This public meeting will be held via teleconference. To access the teleconference dial: 410–874–6300, Conference Pin: 428 926 205.

FOR FURTHER INFORMATION CONTACT: Dwight Sullivan, 703–695–1055 (Voice), *dwight.h.sullivan.civ@mail.mil* (Email). Mailing address is DAC–IPAD, One Liberty Center, 875 N Randolph Street, Suite 150, Arlington, Virginia 22203. Website: *http://dacipad.whs.mil/*. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: In section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92), Congress tasked the DAC–IPAD to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces. This will be the twenty-first public meeting held by the DAC–IPAD. At this meeting the Committee will vote on the final draft of the DAC–IPAD *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military* as required by section 540I of

the National Defense Authorization Act for Fiscal Year 2020.

Agenda: 11:00 a.m.–11:05 a.m. Public Meeting Begins—Welcome and Introduction; 11:05 a.m.–11:25 a.m. Committee Vote on the Final Draft of the DAC–IPAD *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military*; 11:25 a.m.–11:30 a.m. Meeting Wrap-Up and Public Comment; 11:30 a.m. Public Meeting Adjourns.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public. This public meeting will be held via teleconference. To access the teleconference dial: 410–874–6300, Conference Pin: 428 926 205. Please consult the website for any changes to the public meeting date or time.

Written Statements: Pursuant to 41 CFR 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Committee about its mission and topics pertaining to this public session. Written comments must be received by the DAC–IPAD at least five (5) business days prior to the meeting date so that they may be made available to the Committee members for their consideration prior to the meeting. Written comments should be submitted via email to the DAC–IPAD at *whs.pentagon.em.mbx.dacipad@mail.mil* in the following formats: Adobe Acrobat or Microsoft Word. Please note that since the DAC–IPAD operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection. Oral statements from the public will be permitted, though the number and length of such oral statements may be limited based on the time available and the number of such requests. Oral presentations by members of the public will be permitted from 11:25 a.m. to 11:30 a.m. EST on December 4, 2020.

Dated: November 12, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–25599 Filed 11–18–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0128]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; CARES Act Maintenance of Effort (MOE)

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 21, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Tara Ramsey, (202) 260–2063.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: CARES Act Maintenance of Effort (MOE).

OMB Control Number: 1810–0745.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 280.

Abstract: This is a request for an extension of a previously approved information collection that solicits from States, Outlying Areas, and State educational agencies (SEAs) maintenance of effort (MOE) data under section 18008 of the CARES Act. Under four programs—the Governor's Emergency Education Relief Fund (GEER Fund, Section 18002) and the Elementary and Secondary School Emergency Relief Fund (ESSER Fund, Section 18003) and two formula grant programs to the Outlying Areas authorized under Section 18001(a)(1),Education Stabilization Fund-State Educational Agencies (ESF—SEA) and Education Stabilization Fund-Governors (ESF—Governor)—States are required to maintain fiscal effort on behalf of elementary, secondary and postsecondary education. Recipients of the resources from the ESSER Fund, the GEER Fund, the ESF—SEA Fund, and the ESF—Governor Fund have signed Certifications and Agreements, in which they agree to abide by the provisions of the CARES Act, including MOE requirements. The Department is requesting an extension of the currently approved collection to meet the requirements of the CARES Act and ensure that States and Outlying Areas are meeting the MOE requirement. In the publication of frequently asked questions regarding the Maintenance of Effort requirement, ED issued guidance and a sample form for States and Outlying Areas to submit this statutorily required data.

Dated: November 16, 2020.

Kate Mullan,

PRA Coordinator,Strategic Collections and Clearance,Governance and Strategy Division,Office of Chief Data Officer,Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–25553 Filed 11–18–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0115]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Measures and Methods for the National Reporting System for Adult Education

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 21, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Braden Goetz, (202) 245–7405.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Measures and Methods for the National Reporting System for Adult Education.

OMB Control Number: 1830–0027.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 5,700.

Abstract: This information collection request annually solicits performance and related information from the states and outlying areas that receive adult education state grant funds under the Adult Education and Family Literacy Act (AEFLA). The data are used to ensure that states and outlying areas meet the performance accountability requirements of AEFLA. Through this proposal, the Department is submitting a revised the National Reporting System for Adult Education (NRS) Information Collection Request (ICR) to include additional data collection elements consistent with the Workforce Innovation and Opportunity Act of 2014 (WIOA) performance accountability requirements for the AEFLA program. These new data collection elements will become effective on July 1, 2021 and required to be included in the annual performance reports due on October 1, 2021.

Dated: November 16, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–25550 Filed 11–18–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5124–022]

Washington Electric Cooperative, Inc.; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Minor License.

b. *Project No.:* 5124–022.

c. *Date Filed:* October 30, 2020.

d. *Applicant:* Washington Electric Cooperative, Inc. (WEC).

e. *Name of Project:* North Branch No. 3 Hydroelectric Project.

f. *Location:* On the North Branch Winooski River in Washington, County, Vermont. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Patricia Richards, General Manager, Washington Electric Cooperative, Inc., P.O. Box 8, 40 Church Street East Montpelier, Vermont 05651; phone: (802) 223–5245 or email at *patty.richards@wec.coop.*

i. *FERC Contact:* Michael Tust at (202) 502–6522; or email at *michael.tust@ferc.gov.*

j. This application is not ready for environmental analysis at this time.

k. *Project Description:*

Existing Project Facilities and Operation

The project is located at the existing 115-foot-high, 1,525-foot-long Wrightsville Dam which is owned, operated, and maintained by the state of Vermont for flood control but also contains facilities utilized by WEC for hydropower generation. The licensed project consists of the following constructed facilities: A 445-foot-long, 5-foot-diameter steel aboveground penstock emerging from the base of the dam that conveys water to a 1,320-square-foot partially-buried project powerhouse containing three fixed blade turbines with rated capacities of 96, 259, and 578-kilowatts (kW) for a total installed capacity of 933 kW; a 750 square-foot substation located adjacent to the powerhouse that steps up the voltage from 4.16 kilovolts (kV) to 12.5 kV; a 450-foot-long, 12.5-kV transmission line; and appurtenant facilities.

Water from Wrightsville Reservoir enters an existing non-project intake structure at the dam containing two separate intake chambers: A ''hydropower bay'' located at an elevation of 631 feet and an overflow bay located at an elevation of 635 feet. Water entering the hydropower bay passes through trashracks, a headgate, and non-project conveyance tunnel within the dam and is conveyed to the powerhouse through the project penstock before re-entering the North Branch Winooski River approximately 400 feet downstream of the dam creating a 400-foot bypassed reach. Water entering the overflow bay passes

through trashracks and an overflow tunnel within the dam before being discharged to the bypassed reach through a low-level outlet at the base of the dam. WEC's three turbines located in the powerhouse cannot be throttled; however, WEC operates its turbines in a specific sequence to operate in near run-of-river mode while maintaining reservoir elevations between 633 and 635 feet from September 1 through May 31 and between 634 and 635 feet from June 1 through August 31. Additionally, WEC maintains minimum flows of 3.4 cubic feet per second (cfs) in the bypassed reach and 25 cfs in the North Branch Winooski River downstream of the powerhouse.

Proposed Project Facilities and Operation

WEC proposes to bring the following existing facilities into the project boundary as project structures: the trash racks with one-inch spacing and the 9.5-foot by 6.5-foot headgate located within the non-project hydropower bay at the intake; the 1.3-foot by 1.5-foot automated minimum flow gate located at the base of the wall separating the two intake chambers used to pass minimum flows to the bypassed reach; the 100 square-foot hydraulic house located within the dam housing a hydraulic pump and controls used to operate the project headgate and minimum flow gate; and the 550-foot-long dirt road used to access the intake structure.

WEC would continue to operate its three turbine units to replicate near run-of-river operations and continue to maintain its existing minimum flows both within the bypassed reach (*i.e.,* 3.4 cfs) and downstream of the powerhouse (*i.e.,* 25 cfs). However, WEC proposes to modify operations by using its minimum flow gate to release more flow into the bypassed reach (up to 25 cfs) as generating units are turned on and off to reduce flow fluctuations downstream of the powerhouse. WEC also proposes to maintain the reservoir between an elevation of 634 and 635 feet year-round (rather than operating between 633–635 feet) and would cease all generation when reservoir levels fall below 634 feet.

l. *Locations of the Application:* 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 via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TYY, (202) 502–8659.

m. You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural schedule:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Issue Notice of Acceptance/Notice of Ready for Environmental Analysis	December 2020.
Filing of recommendations, preliminary terms and conditions, and fishway prescriptions	February 2021.
Commission issues draft NEPA document	August 2021.
Comments on draft NEPA document	September 2021.
Filing of modified terms and conditions	November 2021.
Commission issues final NEPA document	February 2022.

o. Final amendments to the application must be filed with the Commission no later than thirty (30) days from the issuance date of the notice of ready for environmental analysis.

Dated: November 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25560 Filed 11–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–1950–002.

Applicants: California Independent System Operator Corporation.

Description: Compliance filing: 2020–11–13 FERC Order No. 845 Compliance Filing to be effective 2/20/2020.

Filed Date: 11/13/20.

Accession Number: 20201113–5090.

Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER19–2683–001.

Applicants: EFS Parlin Holdings, LLC.

Description: Report Filing: Refund Report to be effective N/A.

Filed Date: 11/13/20.

Accession Number: 20201113–5061.

Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER20–431–002.

Applicants: Ohio Power Company, AEP Ohio Transmission Company, Inc., American Electric Power Service Corporation, PJM Interconnection, L.L.C.

Description: Compliance filing: AESPC submits Compliance Filing in ER20–431 to be effective 1/21/2020.

Filed Date: 11/12/20.

Accession Number: 20201112–5296.

Comments Due: 5 p.m. ET 12/3/20.

Docket Numbers: ER20–954–003.

Applicants: Ohio Power Company, AEP Ohio Transmission Company, Inc., American Electric Power Service Corporation, PJM Interconnection, L.L.C.

Description: Compliance filing: AEP submits Compliance Filing in ER20–954 to be effective 4/4/2020.

Filed Date: 11/12/20.

Accession Number: 20201112–5278.

Comments Due: 5 p.m. ET 12/3/20.

Docket Numbers: ER20–2705–001.

Applicants: Mankato Energy Center, LLC.

Description: Tariff Amendment: Response to Additional Information Request to be effective 7/21/2020.

Filed Date: 11/12/20.

Accession Number: 20201112–5272.

Comments Due: 5 p.m. ET 12/3/20.

Docket Numbers: ER20–2706–001.

Applicants: Mankato Energy Center II, LLC.

Description: Tariff Amendment: Response to Additional Information Request to be effective 7/21/2020.

Filed Date: 11/12/20.

Accession Number: 20201112–5274.
Comments Due: 5 p.m. ET 12/3/20.

Docket Numbers: ER20–2779–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 3215R8 People's Electric Coop NITSA Deficiency Response to be effective 8/1/2020.
Filed Date: 11/13/20.
Accession Number: 20201113–5056.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–395–000.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2020–11–12 NV Energy Meter Data Waiver to be effective N/A.
Filed Date: 11/12/20.
Accession Number: 20201112–5277.
Comments Due: 5 p.m. ET 12/3/20.

Docket Numbers: ER21–396–000.
Applicants: Monongahela Power Company, The Potomac Edison Company, West Penn Power Company.
Description: Notice of Cancellation of Power Supply Agreement of the South FirstEnergy Operating Companies.
Filed Date: 11/12/20.
Accession Number: 20201112–5334.
Comments Due: 5 p.m. ET 12/3/20.

Docket Numbers: ER21–397–000.
Applicants: Midcontinent Independent System Operator, Inc., Ameren Transmission Company of Illinois.
Description: § 205(d) Rate Filing: 2020–11–13_SA 3580 ATXI-City of Rolla WCA to be effective 1/13/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5008.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–398–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1883R9 Evergy Kansas Central, Inc. NITSA NOA—Alma to be effective 2/1/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5031.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–399–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1887R10 Evergy Kansas Central, Inc. NITSA NOA—Elsmore to be effective 2/1/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5037.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–400–000.
Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.
Description: § 205(d) Rate Filing: 2020–11–13_SA 3028 Ameren IL-Prairie Power Project #30 EIEC Gifford to be effective 1/13/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5038.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–401–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1889R9 Evergy Kansas Central, Inc. NITSA NOA—Mindenmines to be effective 2/1/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5044.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–402–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2020–11–13_Shared Network Upgrades Filing to be effective 2/1/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5051.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–403–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Letter Agreement Terra-Gen—Sanborn Hybrid 3 SA No. 258 to be effective 11/14/2020.
Filed Date: 11/13/20.
Accession Number: 20201113–5066.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–404–000.
Applicants: LS Power Development, LLC.
Description: Request for Order Granting Tariff Waiver, et al. of LS Power Development, LLC.
Filed Date: 11/12/20.
Accession Number: 20201112–5345.
Comments Due: 5 p.m. ET 11/19/20.

Docket Numbers: ER21–405–000.
Applicants: Duke Energy Progress, LLC.
Description: § 205(d) Rate Filing: DEP–DEC Concurrence to Dynamic Transfer Agreement to be effective 1/1/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5092.
Comments Due: 5 p.m. ET 12/4/20,

Docket Numbers: ER21–406–000.
Applicants: Public Service Company of Colorado.
Description: § 205(d) Rate Filing: 2020–11–13 PSC–NCI–LGIA–223–0.0.0 to be effective 11/18/2020.
Filed Date: 11/13/20.
Accession Number: 20201113–5095.
Comments Due: 5 p.m. ET 12/4/20.

Docket Numbers: ER21–407–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Western Area Power Administration Contract Services Agreement Amendment to be effective 2/1/2021.
Filed Date: 11/13/20.
Accession Number: 20201113–5125.
Comments Due: 5 p.m. ET 12/4/20.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES21–3–000.
Applicants: Republic Transmission, LLC.
Description: Errata to October 9, 2020 Application [Exhibit C, D and E] Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Republic Transmission, LLC.
Filed Date: 11/12/20.
Accession Number: 20201112–5341.
Comments Due: 5 p.m. ET 12/3/20.

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 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25556 Filed 11–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–4–000]

Transwestern Pipeline Company, LLC; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Linam Ranch 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 Linam Ranch Project (Project) involving the abandonment in-place of natural gas transmission facilities by

Transwestern Pipeline Company, LLC (Transwestern) in Lea County, New Mexico. 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 an Authorization to abandon facilities. 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 5:00pm Eastern Time on December 14, 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 8, 2020, you will need to file those comments in Docket No. CP21–4–000 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.

Transwestern 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*) 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.*

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission's website (*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*) 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 (CP21–4–000) 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

Transwestern proposes to abandon in-place the Linam Ranch meter station and approximately 2,446 feet of associated 10-inch-diameter natural gas transmission pipeline, both of which are located in Lea County, New Mexico. According to Transwestern, the natural gas market in the project area has changed such that the Project has no firm transportation agreements. Additionally, the maintenance expenses associated with the meter station and piping are excessive and cannot be recovered by its current revenue stream. The general location of the project facilities is shown in appendix 1.[1]

Land Requirements

All project-related activities would occur within the existing boundaries of the DCP Linam Ranch Gas Plant yard and existing Transwestern pipeline easement.

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

[1] 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* 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* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

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. 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 [2] 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.[3] 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.

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.[4] The environmental document for this project will document findings on the impacts on historic properties and 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; and Native American Tribes. 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* 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* 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.

[2] For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Section 1501.6.

[4] 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.

Dated: November 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25558 Filed 11–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP14–1275–002.
Applicants: Mojave Pipeline Company, L.L.C.
Description: Compliance filing Cost and Revenue Study.
Filed Date: 10/30/20.
Accession Number: 20201030–5055.
Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: RP21–190–001.
Applicants: Rockies Express Pipeline LLC.
Description: Tariff Amendment: REX 2020–11–12 GT&C Section 13 Revisions Amendment to be effective 12/3/2020.
Filed Date: 11/12/20.
Accession Number: 20201112–5289.
Comments Due: 5 p.m. ET 11/19/20.

Docket Numbers: RP21–207–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: Amendment to a Negotiated Rate Agreement Filing-Spire Marketing Inc to be effective 11/12/2020.
Filed Date: 11/12/20.
Accession Number: 20201112–5114.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: RP21–208–000.
Applicants: Southern Natural Gas Company, L.L.C.
Description: Compliance filing Annual Report on Operational Transactions 2020.
Filed Date: 11/12/20.
Accession Number: 20201112–5120.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: RP21–209–000.
Applicants: Discovery Gas Transmission LLC.
Description: § 4(d) Rate Filing: 2021 HMRE Surcharge Filing to be effective 1/1/2021.
Filed Date: 11/12/20.
Accession Number: 20201112–5160.
Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: RP21–210–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Negotiated Rates—Adding K1012327 to be effective 12/1/2020.
Filed Date: 11/12/20.

Accession Number: 20201112–5253.
Comments Due: 5 p.m. ET 11/24/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25557 Filed 11–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12635–002]

Moriah Hydro Corporation; Notice of Waiver Period for Water Quality Certification Application

On October 30, 2020, Moriah Hydro Corporation notified the Federal Energy Regulatory Commission that it submitted an application for a Clean Water Act section 401(a)(1) water quality certification to the New York State Department of Environmental Conservation (New York DEC) that same day, in conjunction with the above captioned project. Pursuant to 40 CFR 121.6, we hereby notify New York DEC of the following:

Date of Receipt of the Certification Request: October 30, 2020

Reasonable Period of Time to Act on the Certification Request: One year

Date Waiver Occurs for Failure to Act: October 30, 2021

If New York DEC fails or refuses to act on the water quality certification request by the above waiver date, then the agency certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: November 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25561 Filed 11–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL21–16–000]

Wisconsin Electric Power Company; Notice of Petition for Declaratory Order

Take notice that on November 13, 2020, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207 (2020),[1] Wisconsin Electric Power Company (Petitioner), filed a petition for declaratory order (Petition) requesting that the Commission find that their Market Rate Tariff Service Agreement with Cloverland Electric Cooperative [2], does not impede the Commission's regulations and policies concerning the Public Utility Regulatory Policies Act of 1978 (PURPA), as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern time on November 27, 2020.

Dated: November 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25559 Filed 11–18–20; 8:45 am]

BILLING CODE 6717–01–P

[1] As required by Rule 381.302(a), 18 CFR 381.302(a) (2020), and the Commission's Annual Update of Filing Fees, 85 FR 1,102 (Jan. 9, 2020), Wisconsin Electric has submitted the required filing fee of $30,060.

[2] Edison Sault Electric Company, LLC (ESE) is also listed as a party to the Agreement. Concurrently with the execution of the Service Agreement, Wisconsin Electric's parent company sold all of the membership interests in ESE to Cloverland, and ESE was merged into Cloverland.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Existing Collection

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of information collection—extension without change: Elementary-Secondary Staff Information Report (EEO–5) and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Equal Employment Opportunity Commission (EEOC or Commission) announces that it intends to submit to the Office of Management and Budget (OMB) a request for a three-year extension without change of the Elementary-Secondary Staff Information Report (EEO–5).

DATES: Written comments on this notice are encouraged and must be submitted on or before January 19, 2021.

ADDRESSES: You may submit comments by any of the following methods—please use only one method:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the

instructions on the website for submitting comments.

Mail: Comments may be submitted by mail to Bernadette B. Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

Fax: Comments totaling six or fewer pages can be sent by facsimile (''fax'') machine to (202) 663–4114. (This is not a toll-free number.) Receipt of fax transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or 800–669–6820 (TTY). (These are not toll-free telephone numbers.)

Instructions: All comments received must include the agency name and docket number. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products.

Although copies of comments received are usually also available for review at the Commission's library, given the EEOC's current 100% telework status due to the Coronavirus Disease 2019 (COVID–19) public health emergency, the Commission's library is closed until further notice. Once the Commission's library is re-opened, copies of comments received in response to the proposed rule will be made available for viewing by appointment only at 131 M Street NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Rashida Dorsey, Employer Data Team, Data Development and Information Products Division, Equal Employment Opportunity Commission, 131 M Street NE, Room 4SW32J, Washington, DC 20507; (202) 663–4355 (voice), (202) 663–7063 (TTY) or email at *Rashida.dorsey@eeoc.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act and OMB regulation 5 CFR 1320.8(d)(1), the Commission solicits public comment to enable it to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the Commission's functions, including whether the information will have practical utility; (2) Evaluate the accuracy of the Commission'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 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 Information Collection

Collection Title: Elementary-Secondary Staff Information Report (EEO–5).

OMB Number: 3046–0003.

Frequency of Report: Biennial, even years.

Type of Respondent: Public elementary and secondary school systems or districts with 100 or more employees within the 50 U.S. states and District of Columbia.

Description of Affected Public: Public elementary and secondary school systems or districts with 100 or more employees within the 50 U.S. states and District of Columbia.

Responses: 7082 per biennial collection.

Reporting Hours: 120,901.07 per biennial collection.

Burden Hour Cost: $4,055,001.76 per biennial collection.

Federal Cost: $240,120.85 per biennial collection.

Number of Forms: 1.

Form Number: EEOC Form 168A.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes by regulation or order. Accordingly, the EEOC issued regulations, 29 CFR 1602.39 and .41-.45, prescribing the reporting and related record retention requirements for public elementary and secondary school systems or districts. 29 CFR 1602.39 requires school districts to make or keep all records necessary for completion of an EEO–5 submission and retain those records for three years. 29 CFR 1602.41 requires EEO–5 filers to retain a copy of each filed EEO–5 report for three years. These requirements are related to record keeping which is part of standard administrative practices, and as a result, the EEOC believes that any impact on burden would be negligible and nearly impossible to quantify. Public elementary and secondary school systems or districts with 100 or more employees within the 50 U.S. states and District of Columbia were required to submit EEO–5 reports annually from 1974 to 1981 and then biennially in even years from 1982 to the present. The individual reports are confidential. The EEOC uses EEO–5 data to investigate charges of employment discrimination against public elementary and secondary school systems or districts. The data are also used for research. The data are shared with the Department of Education (Office for Civil Rights) and the Department of Justice.

Burden Statement: The EEOC has updated its methodology for calculating annual burden to reflect the different staff responsible for preparing and filing the EEO–5. The EEOC's revised burden estimate reflects that the bulk of the work in biennially preparing an EEO–5 report is performed by computer support specialists, executive administrative staff, and payroll and human resource professionals; the revised estimate also includes time spent by school district finance professionals and superintendents who, in a few cases, may consult briefly during the reporting process. After accounting for the time spent by the various employees who have a role in preparing an EEO–5, the EEOC estimates that a school district will spend 17.07 hours to prepare the report and estimates that the aggregate biennial hour burden for all respondents is 120,901.07. The cost associated with the burden hours was calculated using hourly wage rates obtained from the Department of Labor [1] for each job identified above as participating in the submission of the report; using those rates, we estimate that the burden hour cost per school district will be approximately $572.58, while the estimated total biennial burden cost for all 7,082 school districts will be $4,055,001.76 (See Table 1 for calculations).

[1] Median hourly wage rates were obtained from the Bureau of Labor Statistics (see U.S. Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, *http://www/bls.gov/ooh/*).

TABLE 1–ESTIMATE OF BIENNIAL BURDEN FOR EEO–5 REPORT

School district staff	Hourly wage rate	Burden hours per district [a]	Burden cost per district	Total burden hours	Total burden hour cost
N = 7,082					
Computer Support Specialist (IT Professional/Data Processing Specialist)	26.33	3.43	$90.28	24,281.35	$639,327.82
Director of School Finance (Financial Managers)	62.45	0.14	8.92	1,012.02	63,200.51
Executive Clerical Staff	26.35	2.93	77.17	20,740.35	546,508.10
Human Resource Specialist	29.77	5.43	161.61	38,445.35	1,144,517.93
Payroll Specialist	19.49	1.43	27.84	10,117.35	197,187.06
Senior Human Resource Managers	56.11	3.43	192.38	24,281.35	1,362,426.28
Superintendent (School Management Occupations)	50.33	0.29	14.38	2,023.33	101,834.07
Total		17.07	572.58	120,901.07	4,055,001.76

Note: Burden Hours per district were determined through interviews with a stratified heterogeneous mixture of school districts used to estimate burden, as approved in the 2018 Paperwork Reduction Act.
[a]Burden Hours are rounded to the tenth decimal place in this publication.

Estimates are based on the assumption of some paper reporting. During the 2018 EEO–5 filing period, the EEOC experienced a 49.8 percent increase in paper filing since the 2016 EEO–5 report filing. Despite the increase, paper filing represents 3.3 percent of total reports received in 2018. Electronic filing remains the most efficient, accurate, and secure means of reporting for respondents required to submit the EEO–5 report. The EEOC has made electronic filing much easier for respondents required to file the EEO–5 Report and as a result, more respondents are using this electronic filing method. Accordingly, the EEOC will continue to encourage EEO–5 filers to submit data through electronic filing, and will only accept paper records from filers who have secured permission to submit data via paper submission.

For the Commission.

Janet Dhillon,

Chair.

[FR Doc. 2020–25564 Filed 11–18–20; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Existing Collection

AGENCY: Equal Employment Opportunity Commission.

ACTION: 60-Day Notice of Information Collection—Extension without change of a currently approved collection Local Union Report (EEO–3) and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Equal Employment Opportunity Commission (EEOC or Commission) announces that it intends to submit to the Office of Management and Budget (OMB) a request for a three-year extension without change of the existing Local Union Report (EEO–3) (Form 274) as described below.

DATES: Written comments on this notice are encouraged and must be submitted on or before January 19, 2021.

ADDRESSES: You may submit comments by any of the following methods—please use only one method:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions on the website for submitting comments.

Mail: Comments may be submitted by mail to Bernadette B. Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

Fax: Comments totaling six or fewer pages can be sent by facsimile (''fax'') machine to (202) 663–4114. (This is not a toll-free number.) Receipt of fax transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or 800–669–6820 (TTY). (These are not toll-free telephone numbers.)

Instructions: All comments received must include the agency name and docket number and will be posted without change to *http://www.regulations.gov,* including any personal information provided. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products.

Although copies of comments received are usually also available for review at the Commission's library, given the EEOC's current 100% telework status due to the Coronavirus Disease 2019 (COVID–19) public health emergency, the Commission's library is closed until further notice. Once the Commission's library is re-opened, copies of comments received in response to the proposed rule will be made available for viewing by appointment only at 131 M Street NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Rashida Dorsey, Employer Data Team, Data Development and Information Products Division, Equal Employment Opportunity Commission, 131 M Street NE, Room 4SW32J, Washington, DC 20507; (202) 663–4355 (voice), (202) 663–7063 (TTY) or email at *Rashida.dorsey@eeoc.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act and OMB regulation 5 CFR 1320.8(d)(1), the Commission solicits public comment to enable it to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the Commission's functions, including whether the information will have practical utility; (2) Evaluate the accuracy of the Commission'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 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 Information Collection

Collection Title: Local Union Report (EEO–3).

OMB Number: 3046–0006.

Frequency of Report: Biennial.

Type of Respondent: Local referral unions with 100 or more members.

Description of Affected Public: Local referral unions and independent or unaffiliated referral unions and similar labor organizations.

Responses: 1,100 [1] per biennial collection.

Reporting Hours: 2,252 per biennial collection.

Burden Hour Cost: $70,415.95 per biennial collection.

Federal Cost: $390,120.85 per biennial collection.

Number of Forms: 1.

Form Number: EEOC Form 274.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), requires labor organizations to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed and produce reports required by the EEOC. Accordingly, the EEOC has issued regulations, 29 CFR 1602.22-.28, which set forth the reporting requirements and record retention policies for various kinds of labor organizations. 29 CFR 1602.22 requires every local union to retain the most recent report filed, and 29 CFR 1602.27-.28 require filers to make records necessary for completion of the EEO–3 and preserve them for a year (or if a charge of discrimination is filed, relevant records must be retained until final disposition of the matter). 29 CFR 1602.22 and 1602.27-.28 are related to record keeping which is part of standard administrative practices, and as a result, the EEOC believes that any impact on burden would be negligible and nearly impossible to quantify. Local referral local unions with 100 or more members have been required to submit EEO–3 reports since 1967 (biennially since 1985). The EEOC uses EEO–3 data for research and to investigate charges of discrimination. The individual reports are confidential.

Burden Statement: The methodology for calculating annual burden reflects the different staff that are responsible for preparing and filing the EEO–3. These estimates stem from a limited study that was conducted in 2015 with nine EEO–3 respondents. The EEOC accounts for time to be spent biennially on EEO–3 reporting by business agents and administrative staff, as well as time spent by attorneys who, in a few cases, may consult briefly during the reporting process. The estimated number of respondents included in the biennial EEO–3 survey is 1,100 local referral unions, as this is the approximate number of filers from the 2018 reporting cycle. The estimated hour burden per report will be 2.05 hours, and the estimated total biennial respondent burden hours will be 2,251.80. Burden hour cost was calculated using median hourly wage rates for administrative staff and legal counsel, and average hourly wage rates for labor union business agents.[2]

The burden hour cost per report will be $67.33, and the estimated total biennial burden hour cost per biennial collection will be $73,842.75 (See Table 1 for calculations).

TABLE 1—ESTIMATE OF BIENNIAL BURDEN FOR EEO–3 REPORT

Local referral union staff	Hourly wage rate[a]	Hours per local	Cost per local	Total burden hours	Total burden hour cost
Secretaries and Administrative Assistants	$18.84	1	$18.84	1,100	$20,724.00
Business Agent	45.00	1	45.00	1,100	49,500.00
Corporate Legal Counsel	69.86	0.05	3.49	55	191.95
Total		2.05	67.33	2,251.80	70,415.95

Note: A limited study was conducted by the EEOC of local referral union EEO–3 respondents. The methodology included surveying nine local referral union respondents by asking a series of survey questions approved by the EEOC's Office of Legal Counsel regarding the type of local union staff involved in submitting EEO–3 data. The EEOC asked responding study participants to estimate how long on average it took identified local union staff members to complete the EEO–3 report and what proportion of that time was allocated to each staff member job title. The burden hours per local union by job title, 2.05, is estimated based on filer responses. The results of the study were published in the Final Notice of Submission for OMB Review—Extension Without Change: Local Union Report (EEO–3) on January 24, 2017: *https://www.federalregister.gov/documents/2017/01/24/2017-01558/agency-information-collection-activities-proposed-collection-submission-for-omb-review.*

[a] Hourly wage rates for administrative staff and legal counsel were obtained from the Bureau of Labor Statistics, May 2019 (see U.S. Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, *https://www.bls.gov/oes/current/oes_stru.htm*) and the average hourly wage rate for a labor union business agent was obtained from salaryexpert.com (see *https://www.salaryexpert.com/salary/job/labor-union-business-agent/united-states*).

These estimates are based upon filers' use of the EEO–3 online filing system to submit reports. The EEOC has made electronic submission much easier for respondents required to file the EEO–3 Report. During the 2018 EEO–3 data collection cycle, approximately 1,100 local referral unions were identified as being eligible to report EEO–3 data, and all but 31 of the 975 responsive EEO–3 filers submitted their data electronically. Electronic filing remains the most efficient, accurate, and secure means of reporting for respondents required to submit the EEO–3 report. The EEOC has made electronic filing much easier for respondents required to file the EEO–3 report and as a result, more respondents are using this electronic filing method. Accordingly, the EEOC will continue to encourage EEO–3 filers to submit data through electronic filing, and will only accept paper records from filers who have secured permission to submit data via paper submission.

For the Commission.

Janet Dhillon,

Chair.

[FR Doc. 2020–25565 Filed 11–18–20; 8:45 am]

BILLING CODE 6570–01–P

[1] This figure is based on the total number of respondents who were eligible to submit EEO–3 data in 2018, which is the most recently completed EEO–3 data year.

EXPORT-IMPORT BANK

[Public Notice EIB–2020–0010]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 million: AP089390XX

AGENCY: Export-Import Bank of the United States.

ACTION: Notice.

SUMMARY: This Notice is to inform the public, in accordance with Section 3(c)(10) of the Export-Import Bank Act of 1945, as amended, that the Export-Import Bank of the United States (''EXIM'') has received an application for final commitment for a long-term loan or financial guarantee in excess of $100 million. Comments received within the comment period specified below will be presented to the EXIM Board of Directors prior to final action on this Transaction.

Reference: AP089390XX.

Purpose and Use: Brief description of the purpose of the transaction:

To support the export of U.S.-manufactured commercial aircraft to Panama.

Brief non-proprietary description of the anticipated use of the items being exported: To be used for passenger air transport between various countries in the Americas.

To the extent that EXIM is reasonably aware, the item(s) being exported are not expected to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties:

Principal Supplier: The Boeing Company

Obligor: Compania Panamena de Aviacion, S.A., Panama

Guarantor(s): Copa Holdings, S.A; AeroRepublica, Colombia; Oval Financing Leasing, Ltd., British Virgin Islands; and La Nueva Aerolinea, S.A., Panama

Description of Items Being Exported: Boeing commercial jet aircraft.

Information on Decision: Information on the final decision for this transaction will be available in the ''Summary Minutes of Meetings of Board of Directors'' on *http://exim.gov/newsandevents/boardmeetings/board/*.

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

DATES: Comments must be received on or before December 14, 2020 to be assured of consideration before final consideration of the transaction by the Board of Directors of EXIM.

ADDRESSES: Comments may be submitted through *Regulations.gov* at *WWW.REGULATIONS.GOV.* To submit a comment, EIB–2020–0010 under the heading ''Enter Keyword or ID'' and select Search. Follow the instructions provided at the Submit a Comment screen. Please include your name, company name (if any) and EIB–2020–0010 on any attached document.

Bassam Doughman,

IT Specialist.

[FR Doc. 2020–25554 Filed 11–18–20; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

Sunshine Act Meetings

Notice of Open Meeting of the Advisory Committee of the Export-Import Bank of the United States (EXIM)

TIME AND DATE: Wednesday, December 2, 2020 from 2:00–4:00 p.m. EST.

PLACE: The meeting will be held virtually.

STATUS: Public Participation: The meeting will be open to public participation and time will be allotted for questions or comments submitted online. Members of the public may also file written statements before or after the meeting to *external@exim.gov.* Interested parties may register for the meeting at *https://www.exim.gov/register-attend-0.*

MATTERS TO BE CONSIDERED: Discussion of EXIM policies and programs to provide competitive financing to expand United States exports.

CONTACT PERSON FOR MORE INFORMATION: For further information, contact Brittany J. Walker, Deputy to the Senior Vice President for External Engagement, at 202–565–3216.

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2020–25644 Filed 11–17–20; 11:15 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[GN Docket No. 17–83; FRS 17248]

Meeting of the Broadband Deployment Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the FCC announces and provides an agenda for the next meeting of the Broadband Deployment Advisory Committee (BDAC), which will be held via live internet link.

DATES: December 17, 2020. The meeting will come to order at 11 a.m.

ADDRESSES: The Meeting will be held via conference call and available to the public via WebEx at *http://www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Justin L. Faulb, Designated Federal Authority (DFO) of the BDAC, at *Justin.Faulb@fcc.gov* or 202–418–1589; Zachary Ross, Deputy DFO of the BDAC, at *Zachary.Ross@fcc.gov* or 202–418–1033; or Belinda Nixon, Deputy DFO of the BDAC, at 202–418–1382, or *Belinda.Nixon@fcc.gov.* The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: The BDAC meeting is open to the public on the internet via live feed from the FCC's web page at *http://www.fcc.gov/live.* Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way for the FCC to contact the requester if more information is needed to fill the request. Please allow at least five days' advance notice for accommodation requests; last minute requests will be accepted, but may not be possible to accommodate. Oral statements at the meeting by parties or entities not represented on the BDAC will be permitted to the extent time permits, at the discretion of the BDAC Chair and the DFO. Members of the public may submit comments to the BDAC in the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the BDAC should be filed in Docket 17–83.

Proposed Agenda: At this meeting, the BDAC will consider and vote on a

report and recommendation from the Increasing Broadband Investment in Low-Income Communities working group, and hear any other updates from the BDAC. This agenda may be modified at the discretion of the BDAC Chair and the Designated Federal Officer (DFO).

(5 U.S.C. App 2 § 10(a)(2))

Federal Communications Commission.

Pamela Arluk,

Chief, Competition Policy Division, Wireline Competition Bureau.

[FR Doc. 2020–25544 Filed 11–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 20–1269; FRS 17247]

Media Bureau Lifts Freeze on the Filing of Television Station Minor Modification Applications and Rulemaking Petitions; Correction

AGENCY: Federal Communications Commission.

ACTION: Notice; correction.

SUMMARY: The Federal Communications Commission published a document into the **Federal Register** of November 12, 2020, announcing the effective date that filing freezes will be lifted on petitions for rulemaking to change channels in the DTV Table of Allotments, petitions for rulemaking for new DTV allotments, petitions for rulemaking to change communities of license, including changes in technical parameters, and modification applications that increase a full power or Class A station's service area beyond an area that is already served. The document contained an incorrect effective date.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, Video Division, Media Bureau, Federal Communications Commission, *Joyce.Bernstein@fcc.gov,* (202) 418–1645.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of November 12, 2020, in FR Vol. 85, No. 219, on page 71894, in the second column, correct the ''Dates'' caption to read:

Dates: The filing freezes will be lifted effective November 27, 2020.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2020–25566 Filed 11–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than December 21, 2020.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Independence Bancshares, Inc., Independence, Iowa;* to acquire First State Bank, Sumner, Iowa.

Board of Governors of the Federal Reserve System, November 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–25547 Filed 11–18–20; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision the Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks (FR 2225; OMB No. 7100–0216). The revisions are applicable as of October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files. These documents also are available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are placed into OMB's public docket files.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Report title: Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks.

Agency form number: FR 2225.

OMB control number: 7100–0216.

Effective date: October 1, 2020.

Frequency: Annually.

Respondents: Foreign banking organizations (FBOs).

Estimated number of respondents: 51.

Estimated average hours per response: 1.

Estimated annual burden hours: 51.

General description of report: The FR 2225 is required for FBOs that wish to and are eligible to establish a non-zero net debit cap for their U.S. branches and agencies under the Federal Reserve Policy on Payment System Risk (PSR policy). The FR 2225 reporting form collects information needed to identify the respondent and its fiscal year-end, and collects four items to determine its year-end capital and assets for purposes of daylight overdraft monitoring. The four items, converted into U.S. dollars collected for the capital and assets determination, are: Worldwide capital for the reporting FBO (item 1); an adjustment to avoid double counting of capital used by any direct or indirect subsidiary of the FBO that also has access to Fedwire and has its own net debit cap (item 2); the FBO's total daylight overdraft capital base for the U.S. branch and agency family (item 3), which is used to calculate the net debit cap; and the reporting FBO's total worldwide assets (item 4). The Reserve Banks use items 1 and 2 as supplemental information to clarify the data reported in item 3. Federal Reserve staff use the assets data reported in item 4 for analytical purposes.

Legal authorization and confidentiality: This information collection is authorized pursuant to section 7(a) of the International Banking Act, 12 U.S.C. 3105(a), which establishes reserve requirements for U.S. branches and agencies of foreign banks, and pursuant to section 13(14) of the Federal Reserve Act (FRA), 12 U.S.C. 347d, which provides that ''each Federal Reserve bank may receive deposits from, discount paper endorsed by, and make advances to any branch or agency of a foreign bank in the same manner and to the same extent that it may exercise such powers with respect to a member bank if such branch or agency is maintaining reserves with such Reserve bank pursuant to section 7 of the International Banking Act of 1978.'' In addition, sections 11(i), 16, and 19(f) of the FRA, 12 U.S.C. 248(i), 248–1, and 464, continue to provide authority for the collection of the FR 2225. The obligation to respond is required to obtain a benefit (*i.e.,* this information is required in order for an FBO to establish a non-zero net debit cap so that its U.S. branches or agencies may be eligible for intraday credit).

The Board does not consider the information collected on the FR 2225 report to be confidential, and the completed version of this report generally is made available to the public upon request. However, in certain instances, specific information collected on an individual FBO's FR 2225 report may be exempt from disclosure pursuant to exemption 4 of the Freedom of Information Act (FOIA), which protects from public disclosure ''trade secrets and commercial or financial information obtained from a person and privileged or confidential'' (5 U.S.C. 552(b)(4)). A request for confidential treatment must be submitted by the FBO in writing concurrently with the submission of the FR 2225 report. This written request must identify the specific data for which confidential treatment is sought and must provide the legal justification for the confidentiality request, as provided in the Board's Rules Regarding Availability of Information (12 CFR part 261). The Federal Reserve will review each confidential treatment request on a case-by-case basis to determine if confidential treatment is appropriate. Under the Board's current rules, the Federal Reserve may subsequently release information for which confidential treatment was requested, if (1) disclosure of such information is required by law (other than 5 U.S.C. 552); (2) the request for confidential treatment (''request'') was made by the FBO pursuant to 5 U.S.C. 552(b)(4) and more than 10 years have passed since the request; or (3) less than 10 years have passed since the request, but the Board believes that the information cannot be withheld from disclosure under 5 U.S.C. 552(b)(4), and the FBO is provided with written notice of the Board's views and with an opportunity to object to the Board's disclosure.

Current actions: On June 29, 2020, the Board published a notice in the **Federal Register** (85 FR 38896) requesting public comment for 60 days on the extension, with revision, of the Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks. The Board revised the instructions to remove references to an FBO's strength of support assessment (SOSA) ranking and its status as a financial holding company (FHC). These changes are related to the revisions to the PSR policy, which the Board implemented on April 1, 2019, and which will take effect on October 1, 2020. The SOSA ranking and FHC status are no longer used for determining an FBO's eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The comment period for this notice expired on August 28, 2020. The Board did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, November 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–25583 Filed 11–18–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Quarterly Report of Interest Rates on Selected Direct Consumer Installment Loans and the Quarterly Report of Credit Card Plans.

DATES: Comments must be submitted on or before January 19, 2021.

ADDRESSES: You may submit comments, identified by *FR 2835 or FR 2835a,* by any of the following methods:

- Agency website: *https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security

screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be available at *https://www.reginfo.gov/public/do/PRAMain,* if approved. These documents will also be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection

Report title: Quarterly Report of Interest Rates on Selected Direct Consumer Installment Loans and Quarterly Report of Credit Card Plans.

Agency form number: FR 2835; FR 2835a.

OMB control number: 7100–0085.

Frequency: Quarterly.

Respondents: Commercial banks.

Estimated number of respondents: FR 2835: 150; FR 2835a: 50.

Estimated average hours per response: FR 2835: .29; FR 2835a: .50.

Estimated annual burden hours: FR 2835: 176; FR 2835a: 100.

General description of report: The FR 2835 collects information from a sample of commercial banks on interest rates charged on loans for new vehicles and loans for other consumer goods and personal expenses. The FR 2835a collects information on two measures of credit card interest rates from a sample of commercial banks with $1 billion or more in credit card receivables and a representative group of smaller issuers. The data from these reports help the Board analyze current household financial conditions and the implications of these conditions for household spending and, as such, these data provide valuable input to the monetary policymaking process.

Legal authorization and confidentiality: The FR 2835 and the FR 2835a are authorized by sections 2A and 11 of the Federal Reserve Act (''FRA''). Section 2A of the FRA requires that the Board and the Federal Open Market Committee maintain long-run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.[1] Section 11 of the FRA authorizes the Board to require reports from each member bank as it may deem necessary and authorizes the Board to prescribe reports of liabilities and assets from insured depository institutions to enable the Board to discharge its responsibility to monitor and control monetary and credit aggregates.[2] The obligation to respond to both the FR 2835 and FR 2835a is voluntary.

Most of the information collected through the FR 2835 is not considered confidential; however, to the extent narrative information submitted to explain large fluctuations in reported data contains nonpublic commercial or financial information, which is both customarily and actually treated as private by the respondent, such information may be kept confidential pursuant to exemption 4 of the Freedom of Information Act (FOIA).[3] Individual respondent data collected through the FR 2835a may be considered confidential pursuant to FOIA exemption 4 to the extent the response contains nonpublic commercial or financial information, which is both customarily and actually treated as private by the respondent.[4]

Board of Governors of the Federal Reserve System, November 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–25581 Filed 11–18–20; 8:45 am]

BILLING CODE 6210–01–P

[1] 12 U.S.C. 225a.

[2] 12 U.S.C. 248(a).

[3] 5 U.S.C. 552(b)(4).

[4] 5 U.S.C. 552(b)(4).

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Government-Administered, General-Use Prepaid Card Surveys.

DATES: Comments must be submitted on or before January 19, 2021.

ADDRESSES: You may submit comments, identified by FR 3063, by any of the following methods:

- *Agency Website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be available at *https://www.reginfo.gov/public/do/PRAMain,* if approved. These documents will also be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, With Revision, the Following Information Collection

Report title: Government-Administered, General-Use Prepaid Card Surveys.

Agency form number: FR 3063.

OMB control number: 7100–0343.

Frequency: Annually.

Respondents: Depository institutions that administer general-use prepaid cards.

Estimated number of respondents: 15.

Estimated average hours per response: 10.

Estimated annual burden hours: 150.

General description of report: The issuer survey (FR 3063a) collects data from issuers of government-administered, general-use prepaid cards including information on the pre-paid card program, the number of cards outstanding, card funding, ATM transactions, purchase transactions, fees paid by issuers to third parties, interchange fees, and cardholder fees. The issuer survey (FR 3063a) is mandatory. The government survey (FR 3063b), which is being discontinued, was originally designed to collect data from state governments, the District of Columbia, and U.S. territories (collectively ''state governments''), and municipal government offices located within the United States (local government offices) that administer general-use prepaid card payment programs. It was intended that the FR 3063b survey would collect similar information from state governments and local government offices to supplement the information collected from card issuers in the FR 3063a survey on the usage of general-use prepaid cards in federal, state or local government-administered payment programs. However, the government survey was voluntary and, ultimately, did not end up being utilized to collect information from state governments or local government offices because relevant information on the use of prepaid cards was obtained from the issuer survey.

The Board uses data from the FR 3063a survey to support an annual report to Congress on the prevalence of use of general-use prepaid cards in federal, state, and local government-administered payment programs and on the interchange and cardholder fees charged with respect to such use of such cards.

Proposed revisions: The Board proposes to revise and streamline the FR 3063a reporting structure to reduce burden on respondents by deleting various questions, which are no longer necessary to support the Board's annual report. The Board believes that the proposed structure would reduce reporting burden without significantly compromising the value of the data collected. The proposed revisions to the FR 3063a would be effective for the data collection administered during the first half of 2021 for calendar year 2020 data. In addition, the Board proposes to discontinue the FR 3063b.

Legal authorization and confidentiality: The issuer survey is authorized by subsection 920(a)(7) of the Electronic Fund Transfer Act, 15 U.S.C. 1693o–2(a)(7), which was added by section 1075(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. This subsection requires the Board to submit an annual report to Congress on the prevalence of the use of general-use prepaid cards in federal, state or local government-administered payment programs and the interchange transaction fees and card-holder fees charged with respect to the use of such general-use prepaid cards (15 U.S.C. 1693o–2(a)(7)(D)). It also provides the Board with authority to require issuers

to provide information to enable the Board to carry out the provisions of the subsection (15 U.S.C. 1693o–2(a)(3)(B)). The obligation of issuers to respond to the issuer survey is mandatory. The Board generally regards the information collected from each individual issuer on the FR 3063a survey as confidential commercial and financial information, which is protected by exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)). The Board, however, may publicly release aggregate or summary information in a way that does not reveal the individual issuer.

Board of Governors of the Federal Reserve System, November 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–25582 Filed 11–18–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than December 4, 2020.

A. Federal Reserve Bank of Atlanta (Kathryn Haney, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org*:

1. *Jeremy Francis Gilpin, South Lake Tahoe, California, and Jeffrey Alan Smith, Atlanta, Georgia, as a group acting in concert;* to acquire voting shares of Community Bankshares, Inc., and thereby indirectly acquire voting shares of Community Bank and Trust—West Georgia, both of LaGrange, Georgia.

B. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Elizabeth L. Morgan, Austin, Texas, as trust protector of fifteen trusts associated with Mr. James W. Collins, McAllen, Texas;* to acquire control of voting shares of VBT Financial Corporation, and thereby indirectly acquire control of voting shares of Vantage Bank Texas, both of San Antonio, Texas.

Board of Governors of the Federal Reserve System, November 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–25569 Filed 11–18–20; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Integrated Pain Management Programs

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for Supplemental Evidence and Data Submissions.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Integrated Pain Management Programs,* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: Submission Deadline on or before December 21, 2020.

ADDRESSES:

Email submissions: epc@ahrq.hhs.gov.

Print submissions:

Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.

Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Jenae Benns, Telephone: 301–427–1496 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *Integrated Pain Management Programs.* AHRQ is conducting this systematic review pursuant to Section 902 of the Public Health Service Act, 42 U.S.C. 299a.

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *Integrated Pain Management Programs,* including those that describe adverse events. The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/integrated-pain-management/protocol.*

This is to notify the public that the EPC Program would find the following information on Integrated Pain Management Programs helpful:

- A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov* trial number.
- *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.
- *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion

criteria, and primary and secondary outcomes.

▪ Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

Key Questions (KQs)

KQ1: What are the effectiveness and harms of integrated or comprehensive pain management programs for Medicare beneficiaries with complex acute/subacute pain or chronic, non-active cancer pain? Population subgroups of interest include those with disabilities (including ESRD), prior substance use disorder, psychological co-morbidities (including suicidal behaviors), and degree of nociplasticity.

KQ2: Have any of the following factors been evaluated and/or shown to impact outcomes in studies of comprehensive or integrated pain management models?

a. *Treatment delivery* including session formats (group, one-on-one), duration, intensity and frequency of sessions, number of sessions; general structure and scope of sessions.

b. *Treatment components* (*e.g.,* medication review and/or management, including transition from opioid to nonopioid medications; psychological support or mental health services; physical reconditioning, such as physical therapy and occupational therapy; use of complementary and integrative medicine treatments; patient education; use of medical procedures or devices).

c. *Care provision.*

i. Care coordination methods or decision support
ii. Provider types involved
iii. Personalization, care pathways

d. *Program characteristics.*

i. Program emphasis/goals
ii. Target population
iii. Referral sources
iv. Staffing characteristics (*e.g.,* turn over)

PICOTS (POPULATIONS, INTERVENTIONS, COMPARATORS, OUTCOMES, TIMING, SETTINGS)

PICOTS	Inclusion	Exclusion
Population	Medicare beneficiaries (*i.e.,* adults ≥65 years old and those under 65 years old who qualify for Medicare due to disability including ESRD) with complex acute/subacute pain[a] or chronic non-active cancer pain.[b] In the absence of publications in Medicare populations, studies of adults with these types of pain will be considered. Population subgroups of interest include those with disabilities (including ESRD), prior substance use disorder, psychological co-morbidities (including suicidal behaviors), degree of nociplasticity.[c]	• Patients undergoing end-of-life care, terminally ill (*e.g.,* hospice) patients; those under supervised palliative care. • Young, non-disabled populations.
Intervention	Pain management programs that address the bio-psychosocial model of pain and include: • Multidisciplinary (interdisciplinary) teams that at a minimum have the following components available: Pharmacotherapy review and/or management, psychological care (mental health services), and physical reconditioning (*e.g.,* PT, OT); studies may also include other components in addition to these; *and* • Description of care coordination, case management or mechanisms of multidisciplinary, interdisciplinary collaboration and communication. Integrated pain management programs (IPMPs) will be defined as those that include the above and are based in primary care. Comprehensive pain management programs (CPMPs) will be defined as those including the above but are not based in primary care.	• Unimodal pain management. • Pain management confined to a single provider type, practice, or isolated method of management. • Programs focused on functional restoration and/or occupational health focused on return to work such as work hardening programs, unless they are specifically done in a Medicare eligible population or are clearly applicable to the Medicare population. • Programs in very young and non-disabled populations (*e.g.,* military populations). • Studies evaluating incremental value of adding a single treatment modality to another single treatment modality (*e.g.,* addition of CBT to PT). • Post-operative or post-trauma rehabilitation programs.
Comparator	Any.	None.
Outcome	Patient oriented outcomes: • *Primary:* Pain, function (focus on "success" if reported), opioid use. • *Secondary:* HRQOL, emotional function (*e.g.,* depression, anxiety), patient satisfaction, global improvement. Harms, adverse events, unintended consequences Program-related outcomes: • Utilization (*e.g.,* pain-related hospital/ED visits or short-term skilled nursing facility use, long term care facility or institutional care transfer, Medicaid enrollment).	Patient-oriented outcomes: • Non-validated instruments for outcomes (*e.g.,* pain, function, HRQOL, depression, etc.) • Intermediate outcomes (*e.g.,* range of motion, physical strength, etc.).

PICOTS (POPULATIONS, INTERVENTIONS, COMPARATORS, OUTCOMES, TIMING, SETTINGS)—Continued

PICOTS	Inclusion	Exclusion
Timing	Duration of follow up: Focus on persistence of effects evaluated short term (1 to <6 months), intermediate term (≥6 to <12 months) and long term (≥12 months) following intervention.	
Setting	Outpatient, inpatient, institutional residence.	• Inpatient or outpatient settings exclusively providing treatment for SUD/OUD or tertiary care, hospice, or similar settings.
Study design, publication type.	Inclusion will focus on RCTs. Prospective cohort studies that control for confounding will be considered if RCTs are not available. Comparative cohorts that do not control for confounding will be considered if cohorts controlling for confounding are not available. In the absence of comparative studies, single arm (*e.g.,* case series, pre-post studies) will be considered if they are clearly relevant to the Medicare population.	• Case reports. • Case series (unless no comparative studies). • Case-control studies, cross-sectional studies. • Conference proceedings, editorials, letters, white papers, citations that have not been peer-reviewed.

CBT = Cognitive Behavioral Therapy; ED = emergency department; ESDR = end stage renal disease; HRQOL = Health-related quality of life; OT = occupational therapy; OUD = opioid use disorder; PICOTS = population, intervention, comparator, outcomes, timing, study design; PT = physical therapy; RCT = randomized control trial; SUD = substance use disorder.

[a] Complex acute or subacute pain: Patients with acute pain (<6 weeks duration) or subacute pain (6 weeks to 12 weeks duration) who are at risk of developing chronic pain).

[b] Chronic, nonactive cancer pain (based on Mersky 1994): Pain that persists for at least three months and is not associated with [active] malignant disease''; pain could, however, be resultant from a previous malignancy that is no longer active.

[c] The term nociplasticity has been used to describe pain resulting from altered nociception without underlying tissue damage resulting in hypersensitivity (*e.g.,* fibromyalgia). Many pain conditions may have a nociplastic component. Some additional terms used in the literature include centralized pain and amplified pain.

Dated: November 13, 2020.

Marquita Cullom,

Associate Director.

[FR Doc. 2020–25451 Filed 11–18–20; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2020–0117]

Advisory Committee on Immunization Practices (ACIP)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC), announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. Time will be available for public comment. The meeting will be webcast live via the World Wide Web.

DATES: The meeting will be held on November 23, 2020 from 12:00 p.m. to 5:00 p.m., EST (times subject to change).

Written comments must be received on or before November 23, 2020.

ADDRESSES: For more information on ACIP please visit the ACIP website: *http://www.cdc.gov/vaccines/acip/index.html.*

You may submit comments, identified by Docket No. CDC–2020–0117 by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

• Mail: Docket No. CDC–2020–0117, c/o Attn: November 23, 2020 ACIP Meeting, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H24–8, Atlanta, GA 30329–4027.

Instructions: All submissions received must include the Agency name and Docket Number. All relevant comments received in conformance with the *https://www.regulations.gov* suitability policy will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

Written public comments submitted by 24 hours prior to the ACIP meeting will be provided to ACIP members before the meeting.

FOR FURTHER INFORMATION CONTACT: Stephanie Thomas, ACIP Committee Management Specialist, Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases, 1600 Clifton Road, NE, MS–H24–8, Atlanta, GA 30329–4027; Telephone: 404–639–8367; Email: *ACIP@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The committee is charged with advising the Director, CDC, on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under provisions of the Affordable Care Act, section 2713 of the Public Health Service Act, immunization recommendations of the ACIP that have been approved by the Director of the Centers for Disease Control and Prevention and appear on CDC immunization schedules must be covered by applicable health plans.

Matters To Be Considered: The agenda will include discussions on COVID–19 vaccines. No recommendation vote is scheduled for COVID–19 vaccines. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda visit *https://www.cdc.gov/vaccines/acip/meetings/meetings-info.html.*

Meeting Information: The meeting will be webcast live via the World Wide Web; for more information on ACIP please visit the ACIP website: *http://www.cdc.gov/vaccines/acip/index.html.*

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials are part of the public record and are subject to

public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket. CDC does not accept comment by email.

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the November ACIP meeting must submit a request at *http://www.cdc.gov/vaccines/acip/meetings/* no later than 11:59 p.m., EST, November 19, 2020 according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by November 20, 2020. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to 3 minutes, and each speaker may only speak once per meeting.

Written Public Comment: Written comments must be received on or before November 23, 2020.

In accordance with 41 CFR 102–3.150(b), less than 15 calendar days' notice is being given for this meeting due to the exceptional circumstances of the COVID–19 pandemic and rapidly evolving COVID–19 vaccine development and regulatory processes. A notice of this ACIP meeting has also been posted on the ACIP website at: *http://www.cdc.gov/vaccines/acip/index.html.*

In the interest of promoting openness and transparency, we are publishing a late notice in the **Federal Register** to inform the public.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–25658 Filed 11–17–20; 4:15 pm]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–0666]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled National Healthcare Safety Network (NHSN) to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on June 15, 2020 to obtain comments from the public and affected agencies. CDC received two comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

National Healthcare Safety Network (NHSN) (OMB Control No. 0920–0666, Exp. 12/31/2022)—Revision—National Center for Emerging and Zoonotic Infection Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Division of Healthcare Quality Promotion (DHQP), National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC) collects data from healthcare facilities in the National Healthcare Safety Network (NHSN) under OMB Control Number 0920–0666. NHSN provides facilities, states, regions, and the nation with data necessary to identify problem areas, measure the progress of prevention efforts, and ultimately eliminate healthcare-associated infections (HAIs) nationwide. NHSN allows healthcare facilities to track blood safety errors and various healthcare-associated infection prevention practice methods such as healthcare personnel influenza vaccine status and corresponding infection control adherence rates. NHSN currently has six components:

Patient Safety (PS), Healthcare Personnel Safety (HPS), Biovigilance (BV), Long-Term Care Facility (LTCF), Outpatient Procedure (OPC), and the Dialysis Component. NHSN's planned

Neonatal Component is expected to launch during the winter of 2020/2021. This component will focus on premature neonates and the healthcare associated events that occur as a result of their prematurity. This component will be released with one module, which includes Late Onset-Sepsis and Meningitis. Late-onset sepsis (LOS) and Meningitis are common complications of extreme prematurity. These infections are usually serious, causing a prolongation of hospital stay, increased cost, and risk of morbidity and mortality. The data for this module will be electronically submitted, and manual data entry will not be available. This will allow more hospital personnel to be available to care for patients and will reduce annual burden across healthcare facilities. Additionally, LOS data will be utilized for prevention initiatives. Data reported under the Patient Safety Component are used to determine the magnitude of the healthcare-associated adverse events and trends in the rates of the events, in the distribution of pathogens, and in the adherence to prevention practices. Data will help detect changes in the epidemiology of adverse events resulting from new medical therapies and changing patient risks. Additionally, reported data is being used to describe the epidemiology of antimicrobial use and resistance and to better understand the relationship of antimicrobial therapy to this rising problem. Under the Healthcare Personnel Safety Component, protocols and data on events—both positive and adverse—are used to determine (1) the magnitude of adverse events in healthcare personnel, and (2) compliance with immunization and sharps injuries safety guidelines. Under the Biovigilance Component, data on adverse reactions and incidents associated with blood transfusions are reported and analyzed to provide national estimates of adverse reactions and incidents. Under the Long-Term Care Facility Component, data is captured from skilled nursing facilities. Reporting methods under the LTCF component have been created by using forms from the PS Component as a model with modifications to specifically address the specific characteristics of LTCF residents and the unique data needs of these facilities reporting into NHSN. A new form has been introduced for field testing—Respiratory Tract Infection (RTI)—not to be used by NHSN users, but as part of an EIP project with 4 EIP sites. Form title will be *Denominators for Healthcare Associated Infections (HAIs): Respiratory Tract Infections.* The purpose of this form is to allow testing prior to introducing a new module and forms to NHSN users. The CDC's Epidemiology Research & Innovations Branch (ERIB) team will use the form to perform field testing of variables to explore the utilization, applicability, and data collection burden associated with these variables. This process will inform areas of improvement prior to incorporating the new module, including protocol, forms, and instructions into NHSN. The estimated burden for this form is 20 minutes, which is based on a similar denominator form. The Dialysis Component offers a simplified user interface for dialysis users to streamline their data entry and analyses processes as well as provide options for expanding in the future to include dialysis surveillance in settings other than outpatient facilities. The Outpatient Procedure Component (OPC) gathers data on the impact of infections and outcomes related to operative procedures performed in Ambulatory Surgery Centers (ASCs). The OPC is used to monitor two event types: Same Day Outcome Measures and Surgical Site Infections (SSIs). NHSN has increasingly served as the operating system for HAI reporting compliance through legislation established by the states. As of April 2020, 36 states, the District of Columbia and the City of Philadelphia, Pennsylvania have opted to use NHSN as their primary system for mandated reporting. Reporting compliance is completed by healthcare facilities in their respective jurisdictions, with emphasis on those states and municipalities acquiring varying consequences for failure to use NHSN. Additionally, healthcare facilities in five U.S. territories (Puerto Rico, American Samoa, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) are voluntarily reporting to NHSN. Additional territories are projected to follow with similar use of NHSN for reporting purposes. NHSN's data is used to aid in the tracking of HAIs and guide infection prevention activities/practices that protect patients. The Centers for Medicare and Medicaid Services (CMS) and other payers use these data to determine incentives for performance at healthcare facilities across the US and surrounding territories, and members of the public may use some protected data to inform their selection among available providers. Each of these parties is dependent on the completeness and accuracy of the data. CDC and CMS work closely and are fully committed to ensuring complete and accurate reporting, which are critical for protecting patients and guiding national, state, and local prevention priorities. CMS collects some HAI data and healthcare personnel influenza vaccination summary data, which is done on a voluntary basis as part of its Fee-for-Service Medicare quality reporting programs, while others may report data required by a federal mandate. Facilities that fail to report quality measure data are subject to partial payment reduction in the applicable Medicare Fee-for-Service payment system. CMS links their quality reporting to payment for Medicare-eligible acute care hospitals, inpatient rehabilitation facilities, long-term acute care facilities, oncology hospitals, inpatient psychiatric facilities, dialysis facilities, and ambulatory surgery centers. Facilities report HAI data and healthcare personnel influenza vaccination summary data to CMS via NHSN as part of CMS's quality reporting programs to receive full payment. Still, many healthcare facilities, even in states without HAI reporting legislation, submit limited HAI data to NHSN voluntarily. NHSN's data collection updates continue to support the incentive programs managed by CMS. For example, survey questions support requirements for CMS' quality reporting programs. Additionally, CDC has collaborated with CMS on a voluntary National Nursing Home Quality Collaborative, which focuses on recruiting nursing homes to report HAI data to NHSN and to retain their continued participation. This project has resulted in a significant increase in long-term care facilities reporting to NHSN. The ICR previously approved in December of 2019 for 5,352,360 responses; 3,113,631 burden hours. The proposed changes in this new ICR include revisions to eight data collection forms and the addition of ten new forms for a total of 79 proposed data collection forms. In this Revision, CDC requests OMB approval for an estimated 1,321,443 annual burden hours.

The ICR previously approved in December of 2019 for 5,352,360 responses; 3,113,631 burden hours and $101,009,102 in annual cost, is due to expire on December 31, 2022. The reporting burden decreased by 1,792,188 hours for a total estimated burden of 1,321,443 hours. The annual cost of reporting will increase by $1,642,524 for a total cost burden of $102,651,626. The proposed changes in this new ICR include revisions to eight data collection forms and the addition

of two new forms for a total of 79 proposed data collection forms. In this Revision, CDC requests OMB approval for an estimated 1,321,443 annual burden hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Form No. & name	Number of respondents	Number of responses per respondent	Avg. burden per response (min./hour)	Total burden (hours)
57.100 NHSN Registration Form	2,000	1	5/60	167
57.101 Facility Contact Information	2,000	1	10/60	333
57.103 Patient Safety Component—Annual Hospital Survey	6,765	1	55/60	6,201
57.105 Group Contact Information	1,000	1	5/60	83
57.106 Patient Safety Monthly Reporting Plan	7,821	12	15/60	23,463
57.108 Primary Bloodstream Infection (BSI)	5,775	5	38/60	18,288
57.111 Pneumonia (PNEU)	1,800	2	30/60	18,288
57.112 Ventilator-Associated Event	5,463	8	28/60	20,395
57.113 Pediatric Ventilator-Associated Event (PedVAE)	334	1	30/60	167
57.114 Urinary Tract Infection (UTI)	6,000	5	20/60	10,000
57.115 Custom Event	600	91	35/60	31,850
57.116 Denominators for Neonatal Intensive Care Unit (NICU)	1,100	12	4/60	880
57.117 Denominators for Specialty Care Area (SCA)/Oncology (ONC)	500	12	5/60	503
57.118 Denominators for Intensive Care Unit (ICU)/Other locations (not NICU or SCA)	5,500	60	5/60	27,665
57.120 Surgical Site Infection (SSI)	6,000	9	35/60	31,500
57.121 Denominator for Procedure	6,000	602	10/60	602,000
57.122 HAI Progress Report State Health Department Survey	55	1	28/60	26
57.123 Antimicrobial Use and Resistance (AUR)-Microbiology Data Electronic Upload Specification Tables	2,500	12	5/60	1,500
57.124 Antimicrobial Use and Resistance (AUR)-Pharmacy Data Electronic Upload Specification Tables	2,000	12	5/60	2,000
57.125 Central Line Insertion Practices Adherence Monitoring	500	213	25/60	44,375
57.126 MDRO or CDI Infection Form	720	12	30/60	3,960
57.127 MDRO and CDI Prevention Process and Outcome Measures Monthly Monitoring	5,500	29	15/60	39,875
57.128 Laboratory-identified MDRO or CDI Event	4,800	79	20/60	126,400
57.129 Adult Sepsis	50	250	25/60	5,208
57.135 Late Onset Sepsis/Meningitis Denominator Form: Data Table for monthly electronic upload	300	12	5/60	300
57.136 Late Onset Sepsis/Meningitis Event Form: Data Table for Monthly Electronic Upload	300	4	5/60	100
57.137 Long-Term Care Facility Component—Annual Facility Survey	3,079	1	1/60	51
57.138 Laboratory-identified MDRO or CDI Event for LTCF	1,998	24	12/60	9,590
57.139 MDRO and CDI Prevention Process Measures Monthly Monitoring for LTCF	1,998	12	12/60	4,795
57.140 Urinary Tract Infection (UTI) for LTCF	339	12	12/60	814
57.141 Monthly Reporting Plan for LTCF	2,011	12	12/60	4,826
57.142 Denominators for LTCF Locations	339	12	250/60	814
57.143 Prevention Process Measures Monthly Monitoring for LTCF	130	12	12/60	312
57.150 LTAC Annual Survey	620	1	10/60	10
57.151 Rehab Annual Survey	1,340	1	10/60	625
57.200 Healthcare Personnel Safety Component Annual Facility Survey	50	1	480/60	400
57.203 Healthcare Personnel Safety Monthly Reporting Plan	.....	1	5/60	.....
57.204 Healthcare Worker Demographic Data	50	200	20/60	3,333
57.205 Exposure to Blood/Body Fluids	50	50	60/60	2,500
57.206 Healthcare Worker Prophylaxis/Treatment	50	30	15/60	375
57.207 Follow-Up Laboratory Testing	50	50	15/60	625
57.210 Healthcare Worker Prophylaxis/Treatment—Influenza	50	50	10/60	417
57.300 Hemovigilance Module Annual Survey	500	1	85/60	708
57.301 Hemovigilance Module Monthly Reporting Plan	500	12	1/60	100
57.303 Hemovigilance Module Monthly Reporting Denominators	500	12	70/60	7,000
57.305 Hemovigilance Incident	500	10	10/60	833
57.306 Hemovigilance Module Annual Survey—Non-acute care facility	500	1	35/60	292
57.307 Hemovigilance Adverse Reaction—Acute Hemolytic Transfusion Reaction	500	4	20/60	667
57.308 Hemovigilance Adverse Reaction—Allergic Transfusion Reaction	500	4	20/60	667
57.309 Hemovigilance Adverse Reaction—Delayed Hemolytic Transfusion Reaction	500	1	20/60	167
57.310 Hemovigilance Adverse Reaction—Delayed Serologic Transfusion Reaction	500	2	20/60	333
57.311 Hemovigilance Adverse Reaction—Febrile Non-hemolytic Transfusion Reaction	500	4	20/60	667
57.312 Hemovigilance Adverse Reaction—Hypotensive Transfusion Reaction	500	1	20/60	167
57.313 Hemovigilance Adverse Reaction—Infection	500	1	20/60	167

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form No. & name	Number of respondents	Number of responses per respondent	Avg. burden per response (min./hour)	Total burden (hours)
57.314 Hemovigilance Adverse Reaction—Post Transfusion Purpura	500	1	20/60	167
57.315 Hemovigilance Adverse Reaction—Transfusion Associated Dyspnea	500	1	20/60	167
57.316 Hemovigilance Adverse Reaction—Transfusion Associated Graft vs. Host Disease	500	1	20/60	167
57.317 Hemovigilance Adverse Reaction—Transfusion Related Acute Lung Injury	500	1	20/60	167
57.318 Hemovigilance Adverse Reaction—Transfusion Associated Circulatory Overload	500	2	20/60	333
57.319 Hemovigilance Adverse Reaction—Unknown Transfusion Reaction	500	1	20/60	167
57.320 Hemovigilance Adverse Reaction—Other Transfusion Reaction	500	1	20/60	167
57.400 Outpatient Procedure Component—Annual Facility Survey	700	1	10/60	117
57.401 Outpatient Procedure Component—Monthly Reporting Plan	700	12	15/60	2,100
57.402 Outpatient Procedure Component—Same Day Outcome Measures	200	1	40/60	133
57.403 Outpatient Procedure Component—Monthly Denominators for Same Day Outcome Measures	200	400	40/60	53,333
57.404 Outpatient Procedure Component—SSI Denominator	700	100	40/60	46,667
57.405 Outpatient Procedure Component—Surgical Site (SSI) Event	700	5	40/60	2,333
57.500 Outpatient Dialysis Center Practices Survey	7,200	1	127/60	15,240
57.501 Dialysis Monthly Reporting Plan	7,200	12	5/60	7,200
57.502 Dialysis Event	7,200	30	25/60	90,000
57.503 Denominator for Outpatient Dialysis	7,200	30	10/60	14,400
57.504 Prevention Process Measures Monthly Monitoring for Dialysis	1,730	12	75/60	25,950
57.505 Dialysis Patient Influenza Vaccination	615	50	10/60	5,125
57.506 Dialysis Patient Influenza Vaccination Denominator	615	5	10/60	513
57.507 Home Dialysis Center Practices Survey	430	1	30/60	215

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–25576 Filed 11–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–21–21AT; Docket No. CDC–2020–0114]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Evaluation of Venous Thromboembolism Prevention Practices in U.S. Hospitals. This proposed study is designed to support a framework for improving hospital venous thromboembolism (VTE) prevention practices through the evaluation of current VTE prevention practices in U.S. adult general medical and surgical hospitals.

DATES: CDC must receive written comments on or before January 19, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0114 by any of the following methods:

☐ *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.

☐ *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7118; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

5. Assess information collection costs.

Proposed Project

Evaluation of Venous Thromboembolism Prevention Practices in U.S. Hospitals—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Venous thromboembolism (VTE), which includes deep vein thrombosis (DVT) and pulmonary embolism (PE), is an important and growing public health problem. Each year in the U.S., it is estimated that VTE affects as many as 900,000 people, is responsible for up to 100,000 deaths, and is associated with healthcare costs of approximately $10 billion. Recurrence after a VTE is common, and complications include post-thrombotic syndrome and chronic thromboembolic pulmonary hypertension. Over half of VTE events are associated with recent hospitalization or surgery and most occur after discharge. An analysis of the National Hospital Discharge Survey from 2007 to 2009 estimated that almost 550,000 U.S. adult hospitalizations had a discharge diagnosis of VTE each year. Hospital-associated VTE (HA–VTE) is often preventable but VTE prevention strategies are not applied uniformly or systematically across U.S. hospitals and healthcare systems.

The Agency for Healthcare Research and Quality (AHRQ) published a guide for preventing HA–VTE in 2016. The framework for improving VTE prevention in hospitalized patients includes a hospital VTE prevention policy, an interdisciplinary VTE team, standardization of VTE prevention processes, monitoring of processes and outcomes, and VTE prevention education for providers and patients. A VTE prevention protocol includes VTE risk assessment, bleeding risk assessment (risk of bleeding with anticoagulant prophylaxis) and clinical decision support for appropriate prophylaxis (*i.e.,* ambulation, anticoagulant prophylaxis, and/or mechanical prophylaxis) based on both VTE and bleeding risk assessments.

Despite evidence-based guidelines for VTE prophylaxis in at-risk hospitalized patients, there is systemic underuse of appropriate VTE prophylaxis. As many as 70% of HA–VTE events are potentially preventable but less than half of hospitalized patients receive appropriate VTE prophylaxis. An implementation gap exists between evidence-based guidelines for VTE prophylaxis in hospitalized adult patients and implementation of those guidelines in real-world hospital settings. The 2008 Surgeon General's Call to Action to Prevent DVT and PE included instituting formal systems related to risk assessment and the provision of prophylaxis to high-risk hospitalized patients. For World Thrombosis Day in 2016, the International Society on Thrombosis and Haemostasis (ISTH) issued a call to clinical leaders, hospitals, and payers to work together to make VTE risk assessment for all hospitalized patients a priority.

In England, The National Venous Thromboembolism Prevention Programme was launched in 2010 with the goal of reducing preventable HA–VTE morbidity and mortality (Roberts, 2017). VTE risk assessment was mandated for all adult patients on admission to an acute hospital utilizing a previously developed national VTE risk assessment tool/model. Hospitals were required to report VTE risk assessment rates, with a financial incentive applied to achieve a target of 90%. This resulted in an impressive, sustained increase in VTE risk assessment rates with a corresponding increase in anticoagulant prophylaxis. There was evidence of significant reductions in HA–VTE and associated mortality following implementation of this program.

Unlike England, the U.S. has no national VTE prevention program with hospital risk assessment rates tied to financial incentives and no national VTE risk assessment tool/model. Various VTE risk assessment models (RAMs) have been developed and published to identify hospitalized patients whose risk for VTE is high enough to offset the risk of bleeding with anticoagulant prophylaxis. However, there is no standardized RAM currently in use across U.S. hospitals and healthcare systems. Implementation of risk assessment varies in terms of the patient population (*e.g.,* medical vs. surgical), time frames (*e.g.,* on admission, on transfer to another unit), method of administration (*i.e.,* electronic vs. paper), person/s performing the risk assessment (*e.g.,* physician, nurse, pharmacist), type of RAM (*e.g.,* quantitative vs. qualitative), and linkage to a clinical decision support tool for appropriate VTE prophylaxis.

An evaluation of the extent to which U.S. hospitals utilize VTE risk assessment is needed to better understand the landscape around VTE prevention practices in real-world hospital settings in order to guide efforts and inform interventions to reduce the burden of HA–VTE. CDC is funding The Joint Commission to evaluate VTE prevention practices in U.S. hospitals. The Joint Commission has had a role in patient safety through standards and performance measurement. It is the measure steward for two electronic clinical quality measures (eCQMs) on VTE prevention available for Center for Medicare and Medicaid Services Inpatient Quality Reporting and Joint Commission hospital accreditation since 2016. However, these two VTE prevention eCQMs only address the initiation of VTE prophylaxis within a specified timeframe; they do not assess the patient's level of VTE risk or the appropriateness of prophylaxis.

For this project, The Joint Commission, in collaboration with CDC, developed a survey on hospital VTE prevention practices. The survey was piloted in nine hospitals and their feedback was used to improve the survey. After OMB approval, the survey will be implemented by The Joint Commission as a one-time data collection in a nationally representative sample of U.S. adult general medical and surgical hospitals. No individual-level data will be collected. CDC will not receive any individual or hospital identifiable information.

The overall purpose of this project is to evaluate current VTE prevention practices in a nationally representative sample of U.S. hospitals (American Hospital Association adult general medical and surgical hospital service category) in order to support a framework for HA–VTE prevention. The information collected in this hospital survey will be used to improve understanding of hospital VTE prevention practices, which will guide efforts and inform interventions to reduce the burden of HA–VTE. Specifically, the information collected on hospital VTE prevention policy and protocol, VTE prevention team, VTE data collection and reporting, VTE risk assessment, VTE prophylaxis safety considerations (*i.e.,* bleeding risk assessment), ambulation protocol, VTE prevention education for providers and

patients, and VTE prophylaxis monitoring and support will be used to assess the extent to which hospitals apply these components of the framework for HA–VTE prevention. The responses to specific VTE prevention practices can be used to assess VTE prevention practices by hospital characteristics (*e.g.,* bed size, urban vs. rural location, teaching vs. non-teaching status) to better target efforts or interventions to improve HA–VTE prevention. Information collected on the barriers to establishing a hospital-wide VTE prevention policy will be helpful in addressing these challenges. Information will be collected on both adult general medical and surgical units since VTE prevention practices differ by specialty. Information on VTE risk assessment (*e.g.,* who conducts the assessment, when is it performed, mandatory or optional, format, type of RAM) will improve understanding of real-world hospital VTE risk assessment practices. Information on the capacity of hospitals to collect data on VTE risk assessment will be helpful in determining the feasibility of VTE risk assessment as a VTE prevention performance measure. The data collected can also serve as a baseline for evaluation of future HA–VTE prevention initiatives.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
The Director of Patient Safety and Quality, the Chairperson of the Patient Safety Committee, other quality improvement professional.	Recruitment material: Implementation email and project information sheet.	384	1	15/60	96
The Director of Patient Safety and Quality, the Chairperson of the Patient Safety Committee, other quality improvement professional.	Evaluation of Venous Thromboembolism Prevention Practices in U.S. Hospitals Questionnaire.	384	1	1	384
Total					480

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–25574 Filed 11–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–0879]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled Information Collections to Advance State, Tribal, Local, and Territorial (STLT) Governmental Agency and System Performance, Capacity, and Program Delivery to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on 05/21/2020 to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Information Collections to Advance State, Tribal, Local, and Territorial (STLT) Governmental Agency and System Performance, Capacity, and Program Delivery (OMB Control No. 0920–0879, Exp. 1/31/2021)—Extension—Center for State, Tribal, Local and Territorial Support (CSTLTS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The mission of the Department of Health and Human Services is to enhance the health and well-being of all Americans. As part of HHS, CDC conducts critical science and provides health information to people and communities to save lives and protect people from health threats. To this end, CDC and HHS seek to accomplish their mission by collaborating with partners throughout the nation and the world to

monitor health, detect and investigate health problems, conduct research to enhance prevention, develop and advocate sound public health policies, implement prevention strategies, promote healthy behaviors, foster safe and healthful environments, and provide leadership and training.

CDC is requesting a three-year approval to extend a generic clearance to collect information related to domestic public health issues and services that affect and/or involve state, tribal, local and territorial (STLT) government entities.

The respondent universe is comprised of STLT governmental staff or delegates acting on behalf of a STLT agency involved in the provision of essential public health services in the United States. Delegate is defined as a governmental or non-governmental agent (agency, function, office or individual) acting for a principal or submitted by another to represent or act on their behalf. The STLT agency is represented by a STLT entity or delegate with a task to protect and/or improve the public's health.

Information will be used to assess situational awareness of current public health emergencies; make decisions that affect planning, response and recovery activities of subsequent emergencies; fill CDC and HHS gaps in knowledge of programs and/or STLT governments that will strengthen surveillance, epidemiology, and laboratory science; improve CDC's support and technical assistance to jurisdictions. CDC and HHS will conduct brief data collections, across a range of public health topics related to essential public health services.

CDC estimates up to 30 data collections with State, territorial, or tribal governmental staff or delegates, and 10 data collections with local/county/city governmental staff or delegates will be conducted on an annual basis. Ninety-five percent of these data collections will be web-based and five percent telephone, in-person, and focus groups. The total annualized burden of 54,000 hours is based on the following estimates.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per respondent (in hrs.)
State, Territorial, or Tribal government staff or delegate.	Web, telephone, in-person, focus group	800	30	1
Local/County/City government staff or delegate.	Web, telephone, in-person, focus group	3,000	10	1

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–25573 Filed 11–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Privacy Act of 1974; Matching Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice of new matching program.

SUMMARY: In accordance with subsection (e)(12) of the Privacy Act of 1974, as amended, the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) is providing notice of the re-establishment of a matching program between CMS and the Social Security Administration (SSA), ''Determining Enrollment or Eligibility for Insurance Affordability Programs Under the Patient Protection and Affordable Care Act.''

DATES: The deadline for comments on this notice is December 21, 2020. The re-established matching program will commence not sooner than 30 days after publication of this notice, provided no comments are received that warrant a change to this notice. The matching program will be conducted for an initial term of 18 months (from approximately March 9, 2021 to September 8, 2022) and within three months of expiration may be renewed for one additional year if the parties make no change to the matching program and certify that the program has been conducted in compliance with the matching agreement.

ADDRESSES: Interested parties may submit comments on the new matching program to the CMS Privacy Officer by mail at: Division of Security, Privacy Policy & Governance, Information Security & Privacy Group, Office of Information Technology, Centers for Medicare & Medicaid Services, Location: N1–14–56, 7500 Security Blvd., Baltimore, MD 21244–1850, or *walter.stone@cms.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions about the matching program, you may contact Anne Pesto, Senior Advisor, Marketplace Eligibility and Enrollment Group, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, at 410–786–3492, by email at *anne.pesto@cms.hhs.gov,* or by mail at 7500 Security Blvd., Baltimore, MD 21244.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, as amended (5 U.S.C. 552a) provides certain protections for individuals applying for and receiving federal benefits. The law governs the use of computer matching by federal agencies when records in a system of records (meaning, federal agency records about individuals retrieved by name or other personal identifier) are matched with records of other federal or non-federal agencies. The Privacy Act requires agencies involved in a matching program to:

1. Enter into a written agreement, which must be prepared in accordance with the Privacy Act, approved by the Data Integrity Board of each source and recipient federal agency, provided to Congress and the Office of Management and Budget (OMB), and made available to the public, as required by 5 U.S.C. 552a(o), (u)(3)(A), and (u)(4).

2. Notify the individuals whose information will be used in the matching program that the information they provide is subject to verification through matching, as required by 5 U.S.C. 552a(o)(1)(D).

3. Verify match findings before suspending, terminating, reducing, or making a final denial of an individual's benefits or payments or taking other adverse action against the individual, as required by 5 U.S.C. 552a(p).

4. Report the matching program to Congress and the OMB, in advance and

annually, as required by 5 U.S.C. 552a(o) (2)(A)(i), (r), and (u)(3)(D).

5. Publish advance notice of the matching program in the **Federal Register** as required by 5 U.S.C. 552a(e)(12).

This matching program meets these requirements.

Barbara Demopulos,

Privacy Advisor, Division of Security, Privacy Policy and Governance, Office of Information Technology, Centers for Medicare & Medicaid Services.

PARTICIPATING AGENCIES:

The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) is the recipient agency, and the Social Security Administration (SSA) is the source agency.

AUTHORITY FOR CONDUCTING THE MATCHING PROGRAM:

The statutory authority for the matching program is 42 U.S.C. secs. 18081 and 18083.

PURPOSE(S):

The purpose of the matching program is to provide CMS with SSA information which CMS and state-based administering entities will use to determine individuals' eligibility for initial enrollment in a Qualified Health Plan through an Exchange established under the Patient Protection and Affordable Care Act, for Insurance Affordability Programs (IAPs), and certificates of exemption from the shared responsibility payment; and to make eligibility redeterminations and renewal decisions, including appeal determinations. IAPs include:

1. Advance payments of the premium tax credit (APTC) and cost sharing reductions (CSRs),
2. Medicaid,
3. Children's Health Insurance Program (CHIP), and
4. Basic Health Program (BHP).

CATEGORIES OF INDIVIDUALS:

The individuals whose information will be used in the matching program are consumers (applicants and enrollees) who receive the eligibility determinations and redeterminations described in the preceding Purpose(s) section.

CATEGORIES OF RECORDS:

The categories of records used in the matching program are identity information, citizenship, death/disability indicators, incarceration information, and income. To request information from SSA, CMS will submit a submission file to SSA that contains the following mandatory specified data elements: Last name, first name, date of birth, Social Security Number (SSN), and citizenship indicator. When SSA is able to match the SSN and name provided by CMS and information is available, SSA will provide CMS with the following about each individual, as relevant: Last name, first name, date of birth, death indicator, disability indicator, incarceration information, Title II (annual and monthly) income information, and confirmation of attestations of citizenship status and SSN. SSA may also provide Quarters of Coverage data when CMS requests it.

SYSTEM OF RECORDS MAINTAINED BY CMS

CMS Health Insurance Exchanges System (HIX), CMS System No. 09–70–0560, last published in full at 78 FR 63211 (Oct. 23, 2013), and amended at 83 FR 6591 (Feb. 14, 2018). Routine use 3 authorizes CMS' disclosures of identifying information about applicants to SSA for use in this matching program.

B. SYSTEMS OF RECORDS MAINTAINED BY SSA

The SSA SORNs and routine uses that support this matching program are identified below:

(1) Master Files of SSN Holders and SSN Applications, 60–0058, last fully published at 75 FR 82121 (Dec. 29, 2010) and amended at 78 FR 40542 (July 5, 2013), 79 FR 8780 (Feb. 13, 2014), 83 FR 31250 (July 3, 2018), and 83 FR 54969 (Nov. 1, 2018);

(2) Prisoner Update Processing System (PUPS), 60–0269, last fully published at 64 FR 11076 (Mar. 8, 1999) and amended at 72 FR 69723 (Dec. 10, 2007), 78 FR 40542 (July 5, 2013), and 83 FR 54969 (Nov. 1, 2018);

(3) Master Beneficiary Record, 60–0090, last fully published at 71 FR 1826 (Jan. 11, 2006), and amended at 72 FR 69723 (Dec. 10, 2007), 78 FR 40542 (July 5, 2013), 83 FR 31250 (July 3, 2018) and 83 FR 54969 (Nov. 1, 2018);

(4) Earnings Recording and Self-Employment Income System, 60–0059, last fully published at 71 FR 1819 (Jan. 11, 2006) and amended at 78 FR 40542 (July 5, 2013) and 83 FR 54969 (Nov. 1, 2018).

[FR Doc. 2020–25551 Filed 11–18–20; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10764, CMS–10454, CMS–R–71, CMS–370/CMS–377, CMS–1572 and CMS–10332]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by January 19, 2021.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05,

7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10764 Evaluation of Risk Adjustment Data Validation (RADV) Appeals and Health Insurance Exchange Outreach Training Sessions

CMS–10454 Disclosure of State Rating Requirements

CMS–R–71 Quality Improvement Organization (QIO) Assumption of Responsibilities and Supporting Regulations

CMS–370/CMS–377 ASC Forms for Medicare Program Certification

CMS–1572 Home Health Agency Survey and Deficiencies Report

CMS–10332 Disclosure Requirement for the In-Office Ancillary Services Exception

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Evaluation of Risk Adjustment Data Validation (RADV) Appeals and Health Insurance Exchange Outreach Training Sessions; *Use:* CMS recognizes that the success of accurately identifying risk-adjustment payments and payment errors is dependent upon the data submitted by Medicare Advantage Organizations (MAOs), and is strongly committed to providing appropriate education and technical outreach to MAOs and third-party administrators (TPAs). In addition, CMS is strongly committed to providing appropriate education and technical outreach to States, issuers, self-insured group health plans and TPAs participating in the Marketplace and/or market stabilization programs mandated by the Affordable Care Act (ACA).

CMS will strengthen outreach and engagement with MAOs and stakeholders in the Marketplace through satisfaction surveys following contract-level (CON) RADV audit and Health Insurance Exchange training events. The survey results will help to determine stakeholders' level of satisfaction with trainings, identify any issues with training and technical assistance delivery, clarify stakeholders' needs and preferences, and define best practices for training and technical assistance. *Form Number:* CMS–10764 (OMB control number: 0938–NEW); *Frequency:* Occasionally; *Affected Public:* Private Sector; *Number of Respondents:* 4,270; *Total Annual Responses:* 4,270; *Total Annual Hours:* 1,068. (For questions regarding this collection contact Melissa Barkai at 410–786–4305.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of information Collection:* Disclosure of State Rating Requirements; *Use:* The final rule ''Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review'' implements sections 2701, 2702, and 2703 of the Public Health Service Act (PHS Act), as added and amended by the Affordable Care Act, and sections 1302(e) and 1312(c) of the Affordable Care Act. The rule directs that states submit to CMS certain information about state rating and risk pooling requirements for their individual, small group, and large group markets, as applicable. Specifically, states will inform CMS of age rating ratios that are narrower than 3:1 for adults; tobacco use rating ratios that are narrower than 1.5:1; a state-established uniform age curve; geographic rating areas; whether premiums in the small and large group market are required to be based on average enrollee amounts (also known as composite premiums); and, in states that do not permit any rating variation based on age or tobacco use, uniform family tier structures and corresponding multipliers. In addition, states that elect to merge their individual and small group market risk pools into a combined pool will notify CMS of such election. This information will allow CMS to determine whether state-specific rules apply or Federal default rules apply. It will also support the accuracy of the federal risk adjustment methodology. *Form Number:* CMS–10454 (OMB control number 0938–1258); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 3; *Total Annual Responses:* 3; *Total Annual Hours:* 17. (For policy questions regarding this collection contact Russell Tipps at 301–869–3502.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Quality Improvement Organization (QIO) Assumption of Responsibilities and Supporting Regulations; *Use:* The Peer Review Improvement Act of 1982 amended Title XI of the Social Security Act to create the Utilization and Quality Control Peer Review Organization (PRO) program which replaces the Professional Standards Review Organization (PSRO) program and streamlines peer review activities. The term PRO has been renamed Quality Improvement Organization (QIO). This information collection describes the review functions to be performed by the QIO. It outlines relationships among QIOs, providers, practitioners, beneficiaries, intermediaries, and carriers. *Form Number:* CMS–R–71 (OMB control number: 0938–0445); *Frequency:* Yearly; *Affected Public:* Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 6,939; *Total Annual Responses:* 972,478; *Total Annual Hours:* 1,034,655. (For policy questions regarding this collection contact Kimberly Harris at 401–837–1118.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Titles of Information Collection:* ASC Forms for Medicare Program Certification; *Use:* The form CMS–370 titled ''Health Insurance Benefits Agreement'' is used for the purpose of establishing an ASC's eligibility for payment under Title XVIII of the Social Security Act (the ''Act''). This agreement, upon acceptance by the Secretary of Health & Human Services, shall be binding on the ASC and the Secretary. The agreement may be

terminated by either party in accordance with regulations. In the event of termination of this agreement, payment will not be available for the ASC's services furnished to Medicare beneficiaries on or after the effective date of termination.

The CMS–377 form is used by ASCs to initiate both the initial and renewal survey by the State Survey Agency, which provides the certification required for an ASC to participate in the Medicare program. An ASC must complete the CMS–377 form and send it to the appropriate State Survey Agency prior to their scheduled accreditation renewal date. The CMS–377 form provides the State Survey Agency with information about the ASC facility's characteristics, such as, determining the size and the composition of the survey team on the basis of the number of ORs/procedure rooms and the types of surgical procedures performed in the ASC. *Form Numbers:* CMS–370 and CMS–377 (OMB control number: 0938–0266); *Frequency:* Occasionally; *Affected Public:* Private Sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 1,567; *Total Annual Responses:* 1,567; *Total Annual Hours:* 1,012. (For policy questions regarding this collection contact Caroline Gallaher at 410–786–8705.)

5. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Home Health Agency Survey and Deficiencies Report; *Use:* In order to participate in the Medicare Program as a Home Health Agency (HHA) provider, the HHA must meet federal standards. This form is used to record information and patients' health and provider compliance with requirements and to report the information to the federal government. *Form Number:* CMS–1572 (OMB control number: 0938–0355); *Frequency:* Yearly; *Affected Public:* State, Local or Tribal Government; *Number of Respondents:* 3,833; *Total Annual Responses:* 3,833; *Total Annual Hours:* 1,917. (For policy questions regarding this collection contact Tara Lemons at 410–786–3030.)

6. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Disclosure Requirement for the In-Office Ancillary Services Exception; *Use:* Section 6003 of the Affordable Care Act (ACA) established a new disclosure requirement that a physician must perform for certain imaging services to meet the in-office ancillary services exception to the prohibition of the physician self-referral law. This section of the ACA amended section 1877(b)(2) of the Act by adding a requirement that the referring physician informs the patient, at the time of the referral and in writing, that the patient may receive the imaging service from another supplier.

Physicians who provide certain imaging services (MRI, CT, and PET) under the in-office ancillary services exception to the physician self-referral prohibition are required to provide the disclosure notice as well as the list of other imaging suppliers to the patient. The patient will then be able to use the disclosure notice and list of suppliers in making an informed decision about his or her course of care for the imaging service.

CMS would use the collected information for enforcement purposes. Specifically, if we were investigating the referrals of a physician providing advanced imaging services under the in-office ancillary services exception, we would review the written disclosure in order to determine if it satisfied the requirement. *Form Number:* CMS–10332 (OMB control number: 0938–1133); *Frequency:* Occasionally; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profits institutions; *Number of Respondents:* 2,239; *Total Annual Responses:* 989,971; *Total Annual Hours:* 18,694. (For questions regarding this collection contact Laura Dash at 410–786–8623.)

Dated: November 16, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–25598 Filed 11–18–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Addition of New Instruments to Existing Information Collections by the Office of Refugee Resettlement (OMB #s: 0970–0553, 0970–0554, and 0970–0547)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is inviting public comments on several proposed instruments. The instruments will be added to the following existing information collections: Services Provided to Unaccompanied Alien Children (OMB #0970–0553), Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities (OMB #0970–0554), and Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970–0547).

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described in this notice.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The components of these requests and the existing information collections to which each component will be added are as follows:

Services Provided to Unaccompanied Alien Children Into ORR Care Provider Facilities (OMB #0970–0553)

1. Admission: This instrument is used by ORR grantee case managers and clinicians to document the UAC's initial needs, functioning, and history. The Admission Details tab includes a case status timeline; biographic information on the UAC; admission and educational information; medical clearance information; influx transfer information, if applicable; system-generated information; a clickable, auto-generated list of *Admission Assessments* and the ability to create a new assessment; a clickable, auto-generated list of *Transfer Requests* and the ability to create a new transfer requests, if applicable; and a clickable, auto-generated list of *Long Term Foster Care (LTFC) Travel Requests* and the ability to create a new transfer requests, if applicable. The Related tab includes areas to upload case management, education, and medical documents; an area to add Entry Team members (individuals granted read/write access to the Admission instrument); and an auto-generated list of changes made to the

Admission instrument. The Call Logs tab includes a clickable, auto-generated list of calls and the ability to add a new call to the log.

2. Home Study/Post-Release Services (HS/PRS) Primary Provider Entity: This instrument is used by ORR grantee HS/PRS providers to add identifying information about their organization into the UAC Path system. Each organization only needs to be created once. Field values may be updated as often as needed.

3. *Home Study/Post-Release Services (HS/PRS) Subcontractor Entity:* This instrument is used by ORR grantee HS/PRS providers to add identifying information about their sub-grantee organizations into the UAC Path system and link them to their *HS/PRS Primary Provide Entity* record. Each organization only needs to be created once. Field values may be updated as often as needed.

4. Home Study/Post-Release Services (HS/PRS) Primary Provider Profile: This instrument is used by primary HS/PRS providers to add identifying information about caseworkers employed by their organization. Each individual only needs to be entered once. Field values may be updated as often as needed.

5. Home Study/Post-Release Services (HS/PRS) Subcontractor Profile: This instrument is used by primary HS/PRS providers to add identifying information about caseworkers employed their sub-grantee organizations. Each individual only needs to be entered once. Field values may be updated as often as needed.

6. Home Study/Post-Release Services (HS/PRS) Referral: This instrument is used by case managers to refer a UAC for a home study and/or post-release services. The Referral Details tab includes biographic information on the UAC; areas to enter information about the HS/PRS referral, referring program, sponsor, HS/PRS provider, and disposition of the case; an area to add Entry Team members (individuals granted read/write access to the referral); an area to upload related documents; a clickable, auto-generated list of HS/PRS referral assessments and the ability to create a new assessment; an auto-generated list of changes made to the referral; and a clickable, auto-generated list of related entries/records. The Related tab includes clickable, auto-generated lists of sponsor HS/PRS referrals, related UAC contacts, related UAC HS/PRS referrals, and related records/entries.

7. Post-Release Services (PRS) Event: This instrument is used by ORR grantee post-release service caseworkers to document referrals made and services provided at critical junctures of service provision, such as 14-day, 6-month, 12-month, and closure. The instrument contains auto-populated sponsor information and areas to document information about the HS/PRS provider, reason for referral, the minor's placement and safety status, and services areas addressed.

8. UAC Authorized/Restricted Call List and Call Log: This instrument is used by grantee case managers to create a list of authorized and restricted contacts to ensure safe communication for the UAC and document the details of phone calls made by a UAC.

9. Case Manager Call Log and Case Notes: This instrument is used by case managers to log any contact (in-person, phone, video, social media, or mail) they make in relation to the UAC's case, including any related notes.

10. Ohio Youth Assessment System (OYAS) Reentry Tool: This instrument was created by the University of Cincinnati Corrections Institute and consists of an Interview Guide, Self-Report Questionnaire, and Score Sheet. The tool is a risk/needs assessment used by case managers in secure and staff secure facilities to assess UAC for readiness to transition into the community and measure the UAC's progress while in ORR custody.

Placement and Transfer of Unaccompanied Alien Children Into ORR Care Provider Facilities (OMB #0970–0554)

1. Family Group Entity: This instrument is used by the ORR Intakes Team to associate UACs who are member of the same family with each other.

2. Influx Transfer Manifest: This instrument is used by designated care provider and ORR staff to plan, track, and notify stakeholders of group transfers to an influx care facility.

3. Influx Transfer Manual and Prescreen Criteria Review: This instrument is used by designated care provider staff to evaluate each UAC's eligibility to be transferred to an influx care facility. Care provider staff review and update information on daily during times of influx. The status in the prescreen criteria section is auto-populated based on information in the UAC's profile and may be overridden if requested by ORR.

Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970–0547)

1. Notification of Concern: This instrument is used by home study and post-release service caseworkers, care provider case managers, and the ORR National Call Center to notify ORR of certain concerns that arise after a UAC is released from ORR custody.

Respondents: ORR grantee and contractor staff, UAC, and sponsors.

Annual Burden Estimates:

SERVICES PROVIDED TO UNACCOMPANIED ALIEN CHILDREN

[OMB #0970–0553]

Instrument	Annual total number of respondents	Annual total number of responses per respondent	Average burden minutes per response	Annual total burden hours
Admission	216	278	20	20,016
Case Manager Call Log and Case Notes	216	8,426	5	151,668
Home Study/Post-Release Services Primary Provider Entity	9	1	10	2
Home Study/Post-Release Services Primary Provider Profile	9	13	10	20
Home Study/Post-Release Services Subcontractors Entity	51	1	10	9
Home Study/Post-Release Services Subcontractors Profile	51	13	10	111
Home Study/Post-Release Services (HS/PRS) Referral	216	68	15	3,672
Ohio Youth Assessment System (OYAS) Reentry Tool	506	3	75	1,898
Post-Release Services Event	60	968	60	58,080
UAC Authorized/Restricted Call List and Call Log	216	6,981	5	125,658
Estimated Annual Burden Hours Total				361,132

PLACEMENT AND TRANSFER OF UNACCOMPANIED ALIEN CHILDREN INTO ORR CARE PROVIDER FACILITIES

[OMB #0970–0554]

Instrument	Annual total number of respondents	Annual total number of responses per respondent	Average burden minutes per response	Annual total burden hours
Family Group Entity	16	188	5	251
Influx Transfer Manifest	3	12	20	12
Influx Transfer Manual and Prescreen Criteria Review	216	43,333	30	4,679,964
Estimated Annual Burden Hours Total				4,680,227

ADMINISTRATION AND OVERSIGHT OF THE UNACCOMPANIED ALIEN CHILDREN PROGRAM

[OMB #0970–0547]

Instrument	Annual total number of respondents	Annual total number of responses per respondent	Average burden minutes per response	Annual total burden hours
Notification of Concern	301	15	15	1,129
Estimated Annual Burden Hours Total				1,129

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Authority: 6 U.S.C. 279; 8 U.S.C. 1232; *Flores* v. *Reno Settlement Agreement,* No. CV85–4544–RJK (C.D. Cal. 1996).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–25477 Filed 11–18–20; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Expedited OMB Review and Public Comment: Community Services Block Grant (CSBG) Annual Report (OMB #0970–0492)

AGENCY: Office of Community Services, Administration for Children and Families, Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: The Office of Community Services (OCS), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is requesting expedited review of an information collection request from the Office of Management and Budget (OMB) and is inviting public comments on the proposed collection of data for the new Community Services Block Grant (CSBG) CARES Act Supplemental and CSBG Disaster Supplemental funding. This information will be collected through modified versions of the currently approved CSBG Annual Report (OMB #0970–0492, expiration 2/28/2023).

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described in this notice.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the ACF, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF is requesting that OMB grant a 180-day approval for this request under procedures for expedited processing. A request for review under normal procedures will be submitted within 180 days of the approval for this request. Any edits resulting from public comment will be incorporated into the submission under normal procedures. The CSBG Supplemental Annual Reports include modified versions of Modules 1, 2, and 4. Module 1 is modified to align with CSBG Disaster Supplemental and CSBG CARES State Plans and to help reduce the burden to the states. OCS modified Modules 2 and 4 to collect specific data for the supplemental funding and to reduce burden, including the removal of questions that were not pertinent to the data collection for the Supplemental Reports. OCS made additional technical modifications including minor wording, headings, and numbering revisions. Respondents are only expected to submit Module 3 once through the current CSBG Annual Report; OCS made technical revisions to allow respondents to confirm which funding source they are using—CSBG, CARES, or Disaster.

Respondents: State governments, including the District of Columbia and the Commonwealth of Puerto Rico, and U.S. territories and CSBG eligible entities (Community Action Agencies).

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
CSBG Annual Report (States)	52	3	198	30,088	10,029
CSBG Annual Report (Eligible Entities)	1,009	3	697	2,109,819	703,273
CSBG CARES Supplemental Annual Report (States)	52	3	107	16,692	5,564
CSBG CARES Annual Report (Eligible Entities)	1,009	3	493	1,492,311	497,437
CSBG Disaster Supplemental Annual Report (States)	15	3	95	4,275	1,425
CSBG Disaster Supplemental Annual Report (Eligible Entities)	50	3	476	71,400	23,800

Estimated Total Annual Burden Hours: 1,241,528.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 112 Stat. 2729; 42 U.S.C. 9902(2).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–25479 Filed 11–18–20; 8:45 am]

BILLING CODE 4184–27–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Product-Specific Guidances; Draft and Revised Draft Guidances for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of additional draft and revised draft product-specific guidances. The guidances provide product-specific recommendations on, among other things, the design of bioequivalence (BE) studies to support abbreviated new drug applications (ANDAs). In the **Federal Register** of June 11, 2010, FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific guidances available to the public on FDA's website. The guidances identified in this notice were developed using the process described in that guidance.

DATES: Submit either electronic or written comments on the draft guidances by January 19, 2021 to ensure that the Agency considers your comment on these draft guidances before it begins work on the final versions of the guidances.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2007–D–0369 for ''Product-Specific Guidances; Draft and Revised Draft Guidances for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this

information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidances to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance documents.

FOR FURTHER INFORMATION CONTACT: Mara Miller, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4709C, Silver Spring, MD 20993–0002, 301–796–0683.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific guidances available to the public on FDA's website at *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

As described in that guidance, FDA adopted this process as a means to develop and disseminate product-specific guidances and provide a meaningful opportunity for the public to consider and comment on those guidances. Under that process, draft guidances are posted on FDA's website and announced periodically in the **Federal Register**. The public is encouraged to submit comments on those recommendations within 60 days of their announcement in the **Federal Register**. FDA considers any comments received and either publishes final guidances or publishes revised draft guidances for comment. Guidances were last announced in the **Federal Register** on August 26, 2020. This notice announces draft product-specific guidances, either new or revised, that are posted on FDA's website.

II. Drug Products For Which New Draft Product-Specific Guidances Are Available

FDA is announcing the availability of new draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Active ingredient(s)
Ceritinib
Clobazam
Crofelemer
Diazepam
Epinephrine
Fluorodopa F–18
Lefamulin acetate
Naloxone hydrochloride; Oxycodone hydrochloride
Pretomanid
Prochlorperazine maleate
Tafamidis
Tafamidis meglumine
Vancomycin hydrochloride

III. Drug Products For Which Revised Draft Product-Specific Guidances Are Available

FDA is announcing the availability of revised draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 2—REVISED DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Active ingredient(s)
Azelaic acid
Budesonide
Bupropion hydrochloride; Naltrexone hydrochloride
Calcipotriene
Clobetasol propionate
Desonide
Erythromycin ethylsuccinate (multiple referenced listed drugs)
Erythromycin ethylsuccinate; Sulfisoxazole acetyl

TABLE 2—REVISED DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS—Continued

Active ingredient(s)
Fluphenazine hydrochloride
Hydrocortisone acetate
Isotretinoin (multiple referenced listed drugs)
Levorphanol tartrate
Lomitapide mesylate
Methylphenidate hydrochloride
Pimavanserin tartrate
Propranolol hydrochloride (multiple referenced listed drugs)
Tofacitinib citrate

For a complete history of previously published **Federal Register** notices related to product-specific guidances, go to *https://www.regulations.gov* and enter Docket No. FDA–2007–D–0369.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). These draft guidances, when finalized, will represent the current thinking of FDA on, among other things, the product-specific design of BE studies to support ANDAs. They do not establish any rights for any person and are not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

IV. Paperwork Reduction Act of 1995

FDA tentatively concludes that this draft guidance contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

V. Electronic Access

Persons with access to the internet may obtain the draft guidances at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs* or *https://www.regulations.gov.*

Dated: November 13, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–25602 Filed 11–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1394]

Richard M. Simon: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Richard M. Simon from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Richard M. Simon was convicted of a felony under Federal law for conduct that relates to the regulation of a drug product under the FD&C Act. Mr. Simon was given notice of the proposed permanent debarment and an opportunity to request a hearing to show why he should not be debarred. As of August 6, 2020 (30 days after receipt of the notice), Mr. Simon had not responded. Mr. Simon's failure to respond and request a hearing constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is applicable November 19, 2020.

ADDRESSES: Submit applications for special termination of debarment to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, (ELEM–4029) Division of Enforcement, Office of Strategic Planning and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, *debarments@fda.hhs.gov,* or at 240–402–8743.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On January 21, 2020, Mr. Simon was convicted as defined in section 306(*l*)(1) of the FD&C Act when judgment was entered against him in the U.S. District Court for the District of Massachusetts, after a jury verdict, on one count of Racketeering Conspiracy in violation of 18 U.S.C. 1962(d). The pattern of racketeering activity he was convicted of included engaging in multiple acts of mail fraud (18 U.S.C. 1341) and wire fraud (18 U.S.C. 1343).

The factual basis for this conviction is as follows: Mr. Simon held executive management positions, including Regional Sales Manager for the Southeast Region and Vice President of Sales, of Insys Therapeutics Inc. (Insys), a Delaware Corporation, with headquarters in Chandler, Arizona. Insys developed and owned a drug called SUBSYS, a liquid formulation of fentanyl to be applied under the tongue. FDA approved SUBSYS for the management of breakthrough pain in adult cancer patients who are already receiving and are already tolerant to opioid therapy for their underlying persistent cancer pain. From early 2012 and continuing through 2015, Mr. Simon participated in a conspiracy whereby employees of Insys bribed medical practitioners in various states to get those practitioners to increase prescribing SUBSYS to their patients, many of whom did not have cancer. Mr. Simon, along with his co-conspirators, measured the effect of these bribes on each practitioner's prescribing habits and on the revenue that each bribed practitioner generated for Insys. Mr. Simon, along with his co-conspirators, reduced or eliminated bribes paid to those practitioners who failed to meet the minimum prescription requirements or failed to generate enough revenue to justify additional bribes.

As a result of this conviction, FDA sent Mr. Simon by certified mail on August 3, 2020, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Mr. Simon was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal also offered Mr. Simon an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Mr. Simon received the proposal on August 7, 2020. He did not request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Simon has been convicted of a felony under Federal law for conduct otherwise relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Mr. Simon, is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see section 306(a)(2)(B) and (c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Mr. Simon, in any capacity, during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Simon provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Mr. Simon during his period of debarment, other than in connection with an audit under section 306(c)(1)(B) of the FD&C Act. Note that, for purposes of section 306 of the FD&C Act, a ''drug product'' is defined as a drug subject to regulation under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262) (see section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Any application by Mr. Simon for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA–2020–N–1394 and sent to the Dockets Management Staff (see **ADDRESSES**). The public availability of information in these submissions is governed by 21 CFR 10.20.

Publicly available submissions will be placed in the docket and will be viewable at *https://www.regulations.gov* or at the Dockets Management Staff (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: November 16, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–25601 Filed 11–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Rural Health Network Development Program; OMB No. 0906–0010—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than January 19, 2021.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Rural Health Network Development Program OMB No. 0906–0010—Revision.

Abstract: The Rural Health Network Development Program (RHND) is authorized under Section 330A(e) of the Public Health Service Act (42 U.S.C. 254(e)). The purpose of this program is to support integrated rural health care networks that have combined the functions of the entities participating in the network to address the health care needs of the targeted rural community. Recipients will combine the functions of the entities participating in the network to address the following legislative aims: (i) Achieve efficiencies; (ii) expand access, coordinate, and improve the quality of essential health care services; and (iii) strengthen the rural health care system as a whole.

RHND-funded programs promote population health management and the transition towards value based care through diverse network membership that includes traditional and non-traditional network partners. Evidence of program impacted demonstrated by outcome data and program sustainability are integral components of the program. This is a 3-year competitive program for networks composed of at least three members that are separate, existing health care providers or entities.

Need and Proposed Use of the Information: This program needs measures that will enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act of 1993. These measures cover the principal topic areas of interest to the Federal Office of Rural Health Policy, including: (a) Access to care; (b) population demographics; (c) staffing; (d) consortium/network; (e) sustainability; and (f) project specific domains. All measures will evaluate the Federal Office of Rural Health Policy (FORHP's) progress toward achieving its goals.

The proposed changes of RHND measures are a result of the accumulation of grantee feedback, peer-reviewed research, and information gathered from the previously approved RHND measures. The proposed changes include additional questions surrounding the network's components of sustainability. Questions surrounding Health Information Technology (HIT) and Telehealth have been modified to reflect updated knowledge on the use of both HIT and Telehealth and to improve understanding of how these important technologies are affecting HRSA grantees. Additional National Quality Forum measures were also included in an effort to allow uniform collection efforts throughout FORHP. In addition, the total number of responses has decreased to 44 since the previous ICR submission. This is due to a new RHND grant cycle with a decreased number of awardees and therefore a decreased number of respondents.

Likely Respondents: Respondents will be awardees of the Rural Health Network Development Program.

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
Performance Improvement and Measurement System Database	44	1	44	6	264
Total	44		44		264

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. 2020–25520 Filed 11–18–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular and Surgical Devices.

Date: December 10, 2020.

Time: 3:30 p.m. to 4:30 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: Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892 301.402.9607, *Jan.Li@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 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25515 Filed 11–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS–CoV–2) and Coronavirus Disease 2019 (COVID–19).

Date: December 11, 2020.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G20, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Zhuqing (Charlie) Li, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G20, Rockville, MD 20852, (240) 669–5068, *zhuqing.li@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25511 Filed 11–18–20; 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 Clinical Trial Implementation Cooperative Agreement (U01), and NIAID SBIR Phase II Clinical Trial Implementation Cooperative Agreement (U44).

Date: December 15, 2020.

Time: 10:00 a.m. to 2:00 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 3G11, Rockville, MD 20892 (Virtual Meeting).

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 3G11, Rockville, MD 20852, 240–669–2740, *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 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25514 Filed 11–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 on Drug Abuse Special Emphasis Panel; Phase II Solicitation: Small Business Innovation Research (SBIR) Program.

Date: December 16, 2020.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Preethy Nayar, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, 301–443–4577, *nayarp2@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25519 Filed 11–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Nursing Home Infections.

Date: December 17, 2020.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Greg Bissonette, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 402–1622, *bissonettegb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: November 13, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25517 Filed 11–18–20; 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; PA20–185; Molecular Oncogenesis.

Date: December 14, 2020.

Time: 11:00 a.m. to 1:00 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: Nywana Sizemore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6189, MSC 7804, Bethesda, MD 20892, 301–408–9916, *sizemoren@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Epilepsy, Traumatic Brain Injury and Inflammation.

Date: December 15, 2020.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health 6701 Rockledge Drive Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Suzan Nadi, Ph.D. Scientific Review Officer Center for Scientific Review National Institutes of Health 6701 Rockledge Drive, Room 5217B, MSC 7846 Bethesda, MD 20892 301–435–1259 *nadis@csr.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 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25516 Filed 11–18–20; 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 a meeting of the Division of Intramural Research Board of Scientific Counselors, National Institute of Allergy and Infectious Diseases.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Allergy and Infectious Diseases, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Division of Intramural Research Board of Scientific Counselors, National Institute of Allergy and Infectious Diseases.

Date: December 14–16, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 50 Center Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Laurie Lewellan, Board of Scientific Counselors, Committee Manager, Division of Intramural Research Program Support Staff, National Institute of Allergy and Infectious Diseases, National Institutes of

Health, Building 33, Room 1N24, 33 North Drive, Bethesda, MD 20892, *Laurie.Lewallen@nih.gov*, 301–761–6362.

(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 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25512 Filed 11–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket Number DHS–2020–0047]

Agency Information Collection Activities: DHS Civil Rights Evaluation Tool 1601–0024, DHS Form 3095

AGENCY: Department of Homeland Security, (DHS).

ACTION: 60-Day notice and request for comments; extension without change of a currently approved collection, 1601–0024.

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 19, 2021. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: You may submit comments, identified by docket number Docket # DHS–2020–0047, 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–2020–0047. 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: Recipients of federal financial assistance from the Department of Homeland Security (DHS) are required to meet certain legal requirements relating to nondiscrimination and nondiscriminatory use of federal funds. Those requirements include ensuring that entities receiving Federal financial assistance from the Department of Homeland Security do not deny benefits or services, or otherwise discriminate on the basis of race, color, national origin, disability, age, sex, or religion, in accordance with the following authorities:

- Title VI of the Civil Rights Act of 1964 (Title VI) Public Law 88–352, 42 U.S.C. 2000d–1 *et seq.,* and the Department's implementing regulation, 6 CFR part 21 and 44 CFR part 7, which prohibit discrimination on the grounds of race, color, or national origin by recipients of Federal financial assistance. Title VI, through its prohibition against discrimination on the basis of national origin, requires recipients to take reasonable steps to provide meaningful access to persons who are limited English proficient (LEP). *See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,* 76 FR 21755–21768 (April 18, 2011).
- Section 504 of the Rehabilitation Act of 1973 (Section 504), Public Law 93–112, as amended by Public Law 93–516, 29 U.S.C. 794, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.,* and the Department's implementing regulations, 6 CFR part 17, and 44 CFR part 19, which prohibits discrimination on the basis of sex in education program and activities received Federal financial assistance.
- Age Discrimination Act of 1975, Public Law 94–135, 42 U.S.C. Section 6101 *et seq.,* and the Department implementing regulation at 44 CFR part 7, which prohibits discrimination on the basis of age by recipients of Federal financial assistance.
- U.S. Department of Homeland Security regulation 6 CFR part 19, which prohibits organizations that receive financial assistance from DHS for a social service program from discriminating against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

The aforementioned civil rights authorities also prohibit retaliatory acts against individuals for participating or opposing discrimination in a complaint, investigation, or other proceeding related to prohibited discrimination.

DHS has an obligation to enforce nondiscrimination requirements to ensure that its federally assisted programs and activities are administered in a nondiscriminatory manner. In order to carry out its enforcement responsibilities, DHS must obtain a signed assurance of compliance and collect and review information from recipients to ascertain their compliance with applicable requirements. DHS implementing regulations and the Department of Justice (DOJ) regulation *Coordination of Non-discrimination in Federally Assisted Program,* 28 CFR part 42, provide for the collection of data and information from recipients (see 28 CFR 42.406).

DHS uses DHS Form 3095: DHS Civil Rights Evaluation Tool as the primary tool to implement this information collection. DHS is seeking an extension of the form for another three-year period. DHS is not proposing any changes to the information collected in the form but is proposing changes to Section 1 of the form on instructions to streamline the process for submitting the completed form.

DHS uses the form to collect civil rights related information from all recipients of federal financial assistance from the Department. Recipients are non-federal entities that receive federal financial assistance in the form of a grant, cooperative agreement, or other type of financial assistance directly from the Department and not through another recipient or ''pass-through'' entity. This information collection does not apply to subrecipients, federal contractors (unless the contract includes the provision of financial assistance), nor the ultimate beneficiaries of services, financial aid, or other benefits from the Department.

Recipients are required to provide the information 30 days from acceptance of award. Recipient of multiple awards of DHS financial assistance only submit one completed form for their organization, not per award. Recipient are required to complete the form once every two years if they have an active award, not every time a grant is awarded. Entities whose award does not run a full two years are required to provide the information again if they receive a subsequent award more than two (2) years after the prior award. In responding to *Section 4: Required Information,* which contains the bulk of the information collection, if the recipient's responses have not changed in the two year period since their initial submission, the recipient does not need to resubmit the information. Instead, the recipient will indicate ''no change'' for each applicable item.

The purpose of the information collection is to advise recipients of their

civil rights obligations and collect pertinent civil rights information to ascertain if the recipient has in place adequate policies and procedures to achieve compliance, and to determine what, if any, further action may be needed (technical assistance, training, compliance review, etc.) to ensure the recipient is able to meet its civil rights requirements and will carry out its programs and activities in a nondiscriminatory manner.

Over the past three years, DHS has used the information collected via the DHS Civil Rights Evaluation Tool to identify gaps and deficiencies in recipient programs and directly help recipients address these gaps and deficiencies by providing technical assistance on developing or improving policies and procedures to prevent discrimination and ensure accessibility.

DHS requires recipients to submit their completed forms and supporting information electronically, via email, to the Department, in an effort to minimize administrative burden on the recipient and the Department. DHS anticipates that records or files that will be used to respond to the information collection are already maintained in electronic format by the recipient, so providing the information electronically further minimizes administrative burden. DHS allows recipients to scan and submit documents that are not already maintained electronically.

If the recipient is unable to submit their information electronically, alternative arrangements will be made to submit responses in hard copy.

DHS is pursuing further streamlining of the submission process through development of an online portal that would allow recipients to submit the data directly in a fully electronic form and eliminate the need for recipients to email the form and supporting documents as attachments.

The information collection will impact some small entities (*e.g.,* non-profit service providers, local fire departments, etc.), however as described in response to Question 2, recipients will only be required to provide this information once every two years, not every time a grant is awarded. Additionally, in responding to Section 4: Required Information, if the recipient's responses have not changed in the two year period since their initial submission, the recipient does not need to resubmit the information. This will dramatically reduce the administrative burden on recipients after the initial submission. Additionally, DHS will further minimize burden on recipients by making available sample policies and procedures to assist recipients in completing Section 4 of the Form, and providing technical assistance directly to the recipient as needed.

In accordance with the authorities identified in Question 1, the Department is required to obtain a signed assurance of compliance from recipients and to ensure that its federally assisted programs and activities are administered in a nondiscriminatory manner. If the information collection is not conducted or is conducted less frequently, the Department will not be able to fulfill its obligations to ascertain recipient compliance and enforce nondiscrimination in recipient programs. This could lead to the award of federal financial assistance to recipients that are not complying with federal civil rights law, and the perpetuation of discrimination in the provision of benefits and services to members of the public.

There are no confidentiality assurances associated with this collection. The only privacy-sensitive information the form collects are the names of Point of Contacts (POCs) from recipient organizations. Coverage for the collection of this information is provided under a Department Privacy Impact Assessment, DHS/ALL/PIA–006 General Contacts List.

DHS is seeking an extension of the form for another three-year period. DHS is not proposing any changes to the information collected in the form but is proposing changes to Section 1 of the form on instructions to streamline the process for submitting the completed form. The changes to Section 1 do not impact the burden analysis. The changes in costs in Item 14 reflect increased hourly rates for Federal staff as reported by Office of Personnel Management for 2020, as well as an increase in the number of staff participating in the review process. Despite these increases, because the number of recipients subject to the collection has decreased from the previous reporting period, the total costs reported in Item 13 and 14 have also decreased.

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: DHS Civil Rights Evaluation Tool.

OMB Number: 1601–0024.

Frequency: On Occasion.

Affected Public: State, Local and Tribal Government.

Number of Respondents: 2929.

Estimated Time per Respondent: 1 Hour.

Total Burden Hours: 11716.

Robert Dorr,

Executive Director, Business Management Directorate.

[FR Doc. 2020–25543 Filed 11–18–20; 8:45 am]

BILLING CODE 9112–FL–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6210–N–02]

Notice of Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2020

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: The Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on April 1, 2020 and ending on June 30, 2020.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Aaron Santa Anna, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW, Room 10282, Washington, DC 20410–0500, telephone 202–708–5300 (this is not a toll-free number). Persons with

hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the second quarter of calendar year 2020.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from April 1, 2020 through June 30, 2020. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the second quarter of calendar year 2020) before the next report is published (the third quarter of calendar year 2020), HUD will include any additional waivers granted for the second quarter in the next report.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

The Principal Deputy General Counsel, Michael B. Williams, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Aaron Santa Anna, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Aaron Santa Anna,

Associate General Counsel for Legislation & Regulations.

Appendix

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development April 1, 2020 Through June 30, 2020

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted.

The regulatory waivers granted appear in the following order:

I. Regulatory Waivers Granted by the Office of Community Planning and Development
II. Regulatory Waivers Granted by the Government National Mortgage Association
III. Regulatory Waivers Granted by the Office of Housing

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 91.105(c)(2) and (k), 24 CFR 91.115(c)(2) and (i), and, 24 CFR 91.235(e) and 24 CFR 91.401.

Project/Activity: Citizen participation reasonable notice and opportunity to comment.

Nature of Requirement: The regulations set forth citizen participation requirements for participating jurisdictions. For substantial amendments to the consolidated plan, a participating jurisdiction to follow its citizen participation plan, which must state how reasonable notice and opportunity for public comment will be given.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver permits participating jurisdictions amending their consolidated plans as a result of the COVID–19 pandemic to reduce the comment period to 5 days. Given the unprecedented economic disruptions caused by the COVID–19 pandemic, participating jurisdictions may need to expeditiously reprogram HOME funds to activities that more directly meet their immediate housing needs. Requiring these participating jurisdictions to complete the required public comment period would cause undue delays in the face of urgent and growing need.

Applicability: The waiver is in effect for any necessary substantial amendments to Fiscal Year 2020 and earlier consolidated plans or action plans and to any approved Annual Action Plan being amended. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 91.105(c)(2) and (k), 24 CFR 91.115(c)(2) and (i), and, 24 CFR 91.235(e) and 24 CFR 91.401.

Project/Activity: Citizen participation reasonable notice and opportunity to comment.

Nature of Requirement: The regulations set forth citizen participation requirements for participating jurisdictions. For substantial amendments to the consolidated plan, a

participating jurisdiction to follow its citizen participation plan, which must state how reasonable notice and opportunity for public comment will be given.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver permits participating jurisdictions amending their consolidated plans as a result of the COVID–19 pandemic to reduce the comment period to 5 days. Given the unprecedented economic disruptions caused by the COVID–19 pandemic, requiring t participating jurisdictions to complete the required public comment period would cause undue delays in commencing tenant-based rental assistance programs to address an urgent and growing need.

Applicability: The waiver applies to any approved Annual Action Plan being amended to reprogram funds to TBRA to address housing needs related to the COVID–19 pandemic. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulations:* 24 CFR 91.220, 24 CFR 91.320.

Project/Activity: Housing and homeless needs assessment, housing market analysis, and strategic plan in Consolidated Plan, and action plans to the extent they are limited to a specific program year.

Nature of Requirement: 42 U.S.C. 12705(a)(2) requires that grantees submit and provide updates to a comprehensive housing affordability strategy, which contains a housing and homeless needs assessment, housing market analysis, and strategic plan, in order to receive CDBG funds. 24 CFR 91.220 for entitlement communities and 24 CFR 91.320 for states require that grantees incorporate the statutory comprehensive housing affordability strategy requirements in their annual action plans.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 9, 2020.

Reason Waived: To expedite grantees' use of CDBG–CV funds, HUD is waiving the requirements at 42 U.S.C. 12705(a)(2) to the extent it requires updates to the housing and homeless needs assessment, housing market analysis, and strategic plan, and 24 CFR 91.220 and 91.320 to the extent the action plan is limited to a specific program year to permit grantees to prepare substantial amendments to their most recent annual action plan, including their 2019 annual action plan.

Applicability: The statutory comprehensive housing affordability strategy requirements are waived to allow grantees to prepare substantial amendments to their most recent annual action plan. In their amended annual action plans, grantees must identify the proposed use of all funds and how the funds will be used to prevent, prepare for, and respond to coronavirus.

Contact: James Höemann, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7282, Washington, DC 20410, telephone (202) 402–5716.

• *Regulation:* 24 CFR 91.520(a).

Project/Activity: The Consolidated Annual Performance and Evaluation Report (performance report) submission to HUD within 90 days after the close of a jurisdiction's program year.

Nature of Requirement: The regulation at 24 CFR 91.520(a) requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: May 7, 2020.

Reason Waived: Under the authority at 24 CFR 91.600, HUD is authorized to waive this requirement when a determination of good cause is made and supported by documentation. Given the outbreak of the coronavirus known as SARS-CoV–2 and the extenuating circumstances placed on state and local governments, and citizens, HUD has determined that there is good cause for waiving this provision. The extenuating circumstances and administrative strain supporting this waiver are well documented in the broad public news coverage related to the outbreak.

Applicability: For program year 2019 CAPERs, the requirement that grantees submit a performance report within 90 days after the close of a jurisdiction's program year is waived, subject to the condition that within 180 days after the close of a jurisdiction's program year the jurisdiction shall submit its performance report.

Contact: James Höemann, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7282, Washington, DC 20410, telephone (202) 402–5716.

• *Regulation:* 24 CFR 92.203(a)(1) and (2), and 24 CFR 92.64(a).

Project/Activity: Source documentation for HOME income determinations.

Nature of Requirement: The regulations require initial income determinations for HOME beneficiaries by examining source documentation covering the most recent two months.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver permits the participating jurisdiction to use self-certification of income in lieu of source documentation to determine eligibility for HOME assistance of persons requiring emergency assistance related to COVID–19. Many families affected by actions taken to reduce the spread of COVID–19, such as business closures resulting in loss of employment or lay-offs, will not have documentation that accurately reflects current income and will not be able to qualify for HOME assistance if the requirement remains effective.

Applicability: This waiver is applicable to initial income determinations for individuals and families that have lost employment or income either permanently or temporarily due to the COVID–19 pandemic and who are applying for admission to a HOME rental unit or a HOME tenant-based rental assistance program. This waiver also applies to homeless individuals and families who are applying for admission to a HOME rental unit or a HOME tenant-based rental assistance program. If a PJ chooses to use this waiver availability, the PJ must ensure that self-certified income takes into consideration all income, including any unemployment and emergency benefits the applicant will receive. However, for purposes of an applicant's self-certification, emergency tax relief (commonly referred to as stimulus payments) is not to be included as an emergency benefit. Also, the PJ must arrange to conduct on-site rent and income reviews within 90 days after the waiver period. The PJ must include tenant income certifications in each project file. This requirement is waived through December 31, 2020, for rental assistance provided in response to the COVID–19 pandemic. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.203(a)(2) and 24 CFR 92.64(a).

Project/Activity: Source documentation for HOME income determinations.

Nature of Requirement: The regulations require the participating jurisdiction to determine a tenant-based rental assistance tenant's income by examining at least two months of source documentation evidencing income and projecting anticipated income forward for the next 12 months.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver permits the participating jurisdiction to use self-certification of income in lieu of source documentation to determine eligibility for HOME assistance of persons requiring emergency rental assistance related to COVID–19. Given the rapid and unanticipated economic disruptions caused by the COVID–19 pandemic, source documentation from the past two months may not reflect the current financial circumstances of many households. Requiring participating jurisdictions to use source documentation would be administratively burdensome, may not reflect current or anticipated income, and may result in individuals and families being incorrectly disqualified from receiving TBRA.

Applicability: This waiver is applicable to tenant-based rental assistance provided to individuals and families experiencing financial hardship. The PJ must ensure that

the tenant's self-certification indicates how the tenant's financial situation has changed (*i.e.,* job loss or reduced wages), and include all income, including any unemployment or emergency benefits received by the tenant as a result of the pandemic. However, for the purposes of a tenant's self-certification, emergency tax relief (commonly referred to as stimulus payments) is not to be included as an emergency benefit. The PJ must include tenant income certifications in each project file. This requirement is waived through December 31, 2020, for rental assistance provided in response to the COVID–19 pandemic. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.205(e)(2) and 24 CFR 92.64(a).

Project/Activity: Four-year project completion deadline.

Nature of Requirement: The regulations require that projects assisted with HOME funds be completed within four years of the date that HOME funds were committed.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: This waiver is necessary to provide additional time to permit completion of HOME-assisted projects that may be delayed as a result of the impact of COVID–19 on project timelines.

Applicability: The waiver applies to projects for which the four-year project completion deadline will occur on or after April 10, 2020. The completion deadlines for covered projects are extended to December 31, 2020. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.209(a) and (h) and 24 CFR 92.64(a).

Project/Activity: Eligible tenant-based rental assistance costs and maximum TBRA subsidy.

Nature of Requirement: The regulations state that eligible TBRA costs include rental assistance and security deposit payments made to income-eligible households. Participating jurisdictions can also use HOME funds to provide utility deposit assistance if such assistance is provided in conjunction with TBRA or a security deposit payment. The maximum amount of monthly assistance may not exceed the difference between the participating jurisdiction's rent standard and 30 percent of the tenant's monthly adjusted income.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver allows participating jurisdictions to provide up to 100 percent subsidy for rent, security deposit payments, and utility bills paid by tenants affected by a reduction or loss of income from the COVID–19 pandemic. The COVID–19 pandemic has caused widespread loss or reduction of income, significantly affecting the financial stability of households, including existing TBRA families, and rendering many unable to pay rent and/or utilities. As individuals experience financial hardship, the amount of assistance required to ensure they remain housed will often exceed the participating jurisdiction's payment standard. Individuals may be unable to pay the participating jurisdiction's minimum required tenant contribution toward rent.

Applicability: This waiver is applicable to TBRA provided to individuals or families experiencing financial hardship, including existing TBRA families. PJs using this waiver authority must execute a rental assistance contract with the owner or tenant for a term mutually agreed upon by all parties, but not to exceed the December 31, 2020, waiver period. The PJ may make utility payments directly to the tenant or utility company based on utility bills submitted for the assisted unit, either by mail or electronically. The waiver applies through December 31, 2020. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.209(e) and 24 CFR 92.64(a).

Project/Activity: Term of rental assistance contract.

Nature of Requirement: The regulations state requirements for the term of rental assistance contracts, including that the term must begin on the first day of the term of the lease.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver eliminates the requirement that the rental assistance contract begin on the first day of the term of the lease. This waiver is necessary to enable participating jurisdictions to assist tenants that are currently housed, including existing TBRA households, but have experienced sudden financial hardship as a result of the COVID–19 pandemic. Because affected households already have an executed lease, it is impossible for the TBRA contract to begin on the first day of the term of the lease.

Applicability: This requirement is waived through December 31, 2020, for TBRA provided in response to the COVID–19 pandemic. The PJ's requirement to execute a rental assistance contract with the owner or tenant is not waived. PJs using this waiver authority must execute a rental assistance contract with the owner or tenant for a term mutually agreed upon by all parties, but not to exceed the December 31, 2020, waiver period. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.209(f) and 24 CFR 92.64(a).

Project/Activity: HOME TBRA rent reasonableness.

Nature of Requirement: The regulations require that a participating jurisdiction must disapprove a lease if the rent is not reasonable, based on an assessment of rents charged for comparable unassisted rental units.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver will permit participating jurisdictions to provide immediate rental assistance without requiring an assessment of rents charged for comparable unassisted rental units. Given the unprecedented need for rental assistance for individuals facing financial hardship during the pandemic, requiring participating jurisdictions to conduct a rent comparison prior to providing rental assistance presents an undue administrative burden.

Applicability: The waiver is applicable to TBRA provided to individuals and tenant households experiencing financial hardship because of a reduction or loss of income. The requirement is waived through December 31, 2020. The waiver is available to all participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.209(g) and 24 CFR 92.64(a).

Project/Activity: HOME TBRA tenant protections—lease.

Nature of Requirement: The regulations require that each HOME-assisted tenant have a lease that complies with the tenant protection requirements of 24 CFR 92.253(a) and (b).

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver will permit participating jurisdictions to assist individuals currently housed but facing financial hardship, where an executed lease is already in place. During the COVID–19 pandemic, participating jurisdictions may assist individuals that are already in rental units but are unable to pay rent and/or utilities due to job loss or reduced wages. These individuals already have an executed lease that may include one or more of the prohibited lease terms included in 24 CFR 92.253(b). Requiring participating jurisdictions to immediately execute or amend leases creates an undue

administrative burden and may disqualify some in-place tenants from receiving TBRA.

Applicability: The requirement that a tenant assisted by TBRA have a lease that complies with the requirements of 24 CFR 92.253(a) and (b) is waived through December 31, 2020, for rental assistance provided to tenants already housed who have an executed lease. PJs using this waiver authority are required to execute a rental assistance contract with the tenant for a term mutually agreed upon by all parties, but not to exceed the waiver period ending on December 31, 2020. PJs must still comply with all VAWA requirements contained in 24 CFR 92.359 by including, at a minimum, a lease addendum that addresses all VAWA requirements. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.209(i) and 24 CFR 92.64(a).

Project/Activity: HOME TBRA housing quality standards.

Nature of Requirement: The regulations require that all housing occupied by households receiving HOME TBRA must meet the housing quality standards (HQS) at 24 CFR 982.401. The participating jurisdiction is required to inspect the unit for compliance prior to occupancy and annually thereafter.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: This waiver will permit the participating jurisdiction to rapidly house or assist individuals affected by the COVID–19 pandemic without requiring an initial HQS inspection. The COVID–19 pandemic has created an unprecedented need for rental assistance for tenant households facing financial hardship. Participating jurisdictions must act quickly to address these needs and requiring HQS inspections of all units where HOME TBRA assistance is provided would create an administrative burden and reduce participating jurisdictions' ability to respond timely to the housing needs created by the pandemic.

Applicability: The requirement is waived through December 31, 2020, for rental assistance provided in response to the COVID–19 pandemic. The waiver is available to all HOME participating jurisdictions. The lead-safe housing requirements of 24 CFR part 35, subpart M, made applicable to units leased by recipients of HOME TBRA by the HOME regulation at 24 CFR 92.355, cannot be waived. Consequently, units built before 1978 must undergo visual evaluation and paint repair in accordance with 24 CFR part 35, subpart M.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.210(a) and (b) and 24 CFR 92.64(a).

Project/Activity: Use of HOME funds for operating reserves for troubled HOME projects.

Nature of Requirement: The regulations establish provisions to permit HOME rental projects that are not financially viable (*i.e.,* projects for which operating costs significantly exceed operating revenue) to be preserved through the use of HOME funds to recapitalize project reserves. The regulations also require HUD to review market needs, available resources, and the likelihood of long-term viability of the project before approving this use of HOME funds. In addition, a written memorandum of agreement between HUD and the participating jurisdiction is a precondition of this funding and the regulation places certain limitations on the amount of funding.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: Participating jurisdictions will not be required to obtain HUD approval or execute a memorandum of agreement with HUD before providing this assistance. The waiver is necessary to enable participating jurisdictions to take rapid action to preserve the financial viability of HOME-assisted affordable rental projects currently under a HOME period of affordability. Because existing tenants in HOME units may be unable to meet their rent obligations due to the economic impact of the COVID–19 pandemic, HOME rental projects may experience operating deficits due to the sudden decrease in rental revenue.

Applicability: The waiver applies to HOME-assisted rental projects currently within the period of affordability established in the HOME written agreement. PJs will not be required to obtain HUD approval or execute a memorandum of agreement with HUD before providing this assistance. PJs may only exercise this waiver authority when the project owner agrees to forego: (1) Any distributions of residual receipts resulting from the project throughout the waiver period and for a period of 6 months thereafter; (2) any right under the existing lease agreement or State or local law to pursue legal action against tenants of HOME-assisted units for non-payment of rent and the collection of any fees associated with late payments without prior approval of the PJ; and (3) any adverse credit reporting against tenants of HOME-assisted units for nonpayment of rent or fees without prior approval of the PJ.

The PJ may provide additional HOME funds to recapitalize operating deficit reserves for HOME-assisted rental projects if the PJ determines that the project is experiencing operating deficits related to the economic effects of the COVID–19 pandemic during the waiver period. The PJ may only provide this assistance to projects experiencing operating deficits that will not be covered by insurance or other sources (*e.g.,* other private, local, state, or federal funds).

The maximum amount of HOME assistance that may be provided is equal to the total of the project's operating expenses, previously scheduled payments to a replacement reserve, and actual debt service (excluding debt service of loans in forbearance) multiplied by the proportionate share of HOME-assisted units to the total number of units in the project for the period beginning on April 1, 2020 and ending on December 31, 2020. Project operating expenses may be demonstrated by one of the following:

• The Owner's most recent year to date financials for the project;

• Certified project-level accounting records covering the most recent 3 months; and

• Copies of project-level bank statements covering the most recent 3 months.

Project operating expenses may also be adjusted due to COVID–19-related expenditures and foregone expenses due to social distancing measures and other COVID–19-related impacts. An owner may demonstrate these expenses with recent receipts, copies of work orders, revised budgets that have been certified by the project owner as true, accurate representations of current expenditures.

In order to take advantage of this waiver, PJs must amend the HOME written agreement with the project owner to include the amount of HOME funds that will be provided to an operating reserve (*i.e.,* the proportion of total costs attributable to HOME units as described in the paragraph above), the costs eligible to be paid with HOME funds in the operating reserve (*i.e.,* operating expenses, scheduled payments to a replacement reserve, and qualifying debt service), and the documentation the PJ is required to maintain to demonstrate the allowable amounts and eligibility of costs paid with the HOME funds in the operating reserve.

The written agreement must specify that the owner must forego: (1) Any distributions of residual receipts during the period this waiver is in effect and for a period of 6 months thereafter; (2) any right under the existing lease agreement or State or local law to pursue legal action against tenants of HOME-assisted units for non-payment of rent and the collection of any fees associated with late payments without prior approval of the PJ; and (3) any adverse credit reporting against tenants of HOME-assisted units for nonpayment of rent or fees without prior approval of the PJ.

Within six months following the waiver period, the PJ must review the project's records of actual revenue and operating expenses, total amount of HOME funds expended from the operating reserve, and the eligibility of expenses by examining invoices and receipts. The written agreement must require the project owner to repay any expenditures for costs determined to be ineligible and any balance of HOME funds remaining in the reserve after December 31, 2020. Any HOME funds repaid to the PJ must be deposited in the local HOME account and reported as program income in IDIS. The waiver is effective through December 31, 2020.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development,

Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: San Luis Obispo County, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by local public housing agency (PHA) for a HOME-assisted project—Iron Works Apartments.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 8, 2020.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: Los Angeles County, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by local public housing agency (PHA) for two HOME-assisted projects—Francisquito Senior Apartments and Athens Vistas Senior Apartments.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: May 11, 2020.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: The city of Santa Cruz, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by local public housing agency (PHA) for a HOME-assisted project—Water Street Apartments.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: May 11, 2020.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: Ventura County, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by local public housing agency (PHA) for a HOME-assisted project—Willett Ranch Apartments.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: May 11, 2020.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: Sonoma County, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by local public housing agency (PHA) for a HOME-assisted project—Altamira Family Apartments.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: June 3, 2020.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.254(a)(3) and 24 CFR 92.64(a).

Project/Activity: Nine-month deadline for sale of HOME-assisted homebuyer units

Nature of Requirement: The regulations require that a homebuyer housing unit developed with HOME funds have a ratified contract for sale to an eligible homebuyer within nine months of the date of completion of construction or rehabilitation.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: Many participating jurisdictions will not be able to meet this deadline due to the effect the COVID–19 pandemic will have on the ability of eligible households to qualify for mortgages as a result of income losses or the inability to schedule inspections, title searches, or closings during periods of business closures.

The waiver is necessary to prevent the loss of homeownership opportunities for HOME-eligible families and temporarily suspend the required corrective action of repayment of HOME funds or conversion of the homebuyer units to rental housing.

Applicability: The waiver applies to projects for which the nine-month homebuyer sale deadline occurs on or after the date of this memorandum and extends the deadline for those projects to December 31, 2020. This waiver does not apply to the remaining requirements of the regulation, including that a homebuyer must receive housing counseling, and that a PJ must determine eligibility of a family by including the income of all persons living in the housing. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.504(d)(1)(ii) and 24 CFR 92.64(a).

Project/Activity: On-site inspections of HOME-assisted rental housing.

Nature of Requirement: The regulations require that during the period of affordability participating jurisdictions perform on-site inspections of HOME-assisted rental housing at least once every three years to determine compliance with the property standards and to verify the information submitted by the owners in accordance with the income and rent requirements.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: Waiving the requirement to perform ongoing on-site inspections will help protect participating jurisdiction staff and limit the spread of COVID–19. To protect participating jurisdiction staff and reduce the spread of COVID–19, this waiver extends the timeframe for participating jurisdictions to perform on-going periodic inspections and on-site reviews to determine a HOME rental project's compliance with property standards and rent and income requirements.

Applicability: The waiver is applicable to ongoing periodic inspections and does not waive the requirement to perform initial inspections of rental properties upon completion of construction or rehabilitation. The waiver is also applicable to on-site reviews to determine a HOME rental project's compliance with rent and income requirements if the project owner is unable to make documentation available electronically. The waiver is in effect through December 31, 2020. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.504(d)(1)(iii); 24 CFR 92.209(i) and 24 CFR 92.64(a).

Project/Activity: Annual inspection of units occupied by recipients of HOME tenant-based rental assistance (TBRA).

Nature of Requirement: The regulations require participating jurisdictions to annually inspect each unit occupied by a recipient of HOME TBRA.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: Waiving the requirement that these annual inspections be performed according to schedule will protect the health of both inspectors and TBRA tenants by observing physical distancing recommendations to limit the spread of COVID–19.

Applicability: The waiver is applicable to annual housing quality standards inspections required to occur from April 10, 2020, through December 31, 2020. PJs shall make reasonable efforts to address any tenant reported health and safety issues during the waiver period. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.551(b)(1) and 24 CFR 92.64(a).

Project/Activity: Timeframe for a HOME participating jurisdiction's response to findings of noncompliance.

Nature of Requirement: The regulations require that if HUD determines that a participating jurisdiction has not met a provision of the HOME regulations, the participating jurisdiction must be notified and given an opportunity to respond within a time period prescribed by HUD, not to exceed 30 days.

Granted By: John Gibbs, Acting Assistant Secretary for Community Planning and Development.

Date Granted: April 10, 2020.

Reason Waived: The waiver is necessary to permit HUD to provide participating jurisdictions with an extended period to respond to findings of noncompliance in recognition of the unanticipated circumstances created by the COVID–19 pandemic. Requiring participating jurisdictions to respond to all findings of noncompliance within 30 days may interfere with a participating jurisdiction's ability to address the unprecedented housing needs caused by the COVID–19 pandemic.

Applicability: The waiver applies to all findings of HOME regulatory noncompliance issued from April 10, 2020, through December 31, 2020. In the notice of findings, HUD will specify a time period for the participating jurisdiction's response. HUD may also extend time periods imposed before April 10, 2020. The waiver is available to all HOME participating jurisdictions.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708–2684.

II. Regulatory Waivers Granted by the Office of Government National Mortgage Association

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 320.15(a). Project/Activity: Regulatory Waiver of Issuer Default Status in Connection with The Pass-Through Assistance Program Related To The COVID–19 National Emergency.

Nature of the Requirement: The regulation at 24 CFR 320.15(a) establishes that any failure or inability of the issuer to make payments as due, as well as such other events as may be identified by the Association and included in the applicable guaranty agreement, contractual agreement or MBS Guide, shall constitute a default of the issuer.

Granted By: Seth D. Appleton, Principal Executive Vice President, Ginnie Mae.

Date Granted: April 10, 2020.

Reason Waived: On March 13, 2020, the President declared a National Emergency related to the COVID–19 pandemic. For the first time, with the COVID–19 National Emergency, Ginnie Mae is facing a situation in which the potential liquidity threat from the emergency has virtually no limitations within the universe of approved Issuers. Because of statutory changes by Congress, such as CARES Act, Public Law 116–136, and policy changes by the insuring and guaranteeing agencies made in response to the COVID–19 National Emergency, it is conceivable that a broad cross section of non-bank Issuers participating in the Ginnie Mae program would seek assistance as the result of liquidity concerns and inability to make payments as due. Ginnie Mae's program allows for the pass-through assistance (PTAP) in limited situations. Given the potential number of issuers that may be impacted, Ginnie Mae has determined that this situation warrants a regulatory waiver because the potential breadth and scale of the impact, and subsequent need for assistance, makes it impractical—and unwise—to assume that there would be no negative impact on the secondary mortgage market if a large number of issuers are declared to be in default because of financial challenges caused by statutes and policies related to a Presidentially-declared National Emergency. Therefore, modifying the definition of default as inapplicable to issuers that request PTAP assistance due to COVID–19 National Emergency is reasonable to meet Ginnie Mae's statutory mission to provide stability in the secondary market for residential mortgages.

Contact: Rene Mondonado, Director, Monitoring & Asset Management, Office of Issuer & Portfolio Management, Government National Mortgage Association, Department of Housing and Urban Development, 425 Third St. SW, 4th FL, Washington, DC 20024, Telephone (202) 475–7992.

III. Regulatory Waivers Granted by the Office of Housing—Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 5.801 (c)(2).

Project/Activity: Financial Statement Due Date.

Nature of Requirement: For specified Multifamily and Residential Care Borrowers otherwise required to submit Annual Financial Statements on or before June 30, 2020, extend the due date of the Borrower Annual Financial Statements to September 30, 2020, and as otherwise provided by law.

Granted By: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 25, 2020.

Reason Waived: Due to COVID–19 National Health Emergency the Borrower Annual Financial Statements have been extended by 90-days.

Contact: Brandt Witte, Program Analyst, Multifamily Asset and Counterparty Oversight Division, Office of Housing, Office of Asset Management and Portfolio Oversight, Department of Housing and Urban Development, 451 Seventh Street SW, Room, telephone (202) 402–2614.

• *Regulation:* 24 CFR 200.73 (c).

Project/Activity: Henderson Heights Apartment, Hendersonville, North Carolina, Project No. 053–11454.

Nature of Requirement: HUD's regulation at 24 CFR 200.73 (c) requiring that ''not less than five rental dwelling units [of an FHA insured multifamily housing project] shall be on one site. The Housing Authority has and will continue to manage the project post-conversion. Henderson Heights consists of 19 residential parcels with 164 buildings with a total of 352 units. The cluster of units/projects were acquired by HHA over a 22-year period. Two satellite sites are located north and west of Hendersonville and are not located within the city limits. The units were acquired and/or developed in seven phases/projects between 1960 and 1982. Out of the 19 parcels, 4 parcels are non-conforming as they each contain fewer than 5 units. The 4 non-conforming parcels contain a total of 12 units. All the non-conforming parcels are located within the City of Hendersonville in close proximity to the larger, conforming parcels. Three of the parcels are located on the same street within a block of each other.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 22, 2020.

Reason Waived: The waiver will meet HUD's goal of preserving and maintaining affordable rental housing for low income families. The proposed FHA-insured loan/RAD conversion will preserve and rehabilitate necessary affordable housing and will contribute to the revitalization of this Hendersonville community.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410–8000, telephone (202) 402–5693.

• *Regulation:* 24 CFR 200.73 (c).

Project/Activity: Neighborhood Apartments, Kalamazoo, Michigan, Project No. 047–11246.

Nature of Requirement: HUD's regulation at 24 CFR 200.73 (c) requiring that ''not less than five rental dwelling units [of an FHA insured multifamily housing project] shall be on one site. All sites composing the Neighborhood Apartment project are located in one neighborhood outside downtown Kalamazoo. The project constitutes one manageable, marketable real estate asset. The project offers 12 one bedroom/one bath units and 32 two bedroom/one bath housed within 11 one-story and two-story buildings. The project consists of three one-story buildings and seven two-story buildings located on 8 separate scattered sites. Two of the parcels are contiguous and contain two units each. One parcel contains 4 units. The remaining 5 parcels all contain 5 or more units.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 23, 2020.

Reason Waived: The waiver will meet HUD's goal of preserving and maintaining affordable rental housing for low income families. The proposed FHA-insured loan/RAD conversion will preserve and rehabilitate necessary affordable housing and will contribute to the revitalization of this Kalamazoo community.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 200.73(c).

Project/Activity: Satchmo Plaza, New Orleans, LA, Project No. 064–11213.

Nature of Requirement: The 24 CFR part 200.73 (c) which states that a site must contain no less than five rental dwelling units. Section 3.1.CC of the 2016 MAP Guide permits a project with two or more non-contiguous parcels of land when the parcels comprise one marketable, manageable real estate entity. Bedford Lending Corporation has applied for mortgage insurance under the Section 223(f) program to refinance Satchmo Plaza. The proposal is to combine two separate, scattered site, Section 8 assisted properties known as Satchmo Plaza and Armant Plaza into a single manageable property consisting of 46 total units and to be known as Satchmo Plaza. The projects are now owned by mortgagors controlled by the same non-profit entity. The existing Satchmo Plaza is 7 buildings on 5 sites totaling 30 units. It is a Section 202 property for the elderly. The existing Armant Plaza is 8 buildings on 3 sites with a total of 16 units. Armant is assisted with HOME/CDBG funds but is not presently age restricted. All of the combined scattered sites (8 sites, 15 buildings) are located in the same neighborhood near downtown New Orleans. Of the 8 sites, 4 have less than five units. The mortgage amount is $2,668,000.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 24, 2020.

Reason Waived: The waiver will meet HUD's goal of preserving and maintaining affordable rental housing for low income families. The proposed FHA-insured loan/RAD conversion will preserve and rehabilitate necessary affordable housing and will contribute to the revitalization of this New Orleans community.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 200.194(d).

Project/Activity: FHA Single Family Waiver for Non-Profit Roster Recertification.

Nature of Requirement: Under 24 CFR 200.194 (d), HUD-approved nonprofit organizations must reapply for approval before the expiration of an existing 2-year authorization term to continue participating in FHA programs. Approximately 30 HUD-approved non-profit organizations that have been impacted by the COVID–19 pandemic are within 90–120 days of their approval or recertification date.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 20, 2020.

Reason Waived: A temporary 120-day extension makes it possible for FHA-approved non-profit organizations to operate without disruption during the COVID–19 pandemic. The temporary waiver is consistent with the Departments mission to promote and support affordable housing objectives and it does not violate any statutory requirements.

Contact: Kevin Stevens, Acting Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 9266, Washington, DC 20410, telephone (202) 402–4317.

• *Regulation:* 24 CFR 203.255(b)(11).

Project/Activity: COVID–19 Certification and Pre-Endorsement Review Requirements for The United States and Its Surrounding Territories.

Nature of Requirement: The U.S. Department of Housing and Urban Development's (HUD) regulation at 24 CFR 203.255(b) addresses the documentation that must be submitted to HUD for mortgages originated under the Direct Endorsement and Lender Insurance Programs. Additionally, subsection 203.255(b)(11) requires a mortgage certification on a form prescribed by the Secretary, stating that the authorized representative of the mortgagee has reviewed the mortgage documents and certifies that the mortgage complies with the requirements of paragraph (b) incorporating all certification items that apply to the mortgage loan as set forth in the applicable handbook (*i.e.,* HUD Handbook 4000.1). The referenced prescribed form is Form HUD 92900–A. A mortgagee must certify at the time of insurance endorsement the loan is in compliance with all FHA origination and underwriting requirements including that the borrower's employment status and ability to make mortgage payments is accurate.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 3, 2020.

Reason Waived: The waiver of the requirement in 24 CFR 203.255(b)(11) that states the mortgagee must certify, as prescribed on the 92900–A, at the time of insurance endorsement that the loan is in compliance with all FHA origination and underwriting requirements solely to the extent that the borrower's employment status and ability to make mortgage payments, will permit the mortgagee that grants the borrower an Accommodation as defined at 4021 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) for forbearance of mortgage payments, after closing of the mortgage transaction to be in compliance with all FHA origination and underwriting requirements.

Contact: Kevin Stevens, Acting Director Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 9266, Washington, DC 20410, telephone (202) 402–4317.

• *Regulation:* 24 CFR 219.220(b).

Project/Activity: City View Park Walnut I, FHA Project Number 083–14002; City View Park Chestnut II, FHA Project Number 083–12004; and City View Park Acorn III, FHA Project Number 083–12005, Louisville, KY. The owner of City View Park I, II, and III seeks approval to defer repayment of the Flexible Subsidy Operating Assistance Loans on the subject projects.

Nature of Requirement: The regulation at 24 CFR 219.220(b) (1995), which governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Properties, states ''Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of mortgage insurance, prepayment of the mortgage, or a sale of the project.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: January 31, 2020.

Reason Waived: The owner requested and was granted waiver of the requirement to repay the Flexible Subsidy Operating Assistance Loans in full when they became due. Deferring the loan payments will preserve these affordable housing resources for an additional 40 years through the execution and recordation of a Rental Use Agreement.

Contact: Walter D. Wynn, Director, FAMD, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW, Room 6164, Washington, DC 20410, telephone (202) 402–2231.

• *Regulation:* 24 CFR 242.17(c)(2).

Project/Activity: Maimonides Medical Center, Brooklyn, New York.

Nature of Requirement: 24 CFR 242.17(c)(2) prohibits FHA from extending Commitments for Insurance of Advances for more than 180 days following the original commitment date.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 28, 2020.

Reason Waived: Initial Endorsement of Maimonides Medical Center's supplement (Section 241) loan was delayed due to the Covid-19 pandemic. The waiver allowed the Federal Housing Administration to schedule closing of Maimonides Medical Center's supplemental (Section 241) construction loan for August 2020.

Contact: Paul Giaudrone, Underwriting Director, Office of Hospital Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 409 3rd Street SW, Washington, DC 20024, telephone (202) 708–0599 Ext. 5684.

• *Regulation:* 24 CFR 266.200(b)(2).

Project/Activity: Massachusetts Housing Partnership (MHP) The Department requires, in 24 CFR 266.200(b)(2), Substantial Rehabilitation, that substantial rehabilitation (S/R) is defined as any combination of the following work to an existing facility of a project that aggregates to at least 15 percent of the project's value after the rehabilitation and that results in material improvement of the project's economic life, livability, marketability, and profitability. Boston, Massachusetts. There is no project number.

Nature of Requirement: The Waiver of 24 CFR 266.200(b)(2), Substantial Rehabilitation. The waiver would permit Mass Housing Partnership (MHP) to use the revised definition published in the Revised MAP Guide on January 29, 2016, such that S/R is: Any scope of work that either (a) exceeds in aggregate cost a sum equal to the 'base per dwelling unit limit' times the applicable *High Cost Factor, or (b) replacement of two or more building systems. Replacement is when the cost of replacement work exceeds 50 percent of the cost of replacing the entire system.

The High Cost Factors for 2019 were published through a Housing Notice (HN) on May 20, 2019, and the revised statutory limits were recently published in the* **Federal Register *on January 1, 2018. The 2019 base dwelling unit amount to determine substantial rehabilitation for FHA insured loan programs has been increased from $15,933 (changed from $6,500 per unit in the 2016 MAP guide) to $15,933. This amount will change annually based upon the change in the annual Consumer Price Index (CPI), along with the statutory limits or other inflation cost index published by HUD.*

The regulatory waiver is subject to the following conditions:

1. The waiver is limited to forty-eight (48) projects and expires on December 31, 2023 for waiver request related to regulation 24 CFR 266.200(b)(2) and (c)(2).

2. MHP must elect to take 50 percent or more of the risk of loss on all transactions.

3. Mortgages made under this waiver may have amortization periods of up to 40 years, but with a minimum term of 17 years.

4. All other requirements of 24 CFR 266.410—Mortgage Provision remain applicable. The waiver is applicable only to loans made under MHP's Risk Sharing Agreement.

5. Projects must comply with Davis-Bacon labor standards in accordance with 24 CFR 266.225.

6. MHP must comply with regulations stated in 24 CFR 266.210 for insured advances or insurance upon completion transactions.

7. The loans exceeding $50 million require a separate waiver request.

8. Occupancy is no less than 93 percent for previous 12 months.

9. No defaults in the last 12 months of the HFA loan to be refinanced.

10. A 20-year affordable housing deed restriction placed on title that conforms to the Section 542(c) statutory definition.

11. A Property Capital Needs Assessment (PCNA) must be performed and funds escrowed for all necessary repairs, and reserves funded for future capital needs; and

12. For projects subsidized by Section 8 Housing Assistance Payment (HAP) contracts:

a: Owner agrees to renew HAP contract(s) for 20-year term, (subject to appropriations and statutory authorization, etc.), and b: In accordance with regulations in 24 CFR 883.306(e), and Housing Notice 2012–14—Use of ''New Regulation'' Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts of Offset Project-Based Section 8 Housing Assistance Payments, if at any time MHP determines that a project's excess funds (surplus cash) after project operations, reserve requirements and permitted distributions are met, MHP must place the excess funds into a separate interest-bearing account. Upon renewal of a HAP Contract the excess funds can be used to reduce future HAP payments or other project operations/purposes. When the HAP Contract expires, is terminated, or any extensions are terminated, any unused funds remaining in the Residual Receipt Account at the time of the contract's termination must be returned.

Granted By: Len Wolfson, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: June 30, 2020.

Reason Waived: The Department is approving your request for forty-eight (48) insured under the 542(c) HFA Risk Sharing Program expiring on December 31, 2023. The waiver of 24 CFR 266.200(b)(2) would permit MHP to use the revised definition published in the Revised MAP Guide on January 29, 2016, such that S/R is: Any scope of work that either (a) exceeds in aggregate cost a sum equal to the 'base per dwelling unit limit' times the applicable *High Cost*High Cost Factor, or (b) replacement of two or more building systems. Replacement is when the cost of replacement work exceeds 50 percent of the cost of replacing the entire system.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.200(c)(2).

Project/Activity: The Waiver of 24 CFR 266.200(c)(2), Existing Project ''Equity Take-out'', that the refinancing of HFA refinance loan is permissible if the preservation is the result, with certain conditions: (1) Occupancy at least 93 percent for previous 12 months; (2) underwrite to the lower of

Section 8 or market rents; (3) no equity take-outs: Risk sharing loan cannot exceed sum of existing indebtedness, cost of repairs, and transaction costs; (4) no defaults in the last 12 months of HFA loans. This waiver's Massachusetts Housing Partnership (MHP) in Boston, Massachusetts, no project name, or number listed.

Nature of Requirement: The Waiver of 24 CFR 266.200(c)(2), Existing Projects ''Equity Take-outs''. The waiver of 24 CFR 266.200(c)(2) would permit equity take-outs for any existing property, including both MHP-financed developments and those outside of MHP's portfolio, to be refinanced by MHP, where MHP and HUD split the risk of loss 50/50.

In order to mitigate risk to FHA, ensure affordability of projects, loans to be refinanced cannot have been in default in the 12 months prior to the date of application for refinancing, the owner must agree to renew the HAP contract for a 20-year term, if applicable, existing and post-refinance HAP residual receipts must be set aside to be used to reduce future HAP payments, the property must be maintained as affordable housing for a period of at least 20 year, regardless of whether the loan is prepaid, and a capital needs assessment must be performed and funds escrowed for all necessary repairs and replacement reserves funded for future capital repairs.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 30. 2020.

Reason Waived: The approval of MHP's underwriting guidelines as indicted in Appendix B—Multifamily Loan Underwriting Standards and Reference Manual revised on November 2018. MHP will meet massive affordable housing needs in post MHP requests a waiver of two existing risk sharing requirements to meet agency's massive affordable housing needs in a post 1414B environment. The Department is approving your request forty-eight (48) insured under the 542(c) HFA Risk Sharing Program expiring on December 31, 2023.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24CFR 266.200(d).

Project/Activity: The waiver of 24 CFR 266.200(d), for projects receiving Section 8 rental subsidies or other rental subsidies. For refinancing of Section 202 projects, and for Public Housing Authority (PHA) projects converting to Section 8 through the Rental Assistance Demonstration (RAD) Initiative, Boston, Massachusetts. No project number or name listed.

Nature of Requirement: The waiver of 24 CFR 266.200(d), for projects receiving Section 8 rental subsidies or other rental subsidies. The Department would permit Massachusetts Housing Partnership (MHP) to underwrite Section 202 projects and PHA projects converting to Section 8 through RAD using the current or to-be-adjusted project-based Section 8 rents, even though they exceed the market rates, consistent with HUD Housing Notice 04–21. ''Amendments to Notice 02–16: Underwriting Guidelines for Refinancing of Section 202, and Section 202/8 Direct Loan Repayments'', which grants authority only to those lenders refinancing with mortgage programs under the National Housing Act.

Granted By: Len Wolfson, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 30, 2020.

Reason Waived: The waiver would allow Supportive Housing program projects of MHP's assuming at least 50 percent of the risk of loss on mortgages insured under Section 542(c) would be subject to the same underwriting standard as other Section 202 projects in that the loans may be underwritten to contract rents. This waiver better aligns requirements between HUD programs, thereby streamlining and facilitating program administration by HFAs. Waiver will create and preserve affordable housing in the State of Massachusetts. The waiver is limited to forty-eight (48) projects and expires on December 31, 2023.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.410(e).

Project/Activity: District of Columbia Housing Agency (DCHFA), Washington, DC, no project name or number listed.

Nature of Requirement: The 24 CFR 266.410(e), which requires mortgages insured under the 542(c) Housing Finance Agency Risk Sharing Program to be fully amortized over the term of the mortgage. The waiver would permit DCHFA to use balloon loans that would have a minimum term of 17 years and a maximum amortization period of 40 years for the projects identified in the ''Multifamily Pipeline Projects''.

Granted by: Len Wolfson, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: June 22, 2020.

Reason Waived: The waiver was granted to allow DCHFA's clients additional financing options to their customers and to align DCHFA business practices with industry standards, thus furthering the creation of a preservation of affordable housing throughout Washington, DC. The regulatory waiver is subject to the following conditions:

1. This waiver is limited to the projects listed in DCHFA's ''Multifamily Pipeline Projects'' and expires on December 31, 2022.

2. DCHFA must elect to take 50 percent or more of the risk of loss on all transactions.

3. Mortgages made under this waiver may have amortization periods of up to 40 years, but with a minimum term of 17 years.

4. All other requirements of 24 CFR 266.410—Mortgage Provision remain applicable. The waiver is applicable only to loans made under DCHFA's Risk Sharing Agreement.

5. In accordance with 24 CFR 266.200(d), the mortgage may not exceed an amount supportable by the lower of the Section 8 or comparable unassisted rents.

6. Projects must comply with Davis-Bacon labor standards in accordance with 24 CFR 266.225.

7. DCHFA must comply with regulations stated in 24 CFR 266.210 for insured advances or insurance upon completion transactions.

8. A 20-year affordable housing deed restriction placed on title that conforms to the Section 542(c) statutory definition.

9. Occupancy is no less than 93 percent for previous 12 months.

10. No defaults in the last 12 months of the HFA loan to be refinanced.

11. A Property Capital Needs Assessment (PCNA) must be performed and funds escrowed for all necessary repairs, and reserves funded for future capital needs; and

12. For projects subsidized by Section 8 Housing Assistance Payment (HAP) contracts:

i. a: Owner agrees to renew HAP contract(s) for 20-year term, (subject to appropriations and statutory authorization, etc.), and b: In accordance with regulations in 24 CFR 883.306(e), and Housing Notice 2012–14—Use of ''New Regulation'' Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts of Offset Project-Based Section 8 Housing Assistance Payments, if at any time DCHFA determines that a project's excess funds (surplus cash) after project operations, reserve requirements and permitted distributions are met, DCHFA must place the excess funds into a separate interest-bearing account. Upon renewal of a HAP Contract the excess funds can be used to reduce future HAP payments or other project operations/purposes. When the HAP Contract expires, is terminated, or any extensions are terminated, any unused funds remaining in the Residual Receipt Account at the time of the contract's termination must be returned.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.410(e).

Project/Activity: California Housing Finance Agency (CalHFA) no project name or number.

Nature of Requirement: The 24 CFR 266.410(e), which requires mortgages insured under the 542(c) Housing Finance Agency Risk Sharing Program to be fully amortized over the term of the mortgage. The waiver would permit CalHFA to use balloon loans that would have a minimum term of 17 years and a maximum amortization period of 40 years for the projects identified in the ''Multifamily Pipeline Projects''. CalHFA had previously been granted a waiver of 24 CFR 266.410(e) on May 25, 2018 which expired on December 31, 2019. This was the second waiver granted to CalHFA related to 24 CFR 266.410(e). The first waiver was approved on July 1, 2014 with an expiration date of June 30, 2016. Granted by: Len Wolfson, Acting, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: June 8, 2020.

Reason Waived: The waiver was granted to allow CalHFA's clients additional financing

options to their customers and to align CalHFA business practices with industry standards. This waiver is effective through December 31, 2022. The regulatory waiver is subject to the following conditions: This waiver expires on December 31, 2022. All other requirements of 24 CFR 266.410—Mortgage Provision remain applicable. The waiver is applicable only to loans made under CalHFA's Risk Sharing Agreement.

The regulatory waiver is subject to the following conditions:

1. This waiver is limited to the projects listed in CalHFA's ''Multifamily Pipeline Projects'' and expires on December 31, 2022.

2. CalHFA must elect to take 50 percent or more of the risk of loss on all transactions.

3. Mortgages made under this waiver may have amortization periods of up to 40 years, but with a minimum term of 17 years.

4. All other requirements of 24 CFR 266.410—Mortgage Provision remain applicable. The waiver is applicable only to loans made under CalHFA's Risk Sharing Agreement.

5. In accordance with 24 CFR 266.200(d), the mortgage may not exceed an amount supportable by the lower of the Section 8 or comparable unassisted rents.

6. Projects must comply with Davis-Bacon labor standards in accordance with 24 CFR 266.225.

7. CalHFA must comply with regulations stated in 24 CFR 266.210 for insured advances or insurance upon completion transactions.

8. A 20-year affordable housing deed restriction placed on title that conforms to the Section 542(c) statutory definition.

9. Occupancy is no less than 93 percent for previous 12 months.

10. No defaults in the last 12 months of the HFA loan to be refinanced.

11. A Property Capital Needs Assessment (PCNA) must be performed and funds escrowed for all necessary repairs, and reserves funded for future capital needs; and

12. For projects subsidized by Section 8 Housing Assistance Payment (HAP) contracts:

i. a: Owner agrees to renew HAP contract(s) for 20-year term, (subject to appropriations and statutory authorization, etc.), and b: In accordance with regulations in 24 CFR 883.306(e), and Housing Notice 2012–14—Use of ''New Regulation'' Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts of Offset Project-Based Section 8 Housing Assistance Payments, if at any time CalHFA determines that a project's excess funds (surplus cash) after project operations, reserve requirements and permitted distributions are met, CalHFA must place the excess funds into a separate interest-bearing account. Upon renewal of a HAP Contract the excess funds can be used to reduce future HAP payments or other project operations/purposes. When the HAP Contract expires, is terminated, or any extensions are terminated, any unused funds remaining in the Residual Receipt Account at the time of the contract's termination must be returned.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 266.410(e).

Project/Activity: Massachusetts Housing Partnership (MHP), no project name or number listed.

Nature of Requirement: The 24 CFR 266.410(e), which requires mortgages insured under the 542(c) Housing Finance Agency Risk Sharing Program to be fully amortized over the term of the mortgage. The waiver would permit MHP to use balloon loans that would have a minimum term of 17 years and a maximum amortization period of 40 years for the projects identified in the ''Multifamily Pipeline Projects''. MHP had previously been granted a waiver of 24 CFR 266.410(e) on May 25, 2018 which expired on December 31, 2019. This was the second waiver granted to MHP related to 24 CFR 266.410(e). The first waiver was approved on July 1, 2014 with an expiration date of June 30, 2016. Granted by: Len Wolfson, Acting, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: June 30, 2020.

Reason Waived: The waiver was granted to allow MHP 's clients additional financing options to their customers and to align MHP business practices with industry standards. This waiver is effective through December 31, 2023. The regulatory waiver is subject to the following conditions: This waiver expires on December 31, 2023. All other requirements of 24 CFR 266.410—Mortgage Provision remain applicable. The waiver is applicable only to loans made under MHP's Risk Sharing Agreement.

The regulatory waiver is subject to the following conditions:

1. This waiver is limited to the projects listed in MHP's ''Multifamily Pipeline Projects'' and expires on December 31, 2023.

2. MHP must elect to take 50 percent or more of the risk of loss on all transactions.

3. Mortgages made under this waiver may have amortization periods of up to 40 years, but with a minimum term of 17 years.

4. All other requirements of 24 CFR 266.410—Mortgage Provision remain applicable. The waiver is applicable only to loans made under MHP's Risk Sharing Agreement.

5. In accordance with 24 CFR 266.200(d), the mortgage may not exceed an amount supportable by the lower of the Section 8 or comparable unassisted rents.

6. Projects must comply with Davis-Bacon labor standards in accordance with 24 CFR 266.225.

7. MHP must comply with regulations stated in 24 CFR 266.210 for insured advances or insurance upon completion transactions.

8. A 20-year affordable housing deed restriction placed on title that conforms to the Section 542(c) statutory definition.

9. Occupancy is no less than 93 percent for previous 12 months.

10. No defaults in the last 12 months of the HFA loan to be refinanced.

11. A Property Capital Needs Assessment (PCNA) must be performed and funds escrowed for all necessary repairs, and reserves funded for future capital needs; and

12. For projects subsidized by Section 8 Housing Assistance Payment (HAP) contracts:

ii. a: Owner agrees to renew HAP contract(s) for 20-year term, (subject to appropriations and statutory authorization, etc.), and b: In accordance with regulations in 24 CFR 883.306(e), and Housing Notice 2012–14—Use of ''New Regulation'' Section 8 Housing Assistance Payments (HAP) Contracts Residual Receipts of Offset Project-Based Section 8 Housing Assistance Payments, if at any time MHP determines that a project's excess funds (surplus cash) after project operations, reserve requirements and permitted distributions are met, MHP must place the excess funds into a separate interest-bearing account. Upon renewal of a HAP Contract the excess funds can be used to reduce future HAP payments or other project operations/purposes. When the HAP Contract expires, is terminated, or any extensions are terminated, any unused funds remaining in the Residual Receipt Account at the time of the contract's termination must be returned.

Contact: Patricia M. Burke, Director, Office of Multifamily Production, HTD, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 6132, Washington, DC 20410, telephone (202) 402–5693.

• *Regulation:* 24 CFR 3282.14(b).

Project/Activity: Manufactured housing regulatory oversight.

Nature of Requirement: This regulation requires manufacturers of manufactured homes to submit a request for Alternative Construction consideration.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: April 16, 2020.

Reason Waived: Supply chain disruption of conforming windows was impacted due to COVID–19 pandemic. The waiver allows HUD to allow any manufacturer to use an Alternative Construction letter without having supplied a request in advance.

Contact: Jason McJury, Deputy Administrator, Office of Manufactured Housing Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 9170, Washington, DC 20410, telephone (202) 402–2480.

• *Regulation:* 24 CFR 3286.211(a).

Project/Activity: Manufactured Housing Regulatory Oversight.

Nature of Requirement: This regulation requires each installation license issued or renewed by HUD to expire 3 years after the date of its issuance or renewal.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: May 29, 2020.

Reason Waived: Due to impacts from COVID–19 manufactured home installers have been unable to complete continuing education requirements and needed extensions to avoid lapses in licensing that would negatively impact housing installations across the country.

Contact: Angelo Wallace, Civil Engineer, Office of Manufactured Housing Programs,

Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 9170, Washington, DC 20410, telephone (202) 402–3848.

[FR Doc. 2020–25476 Filed 11–18–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7029–N–09]

60-Day Notice of Proposed Information Collection: Reporting for HUD Research, Evaluation, and Demonstration Cooperative Agreements

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The U.S. Department of Housing and Urban Development (HUD) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* January 19, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–5534 (this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Anna P. Guido at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Reporting for HUD Research, Evaluation, Demonstration and Data Analysis Cooperative Agreements.

OMB Approval Number: 2528–0299.

Description of the need for the information and proposed use: PD&R intends to establish cooperative agreements with qualified for-profit and nonprofit research organizations and universities to conduct research, demonstrations, and data analysis. PD&R will issue a Notice of Funding Availability (NOFA) describing the cooperative research program. Management of PD&R cooperative agreements for research and demonstrations will require periodic reporting of progress. This information collection will be limited to recipients of cooperative agreements.

Type of Request: (*i.e.,* new, revision or extension of currently approved collection): Revision.

Agency Form Numbers: No agency forms will be used. The quarterly reporting will be accomplished through a short narrative report.

Respondents: HUD anticipates that approximately 14–18 organizations will be selected for cooperative agreement award. Recipients of the cooperative agreements will be the sole members of the affected public for the reporting requirement.

Members of Affected Public: For-profit and nonprofit organizations that apply to participate under the cooperative research agreements NOFA.

Estimated Number of Respondents frequency of response, and hours of response: HUD anticipates that a maximum of 10 organizations will receive cooperative agreements. Quarterly progress reporting, other mandatory federal reporting and recordkeeping requirements are estimated at 72 labor hours annually for each awardee during the life of the agreement. The total estimated burden for progress reporting by all participants is 648 hours annually.

Estimated Total Annual Burden Hours: 648.

Estimated Total Annual Cost: The only cost to the respondents is that of their time.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Cost
Quarterly Reports	18	4	72	4	288	$0	$0
Other Reports	18	1	18	4	72	0	0
Recordkeeping	18	1	18	16	288	0	0
Total					648		0

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms ofinformation technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

The Assistant Secretary for Policy Development and Research, Seth Appleton, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Nacheshia Foxx, who is the

Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Nacheshia Foxx,

Federal Register Liaison for the Department of Housing and Urban Development.

[FR Doc. 2020–25594 Filed 11–18–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R4–ES–2020–0135; FXES11140400000–178–FF04EF2000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Sand Skink and Blue-Tailed Mole Skink; Highlands County, FL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments and information.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from Palmetto Avon Park-HWY 17, LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act. The applicant requests the ITP to take the federally listed sand skink and blue-tailed mole skink incidental to the construction of a commercial development in Highlands County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded under the National Environmental Policy Act. To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

DATES: We must receive your written comments on or before December 21, 2020.

ADDRESSES:

Obtaining Documents: You may obtain copies of the documents online in Docket No. FWS–R4–ES–2020–0135 at *http://www.regulations.gov.*

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing through the following methods:

- *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R4–ES–2020–0135.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R4–ES–2020–0135; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Alfredo Begazo, by telephone at (772) 469–4234 or via email at *alfredo_begazo@fws.gov.* Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the Fish and Wildlife Service (Service), announce receipt of an application from Palmetto Avon Park-HWY 17, LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant requests the ITP to take the federally listed sand skink (*Neoseps reynoldsi*) and blue-tailed mole skink (*Eumeces egregious lividus*) (skinks) incidental to the construction of a commercial development in Highlands County, Florida. We request public comment on the application, which includes the applicant's HCP, and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

Project

The applicant requests a 5-year ITP to take skinks through the conversion of approximately 0.9 acres of occupied skink foraging and sheltering habitat incidental to the construction of a commercial development on a 1.35-acre parcel in Section 6, Township 34S, Range 29E in Highlands County, Florida. The applicant proposes to mitigate for take of the skinks by purchasing credits equivalent to 1.80 acre of skink-occupied habitat from a Service-approved conservation bank in Highlands County. The Service would require the applicant to purchase the credits prior to engaging in any phase of the project.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire comment, including your personal identifying information, may be made available to the public. While you may request that we withhold your personal identifying information, we cannot guarantee that we will be able to do so.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's project, including the construction of stores, driveways, parking areas, a storm water pond, and associated infrastructure (*e.g.,* electric, water, and sewer lines) would individually and cumulatively have a minor or negligible effect on the skinks and the environment. Therefore, we have preliminarily concluded that the ITP for this project would qualify for categorical exclusion and the HCP would be low effect under our NEPA regulations at 43 CFR 46.205 and 46.210. A low-effect HCP is one that would result in (1) minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) minor or negligible effects on other environmental values or resources; and, (3) impacts that, when considered together with the impacts of other past, present, and reasonable foreseeable similarly situated projects, would not result in significant cumulative effects to environmental values or resources over time.

Next Steps

The Service will evaluate the application and the comments to determine whether to issue the requested permit. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the preceding matters, we will determine whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue ITP number TE82107D–0 to Palmetto Avon Park-HWY 17, LLC.

Authority

The Service provides this notice under section 10(c) of the ESA (16 U.S.C. 1539(c)) and NEPA regulation 40 CFR 1506.6.

Roxanna Hinzman,

Field Supervisor, South Florida Ecological Services Office.

[FR Doc. 2020–25567 Filed 11–18–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0031150; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: The University of California Berkeley, Berkeley, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of California Berkeley has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the University of California Berkeley. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the University of California Berkeley at the address in this notice by December 21, 2020.

ADDRESSES: Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley, CA 94720–1500, telephone (510) 672–5388, email *t.torma@berkeley.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of The University of California Berkeley, Berkeley, CA. The human remains were removed from Modoc and Siskiyou Counties, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains objects was made by the University of California Berkeley professional staff in consultation with representatives of the Klamath Tribes and the Modoc Nation (previously listed as The Modoc Tribe of Oklahoma).

History and Description of the Remains

Sometime prior to 1901, human remains representing, at minimum, two individuals were removed by Ernest C. Bonner from an unknown location somewhere in Modoc County, CA. These human remains, which are in a fragmentary state, form part of the ''older museums collection.'' No known individuals were identified. No associated funerary objects are present.

As the human remains are listed as coming from a Modoc Grave in Modoc County, CA, cultural affiliation is based on archeological and historical research.

In 1913, human remains representing, at minimum, one individual were removed from Goose Lake in Modoc County, CA. These human remains were collected by H. H. Stuart from a burial ground located near a small dry run into the lake that covered one acre. The human remains are in a fragmentary state. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, eight individuals were removed from Goose Lake in Modoc County, CA, by H. H. Stuart. Stuart collected the human remains from the bed of the lake. In 1931, the human remains were accessioned by the University. The human remains are in a fragmentary state. No known individuals were identified. No associated funerary objects are present.

At an unknown time, human remains representing, at minimum, one individual were removed from the shore of Goose Lake in Modoc County, CA. The human remains were collected by the father of Dolores Bunyard, who donated them to the University in 1945. The human remains are in a fragmentary state. No known individual was identified. No associated funerary objects are present.

Goose Lake lies within the traditional territory of the Klamath Tribes. Cultural affiliation is based on archeological and historical research.

In August 1954, human remains representing, at minimum, one individual were removed by Gordon L. Grosscup and Robert J. Squier from a burial on the shore of Copic Island in Lower Klamath Lake, Siskiyou County, CA. The remains were accessioned by the University in the same year. The human remains are in a fragmentary state. No known individual was identified. No associated funerary objects are present.

Copic Island lies within the traditional territory of the Klamath Tribes. Cultural affiliation is based on archeological and historical research.

On August 4, 1925, human remains representing, at minimum, one individual were left outside of Room 5 of the anthropology building at the University of California Berkeley. A note accompanying the human remains stated ''Klamath Falls Indian.'' No known individual was identified. No associated funerary objects are present.

The exact location where this individual was discovered is unknown. Cultural affiliation is based on the documentation accompanying the human remains.

Determinations made by the University of California, Berkeley

Officials of the University of California, Berkeley have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 14 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Klamath Tribes.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Thomas Torma, NAGPRA Liaison, Office of the Vice Chancellor for Research, University of California Berkeley, 119 California Hall, Berkeley, CA 94720–1500, telephone (510) 672–5388, email *t.torma@berkeley.edu,* by December 21, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Klamath Tribes may proceed.

The University of California Berkeley is responsible for notifying the Klamath Tribes and the Modoc Nation (previously listed as The Modoc Tribe of Oklahoma) that this notice has been published.

Dated: November 2, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020–25522 Filed 11–18–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Control Number 1010–0082; Docket ID: BOEM–2017–0016]

Agency Information Collection Activities; Leasing of Minerals Other Than Oil, Gas, and Sulphur in the Outer Continental Shelf

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Ocean Energy Management (BOEM) is proposing to renew an information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before January 19, 2021.

ADDRESSES: Send your comments on this ICR by mail to the BOEM Information Collection Clearance Officer, Anna Atkinson, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166; or by email to *anna.atkinson@boem.gov.* Please reference OMB Control Number 1010–0082 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Anna Atkinson by email, or by telephone at 703–787–1025.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, BOEM provides the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps BOEM 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.

BOEM is soliciting comments on the proposed ICR described below. BOEM is especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of BOEM; (2) what can BOEM do to ensure that this information is processed and used in a timely manner; (3) is the burden estimate accurate; (4) how might BOEM enhance the quality, utility, and clarity of the information to be collected; and (5) how might BOEM minimize the burden of this collection on the respondents, including minimizing the burden through the use of information technology?

Comments submitted in response to this notice are a matter of public record. BOEM will include or summarize each comment in our request to the Office of Management and Budget (OMB) for approval of this ICR. You should be aware that your entire comment—including your address, phone number, email address, or other personally identifiable information—may be made publicly available at any time. In order for BOEM to withhold from disclosure your personally identifiable information, you must identify any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

BOEM protects proprietary information in accordance with the Freedom of Information Act (5 U.S.C. 552) and the Department of the Interior's implementing regulations (43 CFR part 2).

Title of Collection: 30 CFR part 581, Leasing of Minerals Other than Oil, Gas, and Sulphur in the Outer Continental Shelf.

Abstract: The Outer Continental Shelf (OCS) Lands Act (Act), as amended (43 U.S.C. 1334 and 43 U.S.C. 1337(k)), authorizes the Secretary of the Interior (Secretary) to administer the provisions relating to the leasing of the OCS, and to prescribe such rules and regulations as may be necessary to carry out such provisions. Additionally, the Act authorizes the Secretary to implement regulations to grant to qualified persons, offering the highest cash bonuses on the basis of competitive bidding, leases of any mineral other than oil, gas, and sulphur. This applies to any area of the OCS not then under lease for such mineral upon royalty, rental, and other terms and conditions that the Secretary may prescribe at the time of the lease offer. The Secretary is to administer the leasing provisions of the Act and prescribe the rules and regulations necessary to carry out those provisions.

Regulations at 30 CFR part 581 implement these statutory requirements. There has been no leasing activity in the OCS for minerals other than oil, gas, or sulphur under these regulations for many years, and so BOEM has not generally collected information under this Part of its regulations; however, because these are regulatory requirements, the potential exists for information to be collected. Therefore, we are renewing OMB approval for this information collection.

BOEM will use the information required by 30 CFR part 581 to determine if statutory requirements are met prior to the issuance of a lease. Specifically, BOEM will use the information to:

- Evaluate the area and minerals requested by the lessee to assess the viability of offering leases for sale;
- Request the state(s) to initiate the establishment of a joint task force to assess the proposed action;
- Ensure excessive overriding royalty interests are not created that would put economic constraints on all parties involved;
- Document that a leasehold or geographical subdivision has been surrendered by the record title holder; and
- Determine if activities on the proposed lease area(s) will have a significant impact on the environment.

OMB Control Number: 1010–0082.

Form Number: None.

Type of Review: Renewal of a currently approved collection.

Respondents/Affected Public: As there are no active respondents, we estimate the potential annual number of respondents to be one. Potential respondents are OCS lease requestors, state governments, and OCS lessees.

Total Estimated Number of Annual Responses: 10 responses.

Total Estimated Number of Annual Burden Hours: 984 hours.

Respondent's Obligation: Required to retain or obtain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non-Hour Burden Cost: $29 non-hour cost burden.

The following table details the individual components and respective hour burden estimates of this ICR. We assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden. BOEM is decreasing the total non-hour cost burden from $50 to $29 to reflect the current filing application fee amount.

BURDEN TABLE

Citation 30 CFR 581	Reporting and/or recordkeeping requirements *	Non-hour cost burden(s) *		
		Hour burden	Average number of annual reponses	Annual burden hours
Subpart A—General				
6	Appeal decisions	Exempt under 5 CFR 1320.4(a)(2), (c)		0
9	Governor of affected States initiates negotiations on jurisdictional controversy, etc., and enters agreement with BOEM.	16	1 request	16
Subtotal			1 Response	16
Subpart B—Leasing Procedures				
11(a), (c)	Submit request for approval for mineral lease with required information.	60	1 request	60
12	Submit response to Call for Information and Interest on areas for leasing of minerals (other than oil, gas, sulphur) in accordance with approved lease program, including information from States/local governments, industry, Federal agencies.	Not considered IC as defined in 5 CFR 1320.3(h)(4)		0
13; 16	States or local governments establish task force; submit comments/recommendations on planning, coordination, consultation, and other issues that may contribute to the leasing process..	200	1 comment	200
16	Submit suggestions and relevant information in response to request for comments on the proposed leasing notice, including information from States/local governments.	Not considered IC as defined in 5 CFR 1320.3(h)(4)		0
18; 20(e), (f); 26(a), (b)	Submit bids (oral or sealed) and required information	250	1 response	250
18(b)(3), (c); 20(e), (f)	Tie bids—submit oral bids for highest bidder	20	1 response	20
20(a), (b), (c); 41(a)	Establish a company file for qualification, submit updated information, submit qualifications for lessee/bidder and required information.	58	1 response	58
21(a); 47(c)	Request for reconsideration of bid rejection/cancellation	Not considered IC per 5 CFR 1320.3(h)(9)		0
21(b), (e); 23; 26(e), (i); 40(b); 41.	Execute lease (includes submission of evidence of authorized agent and request for dating of leases); maintain auditable records re 30 CFR Chapter II, Subchapter A—[burden under ONRR requirements].	100	1 lease	100
Subtotal			6 Responses	688
Subpart C—Financial Considerations				
31(b); 41	File application and required information for assignment or transfer for approval.	160	1 application	160
		$29 required or non-required filing document fee × 1 = $29		
32(b), (c)	File application for waiver, suspension, or reduction and required documentation.	80	1 application	80
33; 41(c)	Submit surety or personal bond	Burden covered under 1010–0081		0
Subtotal			2 Responses	240
			$29 Non-Hour Cost Burden	
Subpart E—Termination of Leases				
46	File written request for relinquishment.	40	1 Response	40
			10 Responses	984
* Total Burden			$29 Non-Hour Cost Burden	

* In the future, BOEM may require electronic filing of certain submissions.

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.*).

Deanna Meyer-Pietruszka,

Chief, Office of Policy, Regulation, and Analysis.

[FR Doc. 2020–25510 Filed 11–18–20; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–658–659 and 731–TA–1538–1542 (Preliminary)]

Aluminum Foil From Armenia, Brazil, Oman, Russia, and Turkey

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of aluminum foil from Armenia, Brazil, Oman, Russia, and Turkey, that are alleged to be sold in the United States at less than fair value (''LTFV'') and imports of aluminum foil that are allegedly subsidized by the governments of Oman and Turkey.[2] The products subject to these investigations are primarily provided for in subheadings 7607.11.30, 7607.11.60, 7607.11.90, and 7607.19.60 of the Harmonized Tariff Schedule of the United States (''HTS'').

Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in § 207.21 of the Commission's rules, upon notice from the U.S. Department of Commerce (''Commerce'') of affirmative preliminary determinations in the investigations under §§ 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under §§ 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On September 29, 2020, the Aluminum Association Trade Enforcement Working Group, Arlington, Virginia, and its individual members—Gränges Americas, Inc., Franklin, Tennessee; JW Aluminum Company, Daniel Island, South Carolina; and Novelis Corporation, Atlanta, Georgia, filed petitions with the Commission and Commerce, alleging that an industry in the United States is materially injured or threatened with material injury by reason of imports of aluminum foil from Armenia, Brazil, Oman, Russia, and Turkey that are alleged to be sold in the United States at LTFV and alleged to be subsidized by the governments of Oman and Turkey. Accordingly, effective September 29, 2020, the Commission instituted countervailing duty investigation Nos. 701–TA–658–659 and antidumping duty investigation Nos. 731–TA–1538–1542 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 5, 2020 (85 FR 62759). In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission conducted its conference through written testimony and video conference on October 20, 2020. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to §§ 703(a) and 733(a) of the Act (19 U.S.C. 1671b(a) and 1673b(a)). It completed and filed its determinations in these investigations on November 13, 2020. The views of the Commission are contained in USITC Publication 5138 (November 2020), entitled *Aluminum Foil from Armenia, Brazil, Oman, Russia, and Turkey: Investigation Nos. 701–TA–658–659 and 731–TA–1538–1542 (Preliminary).*

By order of the Commission.

Issued: November 13, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–25489 Filed 11–18–20; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] 85 FR 67711 (October 26, 2020) and 85 FR 68287 (October 28, 2020).

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1211]

Certain Vaporizer Cartridges and Components and Accessories Thereof; Notice of Commission Determination Not To Review an Initial Determination Granting Complainant's Motion for Leave To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined not to review the Administrative Law Judge's (''ALJ'') initial determination (''ID'') (Order No. 22) granting the complainant's motion for leave to amend the complaint and notice of investigation.

FOR FURTHER INFORMATION CONTACT: Lynde Herzbach, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3228. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On August 14, 2020, the Commission instituted this investigation based on a complaint, as supplemented, filed on behalf of Juul Labs, Inc. of San Francisco, California. 85 FR 49679 (Aug. 14, 2020). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain vaporizer cartridges and components thereof by reason of infringement of U.S. Design Patent Nos.

D842,536; D858,870; D858,869; and D858,868. *Id.* The complaint further alleges that a domestic industry exists. *Id.* The Commission's notice of investigation names forty-nine (49) respondents, including 2nd Wife Vape of Haslet, Texas (''2nd Wife Vape''); CaryTown Tobacco of Richmond, Virginia (''CaryTown Tobacco''); eJuiceDB of Farmingdale, New York (''eJuiceDB''); EZFumes of Bedford, Texas (''EZFumes''); Limitless Accessories, Inc. of Tinley Park, Illinois (''Limitless Accessories, Inc.''); Mr. Fog of Bensenville, Illinois (''Mr. Fog''); Naturally Peaked Health Co. of Brewster, New York (''Naturally Peaked Health Co.''); Price Point NY of Farmingdale, New York (''Price Point NY''); Puff E-Cig of Imlay City, Michigan (''Puff E-Cig''); Shenzhen Azure Tech USA LLC f/k/a DS Vaping P.R.C. of Guangdong, China (''Shenzhen Azure Tech USA LLC f/k/a DS Vaping P.R.C.''); Shenzhen Yark Technology Co., Ltd. of Shenzhen, China (''Shenzhen Yark Technology Co., Ltd.''); Smoker's Express of Auburn Hills, Michigan (''Smoker's Express''); Tobacco Alley of Midland of Midland, Texas (''Tobacco Alley of Midland''); Valgous of Bensenville, Illinois (''Valgous''); and Vape 'n Glass of Streamwood, Illinois (''Vape 'n Glass''). *See id.* The Office of Unfair Import Investigations (''OUII'') is also a party to the investigation. *See id.*

On October 5, 2020, the complainant filed a motion to amend the complaint and notice of investigation to correct the addresses and list the full legal names of certain respondents. Specifically, the complainant seeks to: (1) Include the true legal names for respondents 2nd Wife Vape, CaryTown Tobacco, eJuiceDB, EZFumes, Price Point NY, Smoker's Express, Tobacco Alley of Midland, Vape 'n Glass, Naturally Peaked Health Co., and Puff E-Cig; (2) correct the addresses for respondents Shenzhen Azure Tech USA LLC f/k/a DS Vaping P.R.C. and Shenzhen Yark Technology Co., Ltd.; (3) correct that respondents Limitless Accessories, Inc. and Valgous are a single legal entity named Limitless Accessories, Inc. d/b/a Valgous; and (4) correct both the name and address for respondent Mr. Fog.

None of the respondents filed a response. On October 15, 2020, OUII filed a response supporting complainant's motion.

On October 21, 2020, the ALJ issued the subject ID granting, pursuant to Commission Rule 210.14(b) (19 CFR 210.14(b)), the complainant's motion. *See* Order No. 22 (Oct. 21, 2020). No party petitioned for review of the subject ID.

The Commission has determined not to review the subject ID.

The Commission vote for this determination took place on November 13, 2020.

While temporary remote operating procedures are in place in response to COVID–19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the complainant complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 13, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–25478 Filed 11–18–20; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Pistoia Alliance, Inc.

Notice is hereby given that, on October 19, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. Section 4301 *et seq.* (the ''Act''), Pistoia Alliance, Inc. filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, WorldQuant Predictive, New York, NY; tellic, New York, NY; Synthace Ltd., London, UNITED KINGDOM; Scinapsis Analytics Inc. d/b/a BenchSci, Toronto, CANADA; Sapio Sciences, Baltimore, MD; Owkin, New York, NY; Novo Nordisk, Plainsboro, NJ; Iktos, Paris, FRANCE; GenAlz, Longueuil, CANADA; Elucidata Corporation, New Delhi, INDIA; ClinLine, Leiderdorp, NETHERLANDS; Biorelate Ltd., Oldham, UNITED KINGDOM; and Alchemy CGI, Arlington, MA have been added as parties to this venture.

Also, Tag.bio, San Francisco, CA; Statice GmbH, Berlin, GERMANY; Scilligence Corporation, Cambridge, MA; and Kinapse Limited, London, UNITED KINGDOM have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Pistoia Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 28, 2009, Pistoia Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 15, 2009 (74 FR 34364).

The last notification was filed with the Department on July 21, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 28, 2020 (85 FR 53400).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25589 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on October 14, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the DVD Copy Control Association (''DVD CCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AutoSound Electronics (HK) Ltd., Hong Kong, HONG KONG SAR; and Daesung Eltec Co., Ltd., Seoul, SOUTH KOREA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned

activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on July 10, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 31, 2020 (85 FR 46177).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25590 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Information Warfare Research Project Consortium

Notice is hereby given that, on October 21, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Maritime Sustainment and Technology Innovation Consortium (''MSTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Adaptive Intelligence [AI] Corporation, Banks, OR; ANDRO Computational Solutions, LLC, Rome, NY; Applied Engineering Concepts, Incorporated, Eldersburg, MD; Ashwin-Ushas Corporation, Holmdel, NJ; Colvin Run Networks Inc., Leesburg, VA; Delphinus Engineering, Inc., Eddystone, PA; EHS Technologies Corporation, Moorestown, NJ; Green Expert Technology, Haddonfield, NJ; HII Fleet Support Group LLC, Virginia Beach, VA; Huntington Ingalls Industries Inc., Newport News, VA; ITL LLC., Hampton, VA; Kern Technology Group, LLC, Virginia Beach, VA; Life Cycle Engineering, Inc., North Charleston, SC; LMI Consulting, LLC, Tysons Corner, VA; Lockheed Martin Corporation—Missiles and Fire Control, Orlando, FL; Main Sail, LLC, Chesterland, OH; Makai Ocean Engineering, Inc., Waimanalo, HI; Micro Focus Government, Solutions LLC, Vienna, VA; NDI Engineering Company, Thorofare, NJ; nGAP Inc., Bonsall, CA; Peregrine Technical Solutions, LLC, Yorktown, VA; Perspecta Labs, Basking Ridge, NJ; Polaris Sensor Technologies, Huntsville, AL; Precision Custom Components, York, PA; QED Systems Inc., Virginia Beach, VA; R Squared Solutions, LLC, Chesapeake, VA; SERCO Inc., Herndon, VA; Siemens Energy, Inc./Marine Solutions, Alpharetta, GA; Southeastern Computer Consultants, Inc., Frederick, MD; Southwest Research Institute, Antonio, TX; Stottler Henke Associates, Inc., San Mateo, CA; TDI Technologies, Inc., King of Prussia, PA; Technical Systems Integrators, Inc., Longwood, FL; and Techtrend, Fairfax, VA.

The general area of MSTIC's planned activities are to respond to requirements of the Naval Surface Warfare Center, Philadelphia Division (NSWCPD) for innovative sustainment technological solutions to address current and future security threats in maritime environments including the Navy's ships, submarines, military watercraft and unmanned vehicles. MSTIC's planned activity is to conduct research, development, and prototyping of projects and programs in the following technology areas: COTS Obsolescence and Tech Refresh Product Development; Data Transformation; Cyber; Fleet Introduction Technologies; Waterfront Industry Support Operations; Develop Asset Fabrication, Revitalization (Remanufacturing) and Packaging Innovations; Logistic Supply Chain Management; and Research and Development. The consortium was formed effective August 21, 2020.

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25577 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on ROS-Industrial Consortium Americas

Notice is hereby given that, on October 20, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium-Americas (''RIC-Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, The Ohio State University, Columbus, OH, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership.

On April 30, 2014, RIC-Americas filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on October 1, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65423).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25593 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Electrified Vehicle and Energy Storage Evaluation

Notice is hereby given that, on October 20, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Electrified Vehicle and Energy Storage Evaluation (''EVESE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, AMTE Power, Ltd., Caithess, UNITED KINGDOM, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and EVESE intends to file additional written notifications disclosing all changes in membership.

On September 24, 2020, EVESE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65423).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25578 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—CHEDE–8

Notice is hereby given that, on October 20, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), CHEDE–8 (''CHEDE–8'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, PACCAR, Inc., Mount Vernon, WA; DAF Trucks, N.V., Eindhoven, NETHERLANDS; and A&D Technology, Inc., Ann Arbor, MI, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CHEDE–8 intends to file additional written notifications disclosing all changes in membership.

On December 4, 2019, CHEDE–8 filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 30, 2019 (84 FR 71977).

The last notification was filed with the Department on September 11, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65426).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25584 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Border Security Technology Consortium

Notice is hereby given that, on October 21, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Border Security Technology Consortium (''BSTC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Willowview Consulting, LLC, Eagle, ID; CUBRC, Inc., Buffalo, NY; Secure Planet, Inc., Arlington, VA; Integrated Biometrics, LLC, Spartanburg, SC; AnaVation, LLC, Reston, VA; Arcturus UAV, Inc., Petaluma, VA; Planck Aerosystems, Inc., San Diego, CA; Cross Domain Systems, Medford, MA; ThayerMahan, Groton, CT; Liberty Consulting Solutions, Toms River, NJ; Land Sea Air Autonomy, LLC, Finksburg, MD; Mobilestack Inc., Dublin, CA; Saildrone Inc., Alameda, CA; Spatial Integrated Systems, Inc., Virginia Beach, VA; PredaSAR Corporation, Boca Raton, FL; Cervello Technologies, LLC, Clearwater, FL; and Controp USA Inc., Lanham, MD have been added as parties to this venture.

Also, Blue Force Consulting, Westminster, MD; Border Solutions Group, Fabius, NY; Chartis Consulting Corporation, Falls Church, VA; General Dynamics C4 Systems, Scottsdale, AZ; Guidepost Solutions, LLC, New York, NY; Mason Livesay Scientific dba IB3 Global Solutions, Oak Ridge, TN; Motorola Solutions, Inc, Linthicum Heights, MD; Perfect Sense, Inc., Reston, VA; TransCore ITS, LLC, Harrisburg, PA; TriaSys Technologies Corporation, N. Billerica, MA; and Zolon Tech, Inc., Herndon, VA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and BSTC intends to file additional written notifications disclosing all changes in membership.

On May 30, 2012, BSTC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 18, 2012 (77 FR 36292).

The last notification was filed with the Department on May 19, 2020. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on June 8, 2020 (85 FR 34765).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–25592 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 20–18]

Lewis Leavitt III, M.D.; Decision and Order

On March 11, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Lewis Leavitt III, M.D. (hereinafter, Respondent) of Houston, Texas. OSC, at 1. The OSC proposed the revocation of Respondent's Certificate of Registration No. AL1308370. *Id.* It alleged that Respondent is without ''authority to handle controlled substances in Texas, the state in which [Respondent is] registered with DEA.'' *Id.* at 1–2.

Specifically, the OSC alleged that on January 6, 2020, the Texas Medical Board (hereinafter, Board) suspended Respondent's medical license, which also expired on February 28, 2020. *Id.* The OSC therefore alleged that Respondent lacks authority to handle controlled substances in Texas. *Id.* (citing 21 U.S.C. 824(a)(3)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to

submit a corrective action plan. *Id.* at 2–3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated April 10, 2020, Respondent timely requested a hearing.[1] Hearing Request, at 1. In the Hearing Request, Respondent stated that he ''expects to prevail in the Texas Medical Board proceedings that are pending.'' *Id.*

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge Mark M. Dowd (hereinafter, ALJ). The ALJ issued an Order for Prehearing Statements, dated April 13, 2020. The Government timely complied with the Briefing Schedule by filing a Motion for Summary Disposition on April 22, 2020, (hereinafter, Government Motion or Govt Motion). In its Motion, the Government submitted evidence that Respondent's Texas medical license had been suspended and that he therefore lacked authority to handle controlled substances in Texas, the state in which he is registered with DEA. Govt Motion, at 1. In light of these facts, the Government argued that DEA must revoke his registration. Govt Motion, at 3.

On May 1, 2020,[2] Respondent, requested that the revocation action be suspended until the Board made a final decision on the temporary suspension. Respondent's Prehearing Statement, at 1.

On May 6, 2020, the ALJ issued an Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge (hereinafter, Summary Disposition or SD). In the Summary Disposition, the ALJ denied Respondent's request for a stay of the proceedings until the Texas Medical Board had concluded its proceedings.[3] SD, at 4–5. The ALJ noted that, ''even though the Respondent was actively engaged in negotiating or appealing a State Board decision, '[i]t is not DEA's policy to stay [administrative] proceedings . . . while registrants litigate in other forums.' '' SD, at 5 (citing *Newcare Home Health Servs.,* 72 FR 42,126, 42,127 n.2 (2007)). The ALJ then granted the Government Motion for Summary Disposition. *Id.* The ALJ found that ''summary disposition of an administrative case is warranted where, as here, 'there is no factual dispute of substance.' '' SD, at 7 (citing *Veg-Mix, Inc.* v. *U.S. Dep't of Agric.,* 832 F.2d 601, 607 (D.C. Cir. 1987) (''[A]n agency may ordinarily dispense with a hearing when no genuine dispute exists.'' (citations omitted))). By letter dated June 15, 2020, the ALJ certified and transmitted the record to me for final Agency action. In that letter, the ALJ advised that neither party filed exceptions. I find that the time period to file exceptions has expired. *See* 21 CFR 1316.66.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

Findings of Fact

Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. AL1308370 at the registered address of 1900 Yorktown Street, Apartment 728, Houston, Texas 77056. Govt Motion Exhibit (hereinafter, GX) 1, at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a ''practitioner.'' *Id.* Respondent's registration expires on March 31, 2021, and is currently in ''active pending status.'' *Id.*

The Status of Respondent's State License

On January 6, 2020, the Texas State Medical Board issued an Order of Temporary Suspension (hereinafter, Board Order) without notice of hearing to Respondent ''effective on the date rendered.'' GX 2 (Board Order), at 5–6. According to the Board Order, Respondent ''engaged in unprofessional and dishonorable conduct'' and ''also engaged in the non-therapeutically prescribing of opioids and a muscle relaxant, carisprodol, to multiple patients.'' *Id.* The Board found that Respondent's ''continuation in the practice of medicine would constitute a continuing threat to the public welfare.'' *Id.* at 5.

According to Texas's online records, of which I take official notice, Respondent's registration status is ''delinquent-non payment'' and his disciplinary status is ''suspended by board.''[4] Texas Medical Board Healthcare Provider Search, *https://public.tmb.state.tx.us/HCP_Search/SearchNotice.aspx* (last visited October 27, 2020).

Based on the entire record before me, I find that Respondent currently is not licensed to engage in the practice of medicine in Texas, the state in which Respondent is registered with DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing[5] of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C.

[1] The Hearing Request was deemed filed on April 10, 2020. Order for Prehearing Statements, at 1. I, thus, find that the Government's service of the OSC was adequate.

[2] Respondent submitted a ''Motion to Accept Late Filed Prehearing Statement,'' which noted that the prehearing statement was emailed a few hours after the deadline set by the ALJ and requested that it be accepted nonetheless. The ALJ found, and I agree, that ''neither party [would] be unduly prejudiced by acceptance of the Respondent's out-of-time Prehearing Statement.'' Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge, at 3 n.1.

[3] I find no error in the ALJ's decision to continue DEA's proceedings.

[4] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Respondent files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at *dea.addo.attorneys@dea.usdoj.gov.*

[5] ''[D]ispense[ ] means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance . . . .'' 21 CFR 802(10).

802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

Moreover, because ''the controlling question'' in a proceeding brought under 21 U.S.C. 824(a)(3) is whether the holder of a practitioner's registration ''is currently authorized to handle controlled substances in the state,'' *Hooper,* 76 FR at 71,371 (quoting *Anne Lazar Thorn,* 62 FR 12,847, 12,848 (1997)), the Agency has long held that revocation is warranted even where a practitioner is still challenging the underlying action. *Bourne Pharmacy,* 72 FR 18,273, 18,274 (2007); *Wingfield Drugs,* 52 FR 27,070, 27,071 (1987). Thus, it is of no consequence that the action is being appealed. What is consequential is my finding that Respondent is no longer currently authorized to dispense controlled substances in Texas, the state in which he is registered.

Under the Texas Controlled Substances Act, a practitioner in Texas ''may not prescribe, dispense, deliver, or administer a controlled substance or cause a controlled substance to be administered under the practitioner's direction and supervision except for a valid medical purpose and in the course of medical practice.'' Tex. Health and Safety Code Ann. § 481.071 (West 2019). The Texas Controlled Substances Act defines ''practitioner,'' in relevant part, as ''a physician . . . licensed, registered, or otherwise permitted to distribute, dispense, analyze, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state.'' *Id.* at § 481.002 (39)(A). Further, under the Texas Medical Practice Act, a person must hold a license to practice medicine in Texas. Tex. Occupations Code Ann. § 155.001 (West 2019) (''A person may not practice medicine in this state unless the person holds a license issued under [the Medical Practice Act].''); *see also id.* at § 151.002 (''Physician' means a person licensed to practice medicine in this state.''). Additionally, ''[a] person commits an offense if the person practices medicine in [Texas] in violation of'' the Act. *Id.* at § 165.152(a).

Here, the undisputed evidence in the record is that Respondent currently lacks authority to practice medicine in Texas. I, therefore, find that Respondent is currently without authority to dispense controlled substance in Texas, the state in which he is registered with DEA, and I will order that Respondent's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. AL1308370 issued to Lewis Leavitt III, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Lewis Leavitt III, M.D. to renew or modify this registration, as well as any other application of Lewis Leavitt III, M.D. for additional registration in Texas. This Order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25521 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket Nos. 17–09 and 17–10]

Suntree Pharmacy and Suntree Medical Equipment, LLC; Decision and Order

I. Procedural History

On October 5, 2016, a former Assistant Administrator for Diversion Control of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Suntree Pharmacy (hereinafter, Respondent Pharmacy) and Suntree Medical Equipment LLC (hereinafter, Respondent LLC) (hereinafter collectively, Respondents), of Melbourne, Florida. Administrative Law Judge (hereinafter, ALJ) Exhibit (hereinafter, ALJX) 1, (OSC) at 1. The OSC proposed the revocation of and denial of any pending application to modify or renew Respondents' Certificates of Registration Nos. BS7384174 and FS2194289 ''pursuant to 21 U.S.C. 823(f) and 824(a)(4) for the reason that [Respondents'] continued registrations are inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f).'' *Id.*

Specifically, the OSC alleged that ''over the course of the seventeen month period from October 2013 through March 2015, [Respondents'] pharmacists filled over 200 controlled substances prescriptions outside the usual course of pharmacy practice in violation of 21 CFR 1306.06, and in contravention of their 'corresponding responsibility' under 21 CFR 1306.04(a).'' OSC, at 2. The OSC further alleged that Respondent Pharmacy's failure to exercise its corresponding responsibility was evidenced by its ''repeatedly fill[ing] controlled substance prescriptions that contained multiple red flags of diversion and/or abuse without addressing or resolving those red flags, and under circumstances indicating that the pharmacists were willfully blind or deliberately ignorant of the prescriptions' illegitimacy.'' *Id.* (citing *JM Pharmacy Group, Inc., d/b/a Farmacia Nueva and Best Pharma Corp.,* 80 FR 28,667, 28,670 (2015)). The OSC listed seven red flags of diversion that Respondent Pharmacy allegedly did not resolve prior to filling prescriptions and listed twenty-two [1] patients whose prescriptions indicated red flags. *Id.* at 4, 5–9. Furthermore, the OSC alleged that Respondent Pharmacy was dispensing controlled substances to a physician who wrote prescriptions to himself in violation of Florida law and violated federal law in dispensing controlled substances to an office. *Id.* at 4 (citing Fla. Stat. § 458.331(1)(r) and 21 CFR 1306.04(b)).

The OSC alleged additional violations of Florida state law including: Title XLVI, Fla. Stat., Ch. 893.04(2)(a) (requiring a pharmacist filling a prescription to determine ''in the exercise of her or his professional judgment, that the order is valid''); Fla. Bd. of Pharm. Rule 64B16–21.810(1) (requiring a pharmacist to review the patient record before filling a new or refilling a prescription for therapeutic appropriateness); Fla. Administrative Rule 64B16–27.800 (requiring the maintenance of retrievable records including '''[p]harmacist comments relevant to the individual's drug therapy''' and '''any related information

[1] The OSC listed allegations related to three patients, R.A., A.B., and E.A., which the Government withdrew during the hearing ''to save time.'' Tr. 689.

indicated by a licensed health care practitioner.'''); *Id.* at 3.

The OSC notified Respondents of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 10–11 (citing 21 CFR 1301.43). The OSC also notified Respondents of the opportunity to submit a corrective action plan. *Id.* at 11 (citing 21 U.S.C. 824(c)(2)(C)).

On November 8, 2016, Respondents filed an appearance and a Motion for Extension of Time to File a Request for a Hearing, which the Administrative Law Judge (hereinafter, ALJ) granted in part on November 29, 2016. ALJX 2 (Extension Request), ALJX 5 (Order Granting in Part Extension). Respondents filed a Request for Hearing on November 29, 2016. ALJX 6 (Request for Hearing). The matter was placed on the docket of the Office of Administrative Law Judges and assigned to ALJ Charles W. Dorman (hereinafter, the ALJ). On November 29, 2016, the ALJ established a schedule for the filing of prehearing statements. ALJX 7 (Order for Prehearing Statements). The Government filed its Prehearing Statement on December 20, 2016, and Respondent filed its Prehearing Statement on January 26, 2017.[2] ALJX 8 (hereinafter, Govt Prehearing) and ALJX 12 (hereinafter, Resp Prehearing). On January 31, 2017, the ALJ issued his Prehearing Ruling that, among other things, ordered that the two matters of Respondent LLC and Respondent Pharmacy would be heard in a consolidated hearing, to which both parties consented, and set out six stipulations already agreed upon and established schedules for the filing of additional joint stipulations and supplemental prehearing statements, which were filed by both the Respondent and the Government on March 8 and 20, 2017, respectively. ALJX 14 (Prehearing Ruling), at 1–5; ALJX 17 (hereinafter, Resp Supp Prehearing); ALJX 16 (hereinafter, Govt Supp Prehearing). During the prehearing proceedings, the Government filed a Motion *In Limine,* requesting that certain portions of the Respondents' testimony and evidence be excluded at the hearing. *See* ALJX 21 (hereinafter, Govt Mot *In Limine*). In response to the Government's Motion and Respondents' response, the ALJ ruled that the proposed testimony of customer J.S.3 was irrelevant, because the issue is ''legal, rather than factual, in nature.''[3] ALJX 27, at 3 (Order Granting in part Govt Mot *In Limine*). The ALJ denied the Government's request to exclude the testimony of several practitioners, the legitimacy of whose prescriptions was at issue in the case, but Respondents ultimately did not present testimony from these individuals. I have reviewed and agree with the procedural rulings of the ALJ with the exception of some of the bases for the findings in the Order Granting in part Govt Mot *In Limine* as explained *infra* Section III(A)(1)(c) and (d). The parties agreed to stipulations about the distances between patients and doctors and Respondent Pharmacy, the schedules and brand names of controlled substances, all of which are incorporated herein. RD, at 16–21.

The hearing in this matter spanned three days.[4] The Government filed its Proposed Findings of Fact, Conclusions of Law and Argument on June 19, 2017. ALJX 35 (hereinafter, Govt Posthearing). Respondent filed its Closing Argument, Proposed Findings of Fact, and Conclusions of Law on June 19, 2017. ALJX 36 (hereinafter, Resp Posthearing). The Recommended Rulings, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge (hereinafter, RD) is dated August 15, 2017. Both the Government and the Respondents filed exceptions to the RD on September 5, 2017 (hereinafter, Govt Exceptions) and September 1, 2017 (hereinafter, Resp Exceptions) (respectively). ALJ Transmittal Letter, at 1. On September 18, 2017, the ALJ transmitted his RD, along with the certified record, to me. *Id.*

Having considered this matter in the entirety, I find that the record as a whole established by substantial evidence that Respondent Pharmacy committed acts that render its continued registration inconsistent with the public interest. Respondent Pharmacy filled hundreds of prescriptions without fulfilling its corresponding responsibility and acting outside of the usual course of professional practice in Florida, in violation of federal and state law. I conclude that revocation of Respondents' registrations and denial of any pending application to renew or modify Respondents' registrations are appropriate sanctions.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

II. Findings of Fact

A. Respondents' DEA Registrations

Respondents are registered with the DEA as retail pharmacies in schedules II through V under DEA Certificate of Registration Nos. FS2194289 and BS7384174 at the registered addresses of 7640 North Wickham Road, Suites 116 and 117, Melbourne, FL 32940. Government Exhibit (hereinafter, GX) 1.

B. The Government's Case

The Government's documentary evidence consists primarily of prescriptions and profile information for twenty-five patients. The Government called four witnesses: an expert, Dr. Tracey Gordon (hereinafter, Dr. Gordon), a DEA Diversion Investigator (hereinafter, the DI), an employee at Respondent LLC (hereinafter, M.P.), and Dr. Diahn Clark, Respondents' Owner and Pharmacist in Charge (PIC) (hereinafter, Respondents' Owner and PIC), whose testimony is summarized under the Respondents' Case section.

1. Dr. Gordon

Dr. Gordon has a bachelor's degree and a doctorate in pharmacy and is currently employed as a clinical hospice pharmacist. RD, at 7; Transcript (hereinafter, Tr.) at 22; GX 26 (Dr. Gordon's resume). She holds a Florida pharmacy license and Florida consultant license and she also has twelve years of experience as a retail pharmacist, but she has not practiced as a retail pharmacist in a few years. Tr. 24. As a consultant pharmacist, Dr. Gordon inspects facilities like nursing homes and hospices to make sure that they are following Florida laws. *Id.* at 30. She is familiar with federal and Florida laws regarding dispensing controlled substances and was accepted as ''an expert who is familiar with the practice of pharmacy in the State of Florida.'' RD, at 7; Tr. 26, 31–32. The matters to which Dr. Gordon testified included a pharmacist's corresponding responsibility in the State of Florida including the resolution of prescriptions presenting red flags, what constitutes a red flag, and her review and analysis of the prescriptions presented by the Government. Tr. 21- 311. She reviewed a series of prescriptions, the Florida Prescription Drug Monitoring Program (hereinafter, E–FORCSE), documents, letters of medical necessity, medical records, computer printouts given to her by DEA from both the Agency and the Respondent ''to determine if [Respondents were] exercising their

[2] Respondent filed for an extension, which the ALJ granted in part over the Government's objections. ALJX 9–11.

[3] The ALJ also excluded the testimony of a pharmacy employee who was proposed by Respondent to testify about an audit report that had not been offered as evidence and another individual who had provided a report that was not relevant to the proceedings. ALJX 27, at 4.

[4] Hearings were held in Daytona Beach, FL from April 24–26, 2017.

corresponding responsibility by practicing within the normal scope of pharmacy practice.'' Tr. at 46–47. The ALJ found, and I agree, that Dr. Gordon's testimony was ''sufficiently objective, detailed, plausible, and internally consistent to be considered credible in this recommended decision.'' [5] RD, at 7.

2. The DI

The Government also presented the testimony of a DI who participated in the administrative investigation of the Respondents. Tr. 312–92. He testified to his training as a DEA DI and his experience in investigating over 100 pharmacies. He testified that Respondent Pharmacy was identified as ''an extremely high purchaser of oxycodone, hydromorphone and methadone.'' *Id.* at 316–17. He further testified as to the events that transpired pursuant to the two administrative inspections of Respondent Pharmacy. *Id.* at 318–19. The DI testified that DEA investigators traveled to Respondent Pharmacy to conduct an administrative inspection on September 13, 2013, during which time M.P. signed a DEA Form 82, Notice of Inspection, in which M.P. consented to the inspection of the premises. Tr. 317; GX 32 (DEA Form 82). The DI testified that, based on the report issued by the DEA inspectors at the time, Respondents' Owner and PIC arrived at the pharmacy approximately ninety minutes afterwards. Tr. 318. During that inspection, the DI testified that the DEA inspectors expressed their intent to remove prescriptions from the pharmacy to make photocopies, but Respondents' Owner and PIC told them that she would provide them with copies later, which M.P. delivered to DEA on September 23, 2013. Tr. 318, 323; GX 33 (DEA Form 12 signed by M.P. confirming delivery). The DI also testified that he served Respondents' attorney D.M. with a subpoena in February of 2015 to obtain approximately a year and a half of prescriptions, but D.M. ''questioned the validity of our ability to even issue a subpoena for records to him and stated, as far as he knew, there was no penalty for noncompliance, so he had privacy concerns, and he ended up not giving us the records.'' Tr. 324–27. Thereafter, in April of 2015, DEA obtained and executed an Administrative Inspection Warrant, during which DEA investigators copied portions of Respondent Pharmacy's database that it used when filling prescriptions and provided Respondent Pharmacy with an exact copy. *Id.* at 323, 326–32; RD, at 8. The DEA investigators also removed, copied and returned paper medical records for patients. Tr. at 332–33. The DI additionally testified to his research into the ownership of Respondents and his observations of the Respondents' location and business interactions. *Id.* at 323–60. The ALJ found, and I agree, that the DI's testimony was ''sufficiently objective, detailed, plausible, and internally consistent. Therefore, I merit it as credible . . . .'' RD, at 8.

C. Respondents' Case

1. Respondents' Owner and PIC

Respondents' Owner and PIC testified on behalf of Respondents. Tr. 529–767; 854–58. She testified that she held a degree in pharmacy and practiced until she went to law school, after which she practiced mostly in intellectual property law until she assumed sole ownership of the Respondents in or around 2009 or 2010. Tr. 530. She testified to her duties at the pharmacy, including supervising several part-time pharmacists who fill in while she is ''doing other duties as the owner.'' *Id.* at 533. She testified generally as to the policies and procedures of Respondent Pharmacy when she took over.

> At that time, the only statute we identified initially was legitimate medical necessity. So my interpretation of that was to derive that from the physicians. So we created a policy where the patient would have to have a Brevard County license, a general policy. Of course, exceptions allowed, but the general policy was a Brevard County patient. If they saw a physician in an adjacent county, they would be required to obtain for me, directed to me individually at the pharmacy, not a group of medical records but a letter to me describing the legitimate medical necessity or the diagnosis that I could then glean the medical necessity from.

Id. at 536.

Respondents' Owner and PIC additionally testified that Respondent Pharmacy had ''broad policies that [Respondent Pharmacy's pharmacists] better have a good reason for not following or be subject to counseling. But outside of those broad policies that are stated there or that were developed over time, they had their independent judgment . . . .'' *Id.* at 676–77. Respondents' Owner and PIC testified that Respondent Pharmacy has a ''policy and procedure handbook that employees do receive''; however, Respondents did not produce the handbook in their defense.[6] *Id.* at 710–11. She also stated that the policy is ''updated regularly, but it's generally just a day-to-day hands-on training. I'm there all the time.'' Tr. 709. Respondents particularly focused on the employment of one of their employee B.S., whom Respondents' Owner and PIC had hired as a part-time pharmacist in spite of knowing that ''he had been suspended by the Board of Pharmacy for a period of time'' and he had a prior criminal conviction, and whom she later fired. *Id.* at 553; RX G (employment file for B.S.).

Respondents' Owner and PIC also testified as to her involvement with the resolution of red flags for her patients. As to the red flag regarding the distance her customers traveled, she testified that her wholesaler would allocate a certain amount of controlled substances to pharmacies and that ''is why people drive farther than they normally would.'' Tr. 766. She testified that she would look at the letters of medical necessity to help resolve the red flags regarding the distance traveled to obtain prescriptions, Tr. 701, ''that would be one thing we would look at, in addition to a conversation with the patient.'' Tr. 706.

The ALJ found, and I agree, Respondents' Owner and PIC's ''testimony to be generally objective, detailed, and with some exceptions it was plausible, and internally consistent. Certain aspects of [Respondents' Owner and PIC's] testimony, however, detracted from her overall credibility. Those aspects included unnecessary contentiousness, exaggeration, and a lack of familiarity with the Pharmacy's records.'' RD, at 13. Specifically, the ALJ noted that she exaggerated her relationships with her customers, stating that she always had conversations with D.B. even though she had only filled prescriptions for him three times and similar exaggerations related to M.B., K.B.2, K.B.3 and A.G.

[5] Respondents argue that Dr. Gordon's testimony was inconsistent and should not be afforded weight. As explained herein, I reject Respondents arguments regarding Dr. Gordon and I agree with the ALJ's credibility assessment. Resp Posthearing, at 53–58.

[6] This Agency has applied, and I apply here, the ''adverse inference rule.'' As the D.C. Circuit explained, ''Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.'' *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW)* v. *Nat'l Labor Relations Bd.,* 459 F.2d 1329, 1336 (DC Cir. 1972). The Court reiterated this rule in *Huthnance* v. *District of Columbia,* 722 F.3d 371, 378 (DC Cir. 2013). According to this legal principle, Respondents' decision not to provide evidence within their control gives rise to an inference that any such evidence is unfavorable to Respondents. Therefore, I give little weight to instances where Respondents' Owner and PIC testified that she relied solely on her policies to ensure that red flags were resolved, such as that cash is not a red flag, ''because he would have been asked if he had insurance.'' Tr. 719

He further noted that her testimony contained inconsistencies, such as that she stated the pharmacy had not filled any prescriptions after April 30, 2014, but the records showed that it had, and she stated that D.B.'s dosage had decreased when it had not. RD, at 14. The ALJ concluded, and I agree, that ''to the extent, her testimony conflicts with other testimony, or exhibits, [] I find that the exhibits and the other testimony merit greater weight.'' RD, at 15.

2. Dr. Grant

Respondents presented testimony of an expert, Dr. Wayne Grant, who has been a pharmacist since 1990 and has a bachelor's degree and Doctorate in pharmacy. Tr. 425–527. Dr. Grant works in a ''hospice and palliative care organization,'' where he has been employed for twelve years. *Id.* at 427. He also testified that he teaches a course online as an adjunct faculty at the University of Florida.[7] Tr. 428. Dr. Grant also worked in an ''in-house, closed pharmacy'' for about fifteen years and a retail pharmacy for about five years. Tr. 431–32. Dr. Grant is licensed as a pharmacist in Ohio, and he has never worked in or been licensed as a pharmacist in Florida, although he has reviewed ''mostly for comparative reasons,'' but not taken, some of the continuing education courses in Florida. Tr. 433, 437; RD, at 11. The Government objected to accepting Dr. Grant as an expert witness, because he lacked experience in the standard of practice in the state of Florida, but the ALJ accepted Dr. Grant as ''an expert in the field of pharmacy.'' Tr. 237; 442.

The ALJ found, and I agree, that although generally Dr. Grant ''appeared to be an honest and candid witness,'' his testimony merited ''little weight'' based on six reasons. RD, at 11. First, the ALJ reasoned that Dr. Grant was ''deceptive even when answering questions about his qualifications.'' *Id.* Dr. Grant touted the benefits of working for the University of Florida as including continuing education, stating, ''I get a lot of continuing education,'' but when asked whether he had taken Florida continuing education, he stated that he ''had reviewed a number of those,'' but ''mostly for comparative reasons.'' Tr. 433; RD, at 11. The ALJ further noted that ''while professing to be an adjunct faculty member at the University of Florida, it turns out [Dr. Grant] does not teach, but only occasionally lectures.'' RD, at 11 (citing Tr. 428, 516–17). Second, the ALJ noted that Dr. Grant's testimony that he did not know if he had been qualified in Florida was not credible, because when the ALJ asked him if he had ever testified in Florida, he stated that he had not. *Id.* (citing Tr. 438). Third, in describing ''corresponding duty,'' Dr. Grant stated, ''It looks at a standard in which pharmacy practice is when we're reviewing prescriptions that come into our care.'' Tr. 445. I agree with the ALJ's finding that Dr. Grant's '''expert' explanation of the phrase 'corresponding duty' is almost incomprehensible.'' RD, at 11. Fourth, Dr. Grant initially testified that he had reviewed the prescriptions at issue in the case and there did not seem to be any prescriptions on their face that appeared to be a violation of corresponding responsibility such that there needed to be ''a conversation with the patient and the prescriber,'' but then, on cross examination, admitted in several instances that there should have been follow up. Tr. 445, 478–79, 508–11; RD, at 12. Fifth, the ALJ took issue with Dr. Grant's testimony that the term ''cocktail'' was not ''a common term used in pharmacology.'' When asked if he knew what a cocktail was, Dr. Grant said ''I'm familiar with what I think that terminology is'' and then later answered the same question, ''Other than a drink, I'm not really sure.'' Tr. 455–56. Then, Dr. Grant contradicted himself by explaining what a cocktail was, stating ''[i]n more nefarious [sic] perhaps, they're looking at trying to lump benzos and opioids and a whole host of skeletal muscle relaxers in there too. But we don't teach about cocktails. We don't make cocktails.'' *Id.* at 456. I agree with the ALJ that not only was his testimony contradictory, but also, DEA ''has long discussed drug cocktails.'' RD, at 12. Contrary to his own statements, that he had not heard of ''drug cocktails'' or that the term was not used in pharmacology, he later described them accurately and the federal agency that regulates controlled substance registrations uses the term regularly. Finally, the ALJ noted that Dr. Grant ''even seemed unwilling to use the term red flag.'' RD, at 12. Dr. Grant testified that he was ''familiar with the concept,'' but that he does not ''teach anything about red flags'' and that he had not heard the term in relation to opioids until about two or three years ago. Tr. 449, 518. The ALJ noted that Respondents' Owner and PIC had ''no trouble using the term and understanding its meaning,'' and that DEA has used the term for many years. RD, at 12 (citing Tr. 587, 597–98, 610–11, 617–18, 642, 650, 671–72, 676, 681, 688, 701, 727, 730).

Based on the issues with the merits and credibility of Dr. Grant's testimony, the ALJ found, and I agree, that ''where there is conflict between the testimony of Dr. Grant and the testimony of Dr. Gordon, I find that Dr. Gordon's testimony is more credible and is entitled to greater weight.'' RD, at 13. As such, I rely on Dr. Gordon's testimony to accurately describe a pharmacist's corresponding responsibility and the usual course of professional practice in the State of Florida.

3. D.M.

D.M. is an attorney who initially was representing Respondents, but who withdrew and became a fact witness prior to the start of the hearing. ALJX 28 (Motion to Withdraw); Tr. 799. He testified that he was retained by Respondent Pharmacy around 2008 to give advice on ''compliance and keeping up with what the rules are, regulations, and policies and procedures.'' *Id.* at 801. As part of his advice, he stated that he researched and communicated red flags. *Id.* at 804–06. D.M. testified that he gave advice[8] to Respondent Pharmacy in 2008 that it was generally legal for a doctor to self-prescribe,[9] but that following the Florida Board of Pharmacy's statement to Respondent Pharmacy that it ''wasn't allowed,'' he still thought it was legal, but recommended that Respondent Pharmacy ''should not do that anymore.'' *Id.* at 809–10. He further testified regarding policies that he helped Respondent Pharmacy write in 2008 to not ''fill for an out of county, out of the area customer'' or ''out of the county doctor'' unless it was an established patient in which case they would ''look at other factors.'' *Id.* at 807. D.M. also testified that in 2012 or 2013, he helped to write policies for schedule II controlled substances on letters of medical necessity. *Id.* at 821. However, D.M. also testified that he does not ensure or check compliance with the policies that he wrote. *Id.* at 825.

The ALJ found, and I agree that ''D.M.'s testimony is consistent with other testimony of record. He testified in a candid and forthright manner and he was a credible witness.'' RD, at 15.

[7] The ALJ found, and I agree that Dr. Grant's faculty status at the University of Florida is not clear from his testimony. RD, at 10. Although he testified that he was an adjunct professor, he later testified that he only lectures in Florida once a year, for an ''hour, hour and a half.'' Tr. 517–18.

[8] Although D.M. and Respondents' Owner and PIC claim this advice was given via email, neither could produce the emails. Tr. 829–30.

[9] D.M. later clarified that the question in 2008 was not specific to controlled substances, but all prescription drugs. Tr. 823. He addressed controlled substances in his advice in 2015 after the Board of Pharmacy had told Respondent Pharmacy that the prescriptions could not be filled. *Id.* at 827.

D. Corresponding Responsibility and Course of Professional Practice in Florida

Dr. Gordon credibly testified that before filling a prescription ''a pharmacist should assure that the medication is safe and exercise their corresponding responsibility to make sure the medication is for a legitimate medical purpose, to look at things like drug interactions, appropriateness of dose, what doctor is writing the prescription, how far the patients traveled,[10] is it appropriate, is it safe for themselves and the community.'' Tr. 33. She further testified that in exercising a pharmacist's corresponding responsibility, ''there's not just one or two red flags you specifically look for.'' *Id.* at 34. She testified that such red flags include, ''the type of medication,'' whether the dose is appropriate, combinations of controlled substances, whether the patient is in the local community, what type of doctor is prescribing, the distance from the doctor and the pharmacy.[11] *Id.* at 34–37. Dr. Gordon further testified about short-acting and immediate release medication, and specifically stated that ''it does not make pharmacological sense to prescribe two short-acting opioids,'' for example hydromorphone and oxycodone, ''because they are doing the same thing,'' and therefore such prescriptions are red flags. *Id.* at 36–39.[12] Additionally, Dr. Gordon testified that pattern prescribing by a doctor who prescribes the same dosage and medication to all of his patients is a red flag, and there is also a red flag when those prescriptions are filled sequentially, one after the other. *Id.* at 39. Further, she testified that another red flag is a prescription cocktail, which she described as ''the issuance of two or more prescriptions that do the same thing or enhance the effects of the other.'' *Id.* She gave examples of prescription cocktails, such as ''Soma, a benzodiazepine, like Ativan or Xanax, and an oxycodone or hydromorphone,'' but that more recently she sees ''just a Benzo with a opioid,'' such as ''Alprazolam or Xanax or Lorazepam or Ativan, plus hydromorphone or oxycodone, or both.'' *Id.* at 40. Dr. Gordon testified that other red flags were when patients appeared to come from the same household and received similar medications, when patients are going to multiple doctors or pharmacies, and that prescriptions purchased with cash[13] were a ''big red flag.'' *Id.* at 41–42. She stated that pharmacists can detect doctor shopping through ''E–FORCSE,'' which is a ''computer program set up by the State of Florida that a pharmacy is supposed to report all of their controlled substances: the quantity, the medication, the doctor, and the pharmacy where it was filled, for every patron'' and which started around 2010. *Id.* at 43.

Dr. Gordon testified that a pharmacist can resolve these red flags ''by either talking to the patient and/or speaking to the physician'' and in some cases ''you may need to do both.'' She further clearly testified that the resolution of the red flag ''must be documented[14] before you dispense the medication so that you can let other pharmacists know what happened the time before'' and that documentation must be ''either on the prescription itself or in the computer system.''[15] *Id.* at 44–45. When pressed by Respondents' counsel regarding whether a pharmacy was required by statute to document the resolution of the red flag, Dr. Gordon stated that ''it's not an opinion. It's the standard of practice'' and further clarified ''[t]he standard of practice, if there's something questionable about a prescription, you document it after you speak with the patient or the doctor.'' *Id.* at 215. Finally, Dr. Gordon testified that if it is impossible to resolve a red flag, such as a prescription written by a physician to himself or to a business or office, the standard of practice of pharmacy in Florida would require a pharmacist to ''not dispense the medication.'' *Id.* at 46.

Regarding red flags, Dr. Grant stated, ''the only place that I've really seen this again is with the continuing education, which I have not completed, in regards to Florida, where they list in—this group lists and they put red flags, and they list a whole bunch of things down there as being red flags. And they suggest pharmacists should be looking at that. But it's their process. It's nothing I'm familiar with teaching.'' Tr. 450. As explained above, I credit Dr. Gordon's testimony over Dr. Grant's.

Respondents' Owner and PIC testified that she was aware that when a pharmacist spots a red flag for a prescription, that she must ''resolve it, and if [she] cannot resolve it, not to fill it.'' Tr. 566; RD, at 24. She testified that she trained her pharmacists to identify and resolve red flags. RD, at 24; Tr. 556–57. She also testified that she understands the concept of red flags and that she recognized that there are red flags in Respondent Pharmacy's prescriptions. Tr. 796. Respondents' Owner and PIC stated that, ''I don't believe we did as well with documentation. I do believe we did resolve red flags. Even then, I think we

[10] Dr. Gordon testified that she had searched for local pain management doctors and Respondents' Owner and PIC testified that there were not enough local practitioners in the area. Tr. 568. I agree with the ALJ, who determined that neither party submitted adequate support for their testimony and therefore gave the testimony of each little weight. RD, at 24 n.10.

[11] Respondents argued that Dr. Gordon was inconsistent regarding whether the red flag of distance was resolvable. Resp Posthearing, at 53 (citing Tr. 36, 110—however, the quoted material is on page 111). I disagree that this testimony was inconsistent. Dr. Gordon testified that in ''this particular scenario'' of the group of Dr. R.'s patients coming in together with prescriptions written on the same day and travelling a far distance, one after another in this case, the red flags were not resolvable. Tr. 111. She stated that there is room to clear red flags and gave an extreme example of all of the patients getting into the same car wreck and needing a short supply of something being a possible reason that a pharmacist could still fill the prescription, but she clearly testified that the scenario presented by Dr. R.'s patients coming in together did not present any facts that could have resolved the red flags. *Id.* Furthermore, these prescriptions contained multiple red flags, not solely the red flag regarding distance.

[12] Respondents argued that Dr. Gordon testified that it was a red flag to prescribe two short acting opioids and also to prescribe a long and a short acting opioid. Resp Posthearing, at 54 (citing Tr. 38, 83). I disagree with their characterization of Dr. Gordon's testimony. Regarding the long and the short acting opioids, she testified that ''it's a red flag to see the dosage has changed or there is a different drug.'' Tr. 84.

[13] Respondents stated that Dr. Gordon was inconsistent on whether cash was a red flag, but I find that she credibly testified that ''[i]t's the combination of the red flags, the cash and the opioid, not just the point that they're paying cash.'' Tr. 295; Resp Posthearing, at 55. I agree with this statement and the ALJ's finding that cash is a red flag in combination with the other red flags. RD, at 31 n.13.

[14] Respondents suggested that Dr. Gordon ''did not testify that the resolution of every red flag must be documented,'' but that ''she testified that a pharmacist is required to 'document if you need more information to clear a red flag.'" Resp Posthearing, at 4 (citing Tr. 206). Respondents took Dr. Gordon's quote out of context. During the hearing, Respondents' counsel clarified the statement that he quoted in his brief, stating, ''Okay. So document the resolution of red flags?'' to which Dr. Gordon responded, ''Yes. To show that—for each red flag, if there was a specific situation where you felt that the medication was for a legitimate medical purpose, that should be documented.'' Tr. 206. I find that Dr. Gordon was very clear that the standard of practice and usual course of professional practice in Florida required a pharmacist to document the resolution of every red flag before dispensing.

[15] Respondents argued that Dr. Gordon would require a pharmacist with multiple red flags ''to write paragraphs of data regarding why the patient travelled to the next county, had back pain, was seeking a 'highly abused medication,' and had insurance but was not using it to fill the medication.'' Resp Posthearing, at 58. There is no evidence or testimony in this case that what Dr. Gordon was proposing to be documented would be ''paragraphs of data.'' I reject this characterization of Dr. Gordon's testimony. Respondents are trying to absolve themselves of responsibility to take any notes on their resolution of red flags by exaggerating the burden. The fact is that there was rarely any documentation as to the red flags in this case other than letters of medical necessity, so there is nothing on which to testify to or assess Respondent Pharmacy's level of detail in resolving them.

could have done better at it.'' *Id.* at 796. Finally, she stated that she received the letters of medical necessity, because she ''knew that was an absolute requirement. That's a statutory requirement. The others seemed to gradually evolve. And in my opinion, it was continued professional practice. So documentation of them was innate in my job even prior to the pain epidemic or the requirement of red flags.'' *Id.* at 797.

I agree with the ALJ that Dr. Gordon's testimony should be given the most weight on a pharmacy's corresponding responsibility and the ordinary course of professional practice in Florida to resolve red flags and document the resolution on the prescription or in the patient record. RD, at 13.

E. Allegation That Respondent Pharmacy Filled Prescriptions Written by a Practitioner to Himself in Violation of Florida Law

The OSC alleged that Respondent Pharmacy dispensed controlled substances to a physician that were prescribed to himself in violation of Florida Statute Section 458.331(1)(r). The relevant Florida law states that it is grounds for disciplinary action or denial of a license to ''dispens[e] . . . any medicinal drug appearing on any schedule set forth in chapter 893 by the physician to himself or herself, except one prescribed, dispensed or administered to the physician by another practitioner . . . .'' Fla. Stat. § 458.331(1)(r).

1. Patient J.S.3

The Government alleged that between March 2014 and December 2014, Respondent Pharmacy violated its corresponding responsibility and Florida law when it dispensed six prescriptions for controlled substances to a doctor, J.S.3, who was prescribing controlled substances to himself in violation of Florida law. OSC, at 4; RD, at 27. It further alleged violations of Respondent Pharmacy's corresponding responsibility for filling twelve additional prescriptions written by J.S.3 to himself from June 2012 to June 2013. Govt Prehearing, at 8. The Government's evidence demonstrates that Respondent Pharmacy filled prescriptions written by J.S.3 to himself for various controlled substances to include: Percocet, Ambien and testosterone. GX 2, at 1–34.

Dr. Gordon testified that the prescription to J.S.3 for Ambien filled on June 12, 2012, contained a red flag [16] because ''the name of the patient is the same as the name of the physician'' and that ''it's against the law for a physician to write a controlled substance for himself.'' Tr. 49–50; GX 2, at 1, 2. She additionally testified that a prescription for oxycodone/Tylenol with the brand name Percocet filled on July 13, 2012, and all of the other prescriptions filled by Respondent Pharmacy for J.S.3 presented red flags and were in violation of Florida law for the same reason.[17] Tr. 51–61; GX 2, at 1–34. Dr. Gordon testified that the fact that ''the patient is the physician'' is a red flag and that the red flags were unresolved. Tr. 59–60. In response to the Government's question regarding whether a pharmacist applying ''the minimal acceptable standard of practice of pharmacy'' in Florida should have filled these prescriptions, Dr. Gordon stated that ''[a] pharmacist should not have filled any prescription written by a physician that wrote it for himself, a controlled substance.'' *Id.* at 62.

Respondents' Owner and PIC testified that she had sought advice from her attorney, D.M. about whether it was lawful for a doctor to self-prescribe and D.M. had told her it was lawful in an email.[18] Tr. 571, 777, 809; RD, at 28. She further testified that she had received this advice ''early on in my ownership of the business,'' which ''might even have been prior to my ownership of the business. 2008, 2009.'' *Id.* at 777. She stated that she did not revisit his advice after that time and that she ''probably should have, but [she] did not.'' *Id.* D.M. testified that he researched and gave advice to Respondents' Owner and PIC ''in 2008, generally'' regarding ''could a doctor self-prescribe.'' Tr. 809. D.M. concluded that it was permissible and when asked what advice he communicated to Respondent Pharmacy, he stated, ''At that point in time, we were not using the words red flag. The word was scrutiny. And that it should pass the sniff test, but it wasn't prohibited and it was permissible but required scrutiny.'' *Id.* at 810. Respondents' Owner and PIC testified that the Board of Pharmacy visited in 2015 [19] and told Respondents' Owner and PIC that ''it was not lawful'' to fill a prescription that a doctor had written for himself, after which D.M. confirmed his original legal advice, but recommended that Respondent Pharmacy stop filling these prescriptions, and Respondent Pharmacy did not fill any further prescriptions. Tr. 573, 763, 777, 809. The last prescription filled for J.S.3 was on January 14, 2015. GX 2, at 33–34; Tr. 762; RX H, at 2–3; RD, at 28.

Based on the evidence in the record, I find that from 2012–2015, Respondent filled numerous prescriptions from prescriber J.S.3 to himself without resolving the red flag that he was self-

[16] Respondents' counsel objected to Dr. Gordon's testimony that the J.S.3 prescriptions were unresolved red flags, stating that ''the Government represented that the issue with J.S.3's prescriptions was only an issue as a matter of law, that a pharmacist cannot fill a physician's prescription as a matter of law.'' Tr. 60. The OSC clearly stated that the J.S.3 prescriptions raised red flags, but Respondents' counsel alleged that there was discussion of this issue in pretrial conferences related to Respondents' request to provide testimony of J.S.3. *Id.* at 61. This issue became confused when Respondent proposed the testimony of J.S.3, which the ALJ excluded on the basis that ''the ultimate issue with regard[] to this allegation is legal, rather than factual, in nature.'' ALJX 27 (Order Granting In Part the Government's Motion *In Limine*), at 3. The Government's attorney at the hearing stated that ''the red flag seems to be a matter of law, and I'm simply asking the expert whether there's any indication whether the pharmacist was able to justify in its mind the dispensing of these prescriptions.'' Tr. 61. The ALJ sustained the Respondents' objection; however, he overruled the objection related to Dr. Gordon's opinion regarding whether filling the prescriptions was within the standard of practice. *Id.* Despite this argument at the hearing, I find that Dr. Gordon appropriately testified that the physician's prescription to himself was a red flag. I do not find that the ALJ erred in excluding the testimony of J.S.3 as irrelevant. The testimony of J.S.3 as described by the Respondent could not have added any additional facts that would alter the finding herein. However, I disagree that the issue here was solely about whether these prescriptions violated Florida law, as explained further herein. I further discuss this issue in Section III(A)(1)(c).

[17] Dr. Gordon also identified other red flags with these prescriptions, such as that the prescriptions lacked a DEA number, the prescriptions were paid for by cash, the physician called in the prescription with no hard copy in violation of Florida law; however, these red flags were not identified in the OSC or the Government's Prehearing statements, so I am not basing my decision on these red flags. Tr. 52–59.

[18] The Respondent did not submit the email as evidence.

[19] It is noted that Respondents' version of the Patient profile for J.S.3 included in the E.O.M. or ''end of month'' statement a typed note that stated ''cannot write personal scripts. DC'' and the date the record was printed is covered by a photocopied sticky note. RX H, at 1; Tr. 698. The Government noted that the copy in the Government's evidence that was seized on April 7, 2015, and contains a print date of ''April 7, 2015'' does not include the same language in the E.O.M. statement. Tr. 699; GX 2, at 35. Nevertheless, Respondents' PIC and Owner stated that she made that sticky note in January of 2015 and offered no explanation for why the Government's evidence did not include the typed note in the database. Tr. 699–700. Respondents argued in their Posthearing Brief that there were no prescriptions filled for J.S.3 after January 14, 2015. Resp Posthearing, at 9 n.1. This argument does not explain why the documents in the Government's possession that were printed three months after the last prescription to J.S.3 did not contain the same typed E.O.M. note. The ALJ found, and I agree, that Respondents' PIC and Owner did not testify credibly that the document in RX H was the same record that was available to the Government on the date of seizure in April 7, 2015, because the sticky note obscures the date that the document was printed. RD, at 28 n.11. This appears to me to be a falsification of records and further undermines my ability to trust Respondents' Owner and PIC.

prescribing in violation of state law. *See infra* Section III(A)(1)(c).

F. Allegation That Respondent Pharmacy Filled Prescriptions Written for ''Office Use'' in Violation of 21 CFR 1306.04(b)

The OSC alleged that Respondent ''dispensed testosterone on at least fourteen different occasions pursuant to invalid prescriptions which indicated that the ultimate user was an 'office' in violation of 21 CFR 1306.04(b).'' OSC, at 4. The Government submitted evidence of prescriptions and fill stickers, which demonstrated that between September 23, 2014, and January 28, 2015, Respondent Pharmacy filled prescriptions for office use to Dr. I's office on 8 occasions and to Dr. A's office once. GX 3; RD, at 29.[20] The Government's expert witness Dr. Gordon testified that ''written for office use'' means that ''the pharmacy filled prescriptions for controlled substances not for an individual but for a facility.'' Tr. 64. She testified that the prescriptions ''for office use'' were not purchases by a medical office, but the evidence demonstrated that they were prescriptions because they were ''assigned a prescription number,'' and had the office name in the place of a ''patient's name,'' and further the pharmacy generated ''fill stickers.'' *Id.* at 65. She stated that ''according to the standards set by Florida, a controlled substance should be issued to an individual patient, not an office to be distributed through unknown patients,'' and therefore, she testified that the prescriptions dispensed for office use were dispensed outside the usual course of professional practice. *Id.* at 64, 66. Upon prompting by Respondents' counsel, Dr. Gordon further testified that ''if there were an invoice and the prescription was issued to a practitioner,'' it would have resolved the issue, but clarified that it was not within the acceptable standard of practice to order controlled substances from a pharmacy to be distributed to a dispensing practitioner and then report it to E–FORCSE. *Id.* at 278–79; 288–89.

Respondents' Owner and PIC testified that when she ''had an interest to wholesale some compounding,'' she asked her counsel (D.M.) about whether she could fill prescriptions for an office and that ''he said it was lawful between 3 and 5 percent'' of her total inventory.[21] *Id.* at 583. She also admitted that she did not ask D.M. specifically about dispensing in the context of the prescriptions to Dr. I.'s office and that she had not specifically shown him or asked him about using blank prescriptions and fill stickers. *Id.* at 696–97, 777. She testified that she had accessed the accreditations for Dr. I. and found that Dr. I. was a dispensing practitioner.[22] *Id.* at 578. However, she testified that after the Board of Pharmacy visited in 2015 and told her that wholesaling was not allowed, Respondent Pharmacy stopped dispensing to practitioners and her counsel changed his advice. *Id.* at 584.

I find that Respondent Pharmacy filled prescriptions for Dr. A.'s office and for Dr. I.'s office for office use. *See infra* Section III(A)(1)(b) for further discussion.

G. Allegation That Respondent Pharmacy Failed To Exercise Its Corresponding Responsibility When it Dispensed Controlled Substances Pursuant to Prescriptions Not Issued in the Usual Course of Professional Practice or for a Legitimate Medical Purpose

The OSC alleged that Respondent Pharmacy failed to exercise its corresponding responsibility under 21 CFR 1306.04 as evidenced by its having dispensed controlled substances without resolving ''red flags of diversion'' that were present, including prescriptions: For highly abused narcotics; written to individuals travelling long distances; from groups of individuals who travelled long distances, from the same doctor, presented at the same time; for multiple drugs designed to treat the same condition in the same manner; constituting obvious early refills; and, for ''costly narcotic medications, which the customer repeatedly purchased with cash.'' OSC, at 4.

1. Red Flags Associated With Patients of Dr. R.

The OSC alleged that between February 12, 2014, and May 3, 2014, Respondent Pharmacy ''dispensed narcotic medications to groups of customers who resided in close proximity to [Respondent Pharmacy], but who obtained their prescriptions from a physician located in Miami, Florida, more than 170 miles from their homes.'' OSC, at 4. The Government alleged that the distance between the prescribing practitioner and his patients constituted red flags and Respondent Pharmacy did not adequately resolve the red flags prior to dispensing prescriptions. *Id.* Furthermore, the Government alleged that Dr. R.'s prescriptions presented additional red flags that were unresolved by the pharmacy.

The Government's evidence includes a letter from Dr. R., dated May 22, 2014, which explains that Dr. R. moved his practice from Broward County to Miami, but his Broward County patients had decided to continue under his care. GX 29, at 1. The letter provided high level details about his office protocols to ensure against diversion. *Id.* The ALJ noted that the letter did not provide any names of Dr. R.'s patients. RD, at 30. Respondents' Owner and PIC stated that the letter ''was issued after [Respondents' Owner and PIC] decided to no longer accept [Dr. R's] prescriptions.'' Resp Posthearing, at 11 (citing RX H, at 61). Dr. Gordon opined that the letter did not resolve any of the red flags for patients ''because it still doesn't explain why they're going to be driving further, putting the patients at risk.'' Tr. 193. She testified that although the fact that Dr. R. discusses his practice's controls[23] could help a pharmacist evaluate the red flags, ''[i]t still doesn't justify them traveling three hours.'' *Id.* at 272. Further, Dr. Gordon testified that nothing in the pharmacy records confirmed Dr. R.'s practice controls were actually implemented and there were no written statements from the patients as to why they chose to travel to see Dr. R., and there was no documentation of any pharmacists' discussion with Dr. R. necessitating the letter in Respondent Pharmacy's records. Tr. 270, 286–87; RD, at 72.

Respondents' Owner and PIC testified that she had spoken on the phone to Dr. R. and ''found him legitimate.'' Tr. 555. However, she stated that she had made a policy not to fill Dr. R.'s prescriptions, around the time that she received a letter from him on May 22, 2014, and she counseled B.S.[24] for filling those prescriptions ''because we don't want the scrutiny of it.'' *Id.* at 560, 770; 557; RX H, at 62. However, she stated that despite that policy, there were two

[20] Respondents' Owner and PIC and the RD mentioned thirteen prescriptions to Dr. I's office, but the Government's evidence appeared to contain only eight and one to Dr. A's office and sixteen fill stickers. GX 3; Tr. 577; RD, at 29. The prescription for Dr. A. was filled by the Respondent Pharmacy to [A's] Office on the fill sticker. GX 3, at 4.

[21] Respondents' Owner and PIC stated that she received this legal advice in writing, but Respondent offered no evidence of the advice. Tr. 695–696; RD, at 29.

[22] It is noted that Respondents' Owner and PIC did not offer a similar justification for the prescription to Dr. A's Office.

[23] Dr. Gordon also testified that there was no information in Respondent Pharmacy's files that demonstrated that any of the controls mentioned in the letter had been implemented, except for a urine screen, but ''[i]t was not monthly'' as Dr. R.'s letter had claimed. Tr. 286.

[24] Respondents' Owner and PIC testified that B.S. was later terminated for other reasons in 2016. Tr. 564.

instances where Respondents' Owner and PIC had decided to fill Dr. R.'s prescriptions as an exception to that policy. Tr. 771; 560. One was on April 7, 2014 to J.S.2. *Id.* at 773; GX 6, at 7.

a. Pattern of Filled Prescriptions for Dr. R.'s [25] Patients

The Government presented evidence that not only did Dr. R.'s patients travel long distances to receive their medication, but also they often filled the prescriptions on the same date and ''at the same time, one after another.'' RD, at 71. On February 12, 2014, Patients J.S.1, A.J., and S.P. presented prescriptions for oxycodone and hydromorphone from Dr. R. GX 6, at 1–2; GX 5, at 3–4; GX 4, at 3–4; RD, at 70. Dr. Gordon testified that the pattern of filling in groups is a red flag, because ''that's a group of patients going to see the same doctor, getting the same type of medication, same class of medication, and going to the pharmacy on the same day to get their prescriptions filled.'' Tr. 106. Similarly, on March 11, 2014, Patients D.G. and J.S.1 presented prescriptions from Dr. R. for oxycodone and their prescription numbers indicate that ''[r]ight after one another they were filled.'' Tr. 107; GX 9, at 5–6; GX 6, at 3–4. On March 15, 2014, Respondent Pharmacy filled prescriptions for hydromorphone from Dr. R., for Patients E.H., S.P., and A.J, with sequential fill numbers. GX 8, at 1–2; GX 4, at 5–6; GX 5, at 5–6. On April 11, 2014, Respondent Pharmacy filled prescriptions for S.P., A.J. and E.H. for hydromorphone. GX 4, at 1–2; GX 5, at 7–8; GX 8, at 3–4. Finally, on May 3, 2014, Respondent Pharmacy filled prescriptions for J.S.1 and D.G. for oxycodone and hydromorphone with sequential fill numbers. GX, 6, at 11–12; GX 9, at 9–10.

Dr. Gordon further explained that under normal pharmacy procedures, these Schedule II controlled substances must be locked up and ''the lock and key belongs to the pharmacist,'' and therefore, the pharmacist would have been aware of the pattern of group filling. Tr. 109–10. She opined that the red flags for these prescriptions were not resolvable and that she would not have filled them, because ''it's an effort to take—to get that drug and take it out. And then one right after it is for the same thing.'' *Id.* at 110–11.

b. S.P.

On February 2, 2014, March 11, 2014, and April 11, 2014, Respondent Pharmacy filled prescriptions for hydromorphone for S.P. GX 4, at 4, 2, 6. Dr. Gordon testified that the first red flag in the initial prescription was that the prescription for hydromorphone was ''written for the highest strength the drug is available.'' Tr. 67. Further, the prescription was ''from a doctor who is about three hours away from where the patient resides.'' [26] *Id.* Finally, the fill stickers indicate that the patient paid with cash. *Id.* at 68; GX 4, at 2, 4, 6. The prescription dated February 2, 2014, includes a note on the prescription stating that it was ''verified by Nicole.'' GX 4, at 3. Dr. Gordon explained that ''when a technician calls the doctor's office to verify the validity of the prescription itself, that the prescription was written and issued by the physician.'' Tr. 68. S.P.'s file also contains a form letter with handwritten blanks filled in from Dr. R. faxed on February 12, 2014, that states that Dr. R. ''examined and prescribed narcotic medications'' to S.P. GX 4, at 8. Dr. Gordon opined that the letter provides the ''reasoning for issuing this prescription,'' but does not resolve any of the red flags discussed and stated, ''[i]t makes it worse because it's providing a diagnosis that we see a lot with prescriptions that are associated with diversion of chronic pain syndrome or some kind of back reason, and would also make me wonder how a patient could sit in a car for three hours one way to go to a doctor . . . .'' Tr. 70. She concluded that the prescriptions dispensed to S.P. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. Tr. at 70.

c. A.J.

From January 21, 2014, to April 11, 2014, Respondent Pharmacy filled prescriptions from Dr. R. for customer A.J. GX 5, at 1–8. A.J.'s address on the prescriptions is Palm Bay, Florida and the distance from Dr. R's office in Miami is 176 miles. GX 5, at 3, 5, 7; RD, at 31 (citing Stipulation 8). From December 5, 2014, to March 27, 2015, Respondent Pharmacy filled eight prescriptions for A.J. from another doctor, Dr. D. GX 5, at 9–28. Dr. D.'s office in Orlando, Florida was 74 miles from A.J.'s address. RD, at 32 (citing Stipulation 9). Dr. Gordon testified that the prescriptions from Dr. R. raised numerous flags, including: the type of medication; the fact that it was the highest strength dosage available (hydromorphone eight milligrams); ''the distance traveled by the patient to go see the doctor and that the patient was paying cash.'' Tr. 77. Dr. Gordon also testified that it was a red flag that the prescriptions from Dr. D. included a prescription for morphine in addition to the hydromorphone at the highest dosage, both of which treat the same condition. *Id.* at 80, 84; *e.g.,* GX 5, at 9, 11. She further testified that the prescriptions from Dr. D. raised red flags because of the type of medications, the fact that A.J. was paying cash and the fact that the ''codes that are on here are all back pain or chronic pain syndrome,'' which are ''commonly seen on diverted medications.'' [27] *Id.*

A.J.'s profile contains an entry that states, ''Dr. D. called personally about patient & will send letter over next week.'' GX 5, at 29. There is no letter from Dr. D. in the file and the Respondents' Owner and PIC testified that it was ''generally'' the policy to note the receipt of a letter in the system.[28] Tr. 735–36. The file also contains a form letter faxed on January 23, 2014,[29] from Dr. R. with the patient's name, diagnosis and last MRI filled in by hand. GX 5, at 30; RX H, at 59. Dr. Gordon testified that neither the notation regarding Dr. D., nor the letter from Dr. R. resolved the red flags associated with A.J.'s prescriptions, because there was no documentation explaining the long distances that A.J. traveled to see these doctors. Tr. 85–86; *see* GX 5, at 29, 30; RX H, at 59. She concluded that the prescriptions dispensed to A.J. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. Tr. at 86.

d. D.G.

From January 14, 2014, to May 3, 2014, Respondent Pharmacy filled prescriptions for customer D.G. written

[25] All of the patients in this section are patients of Dr. R., but some of the patients also received prescriptions from other doctors, which also presented red flags as described herein.

[26] The Parties stipulated that the distance from S.P.'s home in Malabar, Florida to Dr. R. in Miami is 170 miles. RD, at 31 (citing Stipulation (hereinafter, Stip.) 7).

[27] Respondents argue that Dr. Gordon ''seems to have an overall bias against patients with back pain.'' Resp Posthearing, at 54. I disagree. She testified that it had been her ''experience'' that people who commonly abuse medications present with prescriptions related to back pain. Tr. 220. It is noted that there are numerous red flags on the prescriptions where Dr. Gordon flagged back pain as an additional red flag.

[28] However, there was a letter from Dr. R. for patient A.J. and no corresponding notation regarding its receipt in A.J.'s profile. GX 5, at 29, 30; RD, at 32.

[29] It is noted that this letter was faxed on January 23, 2014, but the first prescription for A.J. was filled on January 21, 2014; therefore, even had this letter resolved some of the red flags for future prescriptions, which I find it did not, it was not received in time to resolve the red flags for the first prescription. *See* GX 5, at 2.

by Dr. R. GX 9, 1–10. D.G.'s address on the prescriptions is in Palm Bay, Florida and the distance from Dr. R.'s office in Miami is 175 miles. GX 9, at 2, 4, 6, 8; RD, at 33 (citing Stipulation 13). D.G.'s customer file also includes a prescription, dispensed on October 15, 2014, written by another doctor, Dr. B., in Winter Garden, Florida, which is 76 miles from D.G.'s address. GX 9, at 11; RD, at 33 (citing Stipulation 17). Dr. Gordon testified that these prescriptions raised multiple red flags including: ''the type of medication, which is an opioid, the strength [30] of the medication, the distance traveled from the patient's home to the doctor, and cash.'' Tr. 94–95. Further, she testified that the prescriptions from Dr. B. had the same red flags and that the patient was traveling an hour away, which would still trigger a red flag. Tr. 97. The Government's evidence includes a form letter from Dr. R. stating that the date of visit was February 11, 2014,[31] and a diagnosis of lower back pain. GX 9, at 14. Dr. Gordon testified that nothing in the file,[32] including the letter, resolves the red flags, because it does not explain why he is traveling such a distance, particularly considering that he allegedly had lower back pain. Tr. 98. She concluded that the prescriptions dispensed to D.G. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 98.

e. E.H.

From March 15, 2014, to May 9, 2014, Respondent Pharmacy filled prescriptions for customer E.H. written by Dr. R. GX 8, 1–6. E.H.'s address on the prescriptions is in Palm Bay, Florida and the distance from Dr. R's office in Miami is 175 miles. *Id.* at 2, 4, 6; RD, at 34 (citing Stipulation 20). E.H.'s customer file also includes prescriptions filled July 23, 2014, to April 1, 2015, written by various doctors at a pain management clinic in Orlando, Florida, which is 74 miles from E.H.'s address. GX 8, at 7–24; RD, at 34 (citing Stipulation 21). Dr. Gordon testified that these prescriptions raised multiple red flags including: ''the type of medication, the strength of the medication, the distance traveled, and cash.'' Tr. 100. Further, she testified that the prescriptions from the practice in Orlando had the same red flags and that the patient was still traveling a distance.[33] *Id.* at 102. The Government's evidence includes a form letter with the patient, diagnosis and last MRI filled in from Dr. R. faxed on March 14, 2014. GX 8, at 26. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags. Tr. 105. She concluded that the prescriptions dispensed to E.H. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.*

f. J.S.1 and J.S.2

From February 12, 2014, to May 5, 2014, Respondent Pharmacy filled prescriptions for customers J.S.1 and J.S.2 written by Dr. R. GX 6, at 1–14. According to the prescriptions, J.S.1 and J.S.2 live at the same address in Palm Bay, Florida. RD, at 34 (citing Tr. 585); *compare* GX 6, at 1–2, *with* GX 6, at 5–6. The distance from the residence of J.S.1 and J.S.2 to Dr. R's office in Miami is 174 miles. GX 6; RD, at 35 (citing Stipulation 10). They lived 22 miles from Respondent Pharmacy. RD, at 35 (citing Stipulation 12). Dr. Gordon testified that the prescriptions to J.S.1 and J.S.2 raised the same red flags as the other patients including, ''the type of medication, the strength is the highest strength of the medication, the distance traveled, and cash.'' Tr. 87, 113. The Government's evidence includes a form letter for J.S.2 with the patient, diagnosis and last MRI filled in from Dr. R. faxed on March 10, 2014. GX 6, at 16. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags. Tr. 113. No such letter is in the file for J.S.1. *See generally* GX 6. She concluded that the prescriptions dispensed to J.S.2 [34] were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 113–114. Dr. Gordon further testified that the fact that J.S.1 and J.S.2 reside at the same address raises an additional red flag, ''because that shows that they're a group. They both live at the same address, they're getting the same type of chronically sought after narcotic from the same doctor, both traveling an hour or three hours south one way to get their medication, both have a similar diagnosis of back pain.'' *Id.* at 114.

Respondents' Owner and PIC stated that the majority of the prescriptions Respondent Pharmacy filled for J.S.1 and J.S.2 were filled by B.S, but that she had filled some of J.S.2's prescriptions. *Id.* at 586. She recalled having a conversation with J.S.2 about the distance driven and that it was ''short-term'' and ''[h]e did tell me the diagnosis. I don't recall about the time.'' *Id.* at 588. She also testified that she had encouraged J.S.2 to find a local pain physician and he had found one in Orlando, which she considered to be local despite being 50 miles away, because ''there weren't the availability of a lot of pain management doctors, period, but there were even less that had openings.'' Tr. 593–94.

g. C.C.

From December 28, 2013, to May 5, 2014, Respondent Pharmacy filled prescriptions for customer C.C. written by Dr. R. GX 11, at 1–12. C.C.'s address on the prescriptions is in Melbourne, Florida and the distance from Dr. R's office in Miami is 176 miles. GX 11; RD, at 36 (citing Stipulation 28). C.C.'s customer file also includes prescriptions filled from August 18, 2014, to March 30, 2015, written from a practice in Rockledge, Florida. GX 11, at 13–44; RD, at 36. Dr. Gordon testified that the prescriptions from Dr. R. to C.C. raised the same red flags as the other patients.[35] Tr. 123. Dr. Gordon also testified that even though the doctor in Rockledge was local to C.C., the prescriptions still raised red flags because the prescriptions were ''still the short-acting opioid at the highest dose, the chronic back pain, and cash.'' *Id.* at 125; GX 11, 13–44. The Government's evidence includes a form letter for C.C. from Dr. R. with the patient name diagnosis and last MRI filled in by hand, which although undated, appeared to be received April 7, 2014, according to the notes in the Respondent Pharmacy's files. GX 11, at 45–46. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags for the prescriptions for C.C. Tr.

[30] Dr. Gordon further explained that the strength is a concern ''because it's the highest dose the drug is available in in an immediate-release form.'' Tr. 94.

[31] It is noted that although the letter was undated, it had to have been sent after the last visit identified in the letter as February 11, 2014, which was after Respondent Pharmacy's first fill on January 17, 2014, for this patient. GX 9, at 2.

[32] The patient profile for D.G. includes a note in the memo section that states ''3/17/2015 must have new letter of med necessity for any further fills.'' GX 9, at 13. However, that note was dated long after the last prescription in the record for D.G. of October 15, 2014. *Id.* at 12.

[33] One of the prescriptions includes a Rockledge address for the Orlando practice, which Dr. Gordon testified is still far away from E.H.'s home. Tr. 103–04.

[34] Dr. Gordon's testimony did not include a specific conclusion regarding corresponding responsibility for J.S.1 separate and apart from J.S.2; however, I find that the record is clear that the red flags for both of these patients were the same and therefore I draw the same conclusion for J.S.1 that I do for J.S.2.

[35] The Government noted that the fill sticker on one of the prescriptions gives an address in Boynton Beach for Dr. R., but Dr. Gordon said that although ''it probably shaves off maybe an hour and a half drive,'' it still raises the same red flags. Tr. 123–24.

126–127. She concluded that the prescriptions dispensed to C.C. from Dr. R.[36] were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.*

h. P.P.

From January 31, 2014, to April 10, 2014, Respondent Pharmacy filled prescriptions for customer P.P. written by Dr. R. GX 12, at 1–6. P.P.'s address on the prescriptions is in Palm Bay, Florida and the distance from Dr. R's office in Miami is 173 miles. GX 12; RD, at 36 (citing Stipulation 30). Dr. Gordon testified that the prescriptions from Dr. R. to P.P. raised the same red flags as the other patients for the strength, type of medication, ''a highly sought after opioid,'' and the distance traveled. Tr. 128. She further stated that P.P. charged his insurance for some of the prescriptions, but paid cash for the prescription filled on February 18, 2014, which indicates a red flag when patients are ''maybe trying to hide something from the pharmacist. They get it filled somewhere else and bill their insurance.'' *Id.* at 128. The Government's evidence includes a form letter for P.P. from Dr. R. with the patient name, diagnosis and last MRI filled in by hand, which was faxed on January 23, 2014. GX 12, at 8; RX H, at 264. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags for the prescriptions for P.P. Tr. 129–130. She concluded that the prescriptions dispensed to P.P. prescribed by Dr. R. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.*

Although the letter of necessity from Dr. R. was included in the Government's evidence, there was no corresponding note of receipt in his patient file and there was no note that Respondent Pharmacy would not take out of county prescriptions.[37] GX 12, at 7. Respondents' Owner and PIC stated that no prescriptions were filled for patient P.P. after May 14, 2014, but the ALJ found, and I agree, that Respondents' own exhibits demonstrate that not to be the case. Tr. 633; RD, at 37; RX H, at 265 (showing that the last prescription filled for P.P. by Respondent Pharmacy was on September 22, 2016). Respondents' Owner and PIC also testified that the prescriptions for P.P. were filled by Pharmacist B.S.,[38] a former employee of Respondent Pharmacy. Tr. 632–33.

i. K.P.

From February 4, 2014, to April 8, 2014, Respondent Pharmacy filled prescriptions for customer K.P. written by Dr. R. GX 13, 11–16. Additionally, from April 22, 2013, to August 24, 2013, Respondent Pharmacy filled prescriptions for K.P. from a prescriber in Fort Lauderdale, Florida.[39] K.P.'s address on the prescriptions varies;[40] however, K.P.'s address on all of the fill stickers from Respondent Pharmacy indicates that he was located in Fort Lauderdale, Florida. GX 13, at 2, 4, 6, 8, 10, 12, 14, 16. The distance between K.P.'s address and Respondent Pharmacy is 164 miles. RD, at 38 (citing Stipulation 32). Dr. Gordon testified that these prescriptions raised numerous red flags including: ''the type of medication, the highly sought out opioid, the strength of the medication, the distance to the pharmacy [. . .] and that the patient was paying cash.'' Tr. 132. The Government's evidence includes a form letter with the patient name, diagnosis and last MRI filled in from Dr. R. faxed on January 31, 2014. GX 13, at 18; RX H, at 273. There was no documentation of the letter in the notes section of the patient profile in Respondent Pharmacy's system, but there was an undated note stating not to fill any more ''out of county physicians.'' GX 13, at 17; RD, at 38. There was no letter of necessity or other notes regarding the prescriber in Fort Lauderdale. *See generally* GX 13; RD, at 38. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags. Tr. 135–136. She concluded that the prescriptions dispensed to K.P. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 136.

Based on all of the record evidence, and the testimony of Dr. Gordon, which I credit, I find that the prescriptions issued by Dr. R. and other doctors for Dr. R.'s patients as detailed herein, raised red flags, including that customers arrived in groups, purchased prescriptions with cash, traveled long distances and because the prescriptions were for highly sought after controlled substances at highest strengths. I further find that the letters of medical necessity provided by Dr. R. did not resolve the multiple red flags on his prescriptions and that, even if these red flags were resolvable, there was no credible evidence in the record that Respondent Pharmacy resolved them before it filled the prescriptions. I conclude that the pharmacists filling the prescriptions did not fulfill their corresponding responsibility and the prescriptions were not dispensed in the usual course of professional practice.

2. Other Prescriptions Presenting Red Flags

a. J.C.

From approximately October 11, 2013, to January 16, 2015, Respondent Pharmacy filled prescriptions for customer J.C. written by a prescriber in Fort Lauderdale, Florida. GX 10. Most of the prescriptions record only a street address for the patient without a city, but a few prescriptions list the city as Palm Bay, Florida.[41] *Compare, e.g.,* GX 10, at 1 *with* GX 10, at 71–82; RD, at 39. The address on all of the fill stickers states that J.C. lives in Indialantic, Florida, which is 158 miles from the prescriber's office in Fort Lauderdale. *See, e.g.,* GX 10, at 2; RD, at 39 (citing Stipulation 22). There is nothing in the record evidence that resolves the discrepancy between the addresses on the prescriptions and the address on the fill stickers. RD, at 39. The first five prescriptions in the Government's exhibit were all issued on January 3, 2014, and are all for varying strengths and amounts of the same controlled substance, Roxicodone, including two prescriptions for 10 milligrams and two prescriptions for 20 milligrams and one prescription for 5 milligrams. Tr. 115,

[36] Although Dr. Gordon testified that the prescriptions from the physician in Rockledge raised red flags, she limited her opinion that Respondent had not fulfilled its corresponding responsibility or acted within the usual course of professional practice to the prescriptions to C.C. by Dr. R. I am limiting my findings to Dr. R's prescriptions, because most of the other prescriptions included a red flag of distance and Dr. Gordon did not explain how or whether the absence of that red flag in this instance might affect the pharmacist's corresponding responsibility and professional practice.

[37] The ALJ noted, and I agree, that the Respondents' Owner and PIC testified that even though there was no notation, a pharmacist filling a prescription for P.P. could check the paper file for the letter of necessity; however, without a notation, a pharmacist would not know that the letter existed to know to check the paper file. RD, at 37 n.17 (citing Tr. 748–49)

[38] Although B.S. may have filled the prescriptions in the Government's evidence, it is noted that Respondents' evidence demonstrates that B.S. was terminated for potential diversion on April 23, 2016; therefore, a different pharmacist must have filled P.P.'s prescriptions following B.S.'s termination. RX G, at 5l; Tr. 564.

[39] One of the fill stickers for the Fort Lauderdale prescriber indicates a Miami address, but I find this to be irrelevant because the red flag for K.P. related to location is the distance he lived from the pharmacy. *See* GX 13, at 10; Tr. 133.

[40] A few of the prescriptions show addresses in Sunrise Florida, which is west of Fort Lauderdale. RD, at 38 n.18. Additionally, one of the prescriptions indicates that K.P. lives in Palm Bay, which Dr. Gordon testified ''creates more of a red flag. Where does he live?'' GX 13, at 11; Tr. 134–35.

[41] Dr. Gordon testified that even if the patient had lived in Palm Bay, it would be a 2 to 2.5 hour trip to Fort Lauderdale. Tr. 116.

835; GX 10, at 1–10; RD, at 39. Dr. Gordon testified that the five prescriptions for Roxicodone ''just screams red flags.'' Tr. 117. ''Furthermore, the instructions for taking these five prescriptions for the same controlled substance suggested that J.C. could have been taking all of these medications at the same time.'' RD, at 39 (citing Tr. 834–35). On the same date, January 3, 2014, in addition to the five prescriptions for the Roxicodone, Respondent Pharmacy also filled a sixth prescription for J.C. for the highest available dosage of diazepam, or Valium, which ''would now constitute a drug cocktail.'' Tr. 117; GX 10, at 175–76.

Furthermore, the ALJ found, and I agree, that Respondent Pharmacy additionally filled this same drug cocktail of oxycodone and diazepam for J.C. on January 28, 2014 (Tr. 118–19; GX 10, at 11–20, 177–78); July 19, 2014 (GX 10, at 95–96, 193–194); September 3, 2014 (GX 10, at 111–14,[42] 191–92); September 23, 2014 (GX 10, at 119–26, 193–94); December 22, 2014 (GX 10, at 141–44, 197–98); and January 16, 2015 [43] (GX 10, at 145–48, 199–200).

Further, Respondent Pharmacy filled prescriptions for J.C. that constituted early refills. Tr. 121. For example, the ALJ found, and I agree, that Respondent Pharmacy filled multiple prescriptions for J.C. on January 28, 2014 (Tr. 121, GX 10, at 11–19) and then again filled prescriptions on February 11, 2014, and February 26, 2014. GX 10, at 19–20, 21–26, 27–30. Dr. Gordon said this raised red flags because ''[t]he patient already got like a ton of oxycodone, and this is just like twelve days later he just got a whole nother [sic] batch.'' Tr. 122. She further testified that nothing in the patient records [44] is written to resolve the red flags for J.C.'s prescriptions. *Id.*

Respondents' Owner and PIC testified [45] that if J.C. paid cash for a prescription, the fill sticker stated ''cash'' and if he used insurance it would read ''advance.'' Tr. 615. J.C. paid cash for his prescriptions 10 times. RD, at 40 (citing Tr. 613); *see e.g.,* GX 10, at 146. Respondents' Owner and PIC further testified that she knows J.C. and he was a customer for 10 years. Tr. 596, 740. She further testified that she had had a conversation with the prescribing doctor [46] ''about the therapy because it is different, so I particularly wanted to know about the use of several different strengths of oxycodone.'' *Id.* at 597. In speaking with the doctor, Respondents' Owner and PIC testified that ''[J.C.] was on a very tightly tailored pain management treatment plan where as his pain fluctuated, he would use a different dose to use the minimal amount to relieve the pain.'' *Id.* at 610. Later, she changed the rationale for the multiple prescriptions, stating, ''those were split scripts [47] so that if the patient either didn't have the funds or if it wasn't available because of shortages . . . so that he could get a partial here and there.'' Tr. 855.

Dr. Gordon testified that there were no instructions with these prescriptions about how to take them. *Id.* at 832–34. In order to address the prescriptions under the standard of practice, she said that a pharmacist would need to call to find out why the patient needs all of the prescriptions, ''and is the patient supposed to take one at a time or can they take all four at the same time.'' *Id.* at 835, 837. She concluded that the prescriptions dispensed to J.C. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 120

b. M.B.

From October 3, 2013, to March 13, 2015, Respondent filled prescriptions for patient M.B., whose address on the prescriptions and fill stickers was listed in Palm Bay, Florida. GX 14, at 1–88. Dr. Gordon testified that these prescriptions raised multiple red flags. For example, the prescriptions filled for hydromorphone and lorazepam on December 30, 2013, constituted a drug cocktail. Tr. 137. Dr. Gordon noted many instances of drug cocktails dispensed to M.B., including Ativan and hydromorphone, MS Contin, or extended-release morphine. Tr. 138. The ALJ noted that beginning in December 2014, Respondent Pharmacy was filling two prescriptions for hydromorphone for M.B. at the same time it filled prescriptions for lorazepam for him. RD, at 41; GX 14, at 65–88. Dr. Gordon testified that a further red flag was the location of the physician in Sanford, which is about an hour away from M.B.'s residence in Palm Bay. *Id.* at 138. The records for patient M.B. demonstrate that M.B. paid for his prescriptions ''cash for some things and insurance for others.'' Tr. 138; *compare* GX 14, at 10, *with id.* at 12.

The Government's Exhibit included a letter dated May 6, 2013, with a corresponding note in the patient profile from M.B.'s prescriber. GX 14, at 89–92. The letter included a diagnostic code and list of medications, but ''provide[d] no information about why M.B. was making a 170 mile round trip to see'' the prescriber. RD, at 41; GX 14, at 90–92. Dr. Gordon testified that nothing in the file, including the letter, resolved the red flags. Tr. 138–39. She concluded that the prescriptions dispensed to M.B. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 139–40.

Respondents' Owner and PIC testified that she spoke to M.B.'s prescriber and ''had a general conversation, not patient specific.'' Tr. 640. She testified that ''63 out of 91 [of M.B.'s] prescriptions'' were paid by insurance, and that M.B.'s payment with cash ''raised a red flag that was resolved,'' because ''the insurance, if they won't pay for it, then we give them the option to pay cash.'' [48] *Id.* at 642. Respondents' Owner

[42] It was not alleged by the Government and is therefore not being considered, but is noted that the Government's exhibit also demonstrates that J.C. filled prescriptions written on September 2, 2014 at Respondent Pharmacy on September 3, 2014, and September 5, 2014, and September 10, 2014. GX 10, at 114, 116, 118.

[43] The prescriptions for oxycodone and Diazepam were all prescribed on January 16, 2015, but Respondent Pharmacy dispensed them on January 16, 2015, January 19, 2015, and January 28, 2015. GX 10, at 145–152; 199–200. The evidence shows that Respondent Pharmacy dispensed prescriptions for oxycodone and diazepam, which constituted a drug cocktail, on January 19, 2015. *Id.* at 148, 200.

[44] The Patient profile includes a note that says that someone spoke with the prescriber and verified medical necessity on October 2, 2012. The notes also include a note on March 30, 2015, after several years of filling prescriptions, that the address on RX must match address on the driver's license and that there could be ''no more credit.'' GX 10, at 201.

[45] Respondents' Owner and PIC also testified that she believed that the Government had not included all evidence from the patient memo in their exhibits, because she ''knew this patient well.'' Tr. 612. Respondent did not offer additional evidence and the print out in her exhibits on J.C. contains the same information in the patient memo as the Government's print out. *Compare* RX H, at 145 *with* GX 10, at 201.

[46] Respondents' Owner and PIC testified that this doctor had a good reputation in the community. At first, Dr. Gordon testified that it is not within the standard of practice to rely on a physician's reputation to fill a prescription, but later amended her statement to allow that reputation ''will come into play.'' Tr. 832, 838. I do not find this information particularly relevant, because there is nothing in the record documenting Respondents' Owner and PIC's belief that the physician's reputation resolved the multitude of red flags that these prescriptions presented.

[47] Some of the prescriptions did include a note indicating ''split script;'' however, I find Dr. Gordon more credible that this could not resolve the red flag of the need for all of the prescriptions or the instructions on how to take them. *See e.g.,* GX 10, at 161. Additionally, on March 20, 2015, Respondent Pharmacy filled all of the prescriptions that appeared to be duplicative on the same day, which undermines the notion that they were split scripts. *Id.* at 159–64.

[48] I note that M.B.'s patient records demonstrate that he paid cash for most of his prescriptions for hydromorphone and the other prescriptions with

Continued

and PIC testified that M.B. had ''presented with a prescription from a different physician,'' and that she had ''faxed Dr. [C]'s office to see the reason for his discharge'' and found out ''that he had been discharged for cause,'' so she refused to fill further prescriptions for M.B. Tr. 643 (citing RX H, at 274 (found at 283)).

c. C.A.

From December 17, 2013, to February 10, 2014, Respondent Pharmacy filled prescriptions for patient C.A., whose address on the fill stickers was listed as Sebastian, Florida,[49] which was 86 miles from the prescriber in Orlando. GX 15, at 1–7; RD, at 41 (citing Stipulation 35). Dr. Gordon testified that these prescriptions raised multiple red flags, including the type of medication, the distance traveled and that all of the prescriptions were paid for in cash. Tr. 141; GX 15, at 2, 4, 6. ''Two of the three prescriptions that contain these red flags were filled by [Respondents' Owner and PIC].'' RD, at 42 (citing Tr. 142; GX 15, at 1–2, 5–6). The patient's profile notes ''must have letter of med nec for March 2014 fill Dr. Kuhn.'' GX 15, at 7. The exhibits included an undated letter. GX 15, at 8. From the date of the note, it appears that this letter must have arrived around the time of the March 2014 fill and after the three prescriptions in the exhibit. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags. Tr. 143. She concluded that the prescriptions dispensed to C.A. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.*

d. D.B.

From December 17, 2013, to March 26, 2015, Respondent Pharmacy filled prescriptions for patient D.B. GX 7, at 1–60. D.B.'s address on the fill stickers is in Port St. Lucie, Florida, which is 76 miles from Respondent Pharmacy; however, D.B.'s address on the prescriptions is in Jupiter, Florida. GX 7, at 1–60; RD, at 42 (citing Stipulation 27). The doctor's office in Jupiter, Florida is 111 miles from Respondent Pharmacy. RD, at 42 (citing Stipulation 26).

Dr. Gordon testified that these prescriptions raised multiple red flags, including the type and strength of the medication, the distance traveled to the pharmacy and that many of the prescriptions were paid for with cash. Tr. 144. Additionally, many of the prescriptions filled were for drug cocktails. *Id.* at 144–47. For example, Respondent Pharmacy filled a drug cocktail of: Oxycodone and the highest dose of Xanax (filled by Respondents' Owner and PIC six days after the oxycodone prescription) in December 2013. GX 7, at 1–3; Tr. 145–46; RD, at 42. Respondents' Owner and PIC filled a prescription for oxycodone, Percocet and Xanax, which included two immediate release opioids, on July 1, 2014. Tr. 148; GX 7, at 21–26. Respondent Pharmacy filled prescriptions for Percocet, Xanax and Ambien on February 21, 2015. Tr. 146–47; GX 7, at 51–56. Additionally, on October 24, 2014, Respondent Pharmacy filled two identical prescriptions for the highest dosage of oxycodone. Tr. 147; GX 7, at 35–38.

Further, the record demonstrates early fills, which constitute red flags. For example, on June 19, 2014, Respondent Pharmacy filled a prescription for a 30 day supply of Percocet and 30 day supply of oxycodone, and Respondents' Owner and PIC re-filled both for a 30 day supply on July 1, 2014, despite that 30 days had not passed. Tr. 726–27; GX 7, at 19, 20, 21–14. Respondents' Owner and PIC admitted that it was an early fill ''as to counting the days.'' Tr. 727. She further responded ''yes'' to the question as to whether the early fill constituted a red flag and admitted that nothing in the patient profile or on the prescription resolved the red flag. Tr. 727.[50]

The patient memo box on D.B.'s patient profile includes a note from March 30, 2015, that ''address on RX must match driver's license.'' GX 7, at 61; Tr. 733. Further, Respondents' Owner and PIC testified that she had resolved the red flag that he was traveling so far, because ''he had a residence in Satellite Beach that he intended to move back to'' and Respondents provided a copy of what appears to be a scanned prescription, dated March 24, 2015, with a handwritten note in Respondents' Owner and PIC's handwriting, stating, ''Moving back to Sat Bch July.'' Tr. 619; RX H, at 192. However, the ALJ found, and I agree, that ''the pharmacy had been filling D.B.'s prescriptions since December of 2013, yet all of the prescription addresses indicated that D.B. lived in Jupiter, Florida, while the fill stickers indicated he lived in Port St. Lucie.'' RD, at 43.

Dr. Gordon testified that nothing in the Government's evidence resolved the red flags on the prescriptions. Tr. 147–49. She concluded that the prescriptions dispensed to D.B. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 149.

e. J.D.

From October 18, 2013, to April 3, 2015, Respondent Pharmacy filled prescriptions for patient J.D. whose address on the prescriptions and most of the fill stickers[51] was listed as Cocoa Beach, Florida, which was 75 miles from the prescriber in Sanford, Florida. GX 16, at 1–72; RD, at 43 (citing Stipulation 36). Dr. Gordon testified that these prescriptions raised multiple red flags, including the type of medication, the fact that the Xanax and hydromorphone were at high dosages, the distance traveled, paying for prescriptions with cash, and drug cocktails of hydromorphone and Xanax. Tr. 152–54; RD, at 43. The ALJ found, and I agree, that the Government's evidence demonstrates that Respondent Pharmacy filled prescriptions for both hydromorphone, at its highest dosage, and Xanax on 16 different dates. RD, at 43–44 (citing GX 16, at 7–70). Furthermore, the ALJ found, and I agree, that Respondent Pharmacy provided J.D. with early refills on March 21, 2014, May 16, 2014, October 3, 2014, November 21, 2014, and January 9, 2015. RD, at 44 (citing GX 16, at 11–26, 39–62).

The patient's profile notes a May 14, 2013, letter of medical necessity from Dr. C., seven months after Respondent Pharmacy began filling J.D.'s prescriptions. GX 16, at 73. The letter provides a list of medications, a diagnosis code and the initial date of

insurance, which would support Respondents' Owner and PIC's testimony regarding the resolution of the red flag; however, he used insurance to pay for ''hydromorphone 8 MG tablet'' on March 13, 2015 (GX 14, at 86) and Respondents offered no explanation to resolve this discrepancy. More importantly, Respondents provided no documentation of the alleged resolution of this red flag or any other of the red flags for patient M.B.

[49] As the ALJ noted, the address listed for C.A. on the prescriptions had the same street address as the fill stickers, but listed the city as Barefoot Bay, Florida instead of Sebastian, Florida. *Compare* GX 15, at 1, *with id.* at 2. The distance between these two cities is negligible and despite the Government trying to raise the difference as a red flag at the hearing, it does not appear to be relevant. Tr. 141.

[50] Respondents' Owner and PIC argued that the fact that the patient ''consistently saw the same doctor who wrote subsequent scripts which seemed to legitimize'' the prescriptions, because ''that would suggest that a conversation was had about how much was used and why he was writing it yet again.'' Tr. 729. I reject the notion that a red flag that demonstrates that a prescription may be illegitimate is resolved because the practitioner who issued the initial potentially illegitimate prescription, issued another potentially illegitimate prescription.

[51] The first two prescriptions list an address of Titusville, Florida on the fill stickers and not the prescriptions, but the rest of the prescriptions list Cocoa Beach on both. GX, 16, at 1–4.

treatment, but no explanation for the distance traveled, strength of the medication or the combination of medications. GX 16, at 74–75. Dr. Gordon testified that nothing in the file, including the letter, resolves the red flags. Tr. 154.[52]

f. K.B.3

From December 27, 2013, to January 23, 2015, Respondent Pharmacy filled prescriptions for patient K.B.3, whose address on the prescriptions and fill stickers was listed as Palm Bay, Florida, which was 88 miles from the prescriber, Dr. S., in Sanford, Florida. GX 17, at 1–27; RD, at 44 (citing Stipulation 37). Dr. Gordon testified that these prescriptions raised multiple red flags, including the type of medication, the fact that the hydromorphone was prescribed at its highest strength, the distance traveled to the prescriber, and paying for prescriptions with cash. Tr. 155–56; RD, at 44. The ALJ additionally noted that Respondents' Owner and PIC ''filled prescriptions for K.B.3 for the maximum available dosage of hydromorphone on June 25, 2014, and July 22, 2014.'' RD, at 44 (citing GX 17, at 29–35). Respondents' Owner and PIC testified that she did not see any red flags related to the distance traveled or any other red flags related to K.B.3's prescriptions and that she ''interacted with him regularly.'' Tr. 660.

The patient's profile notes that on September 24, 2014, Respondent Pharmacy received a letter of medical necessity from Dr. S. GX 17, at 28. The Government's Exhibits include three different letters dated September 24, 2014, January 30, 2013, and September 2, 2013, explaining that K.B.3 had been under various doctors' care for back pain,[53] but they ''don't address why the patient's paying cash, they don't address why the patient's going such a long distance to obtain these sought after opioids, desirable opioids.'' Tr. 157; GX 17, at 29–34. Dr. Gordon testified that nothing in the file resolves the red flags. Tr. 156–157. She concluded that the prescriptions dispensed to K.B.3 were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 157.

g. K.B.2

From October 21, 2013, to March 26, 2015, Respondent Pharmacy filled prescriptions for patient K.B.2, whose address on the prescriptions and fill stickers was listed as Melbourne, Florida, which was 67 miles from the prescriber in Orlando, Florida. GX 18, at 1–98; RD, at 45 (citing Stipulation 38). Dr. Gordon testified that these prescriptions raised multiple red flags, including the type of medication, the fact that the diazepam and hydromorphone were prescribed at its highest strength, the distance traveled to the prescriber, paying for prescriptions with cash. Tr. 158–64; RD, at 45. Dr. Gordon also testified that Respondent Pharmacy filled drug cocktails for K.B.2 consisting of diazepam, hydromorphone and morphine sulfate.[54] Tr. 159–61. The ALJ concluded that Respondent Pharmacy filled this drug cocktail for K.B.2 13 times between January 13, 2014, and March 26, 2014. RD, at 45 (citing GX 18, at 11–98). He further noted that ''[a]lthough K.B.2 would normally receive his prescriptions for these three controlled substances on the same day, he would frequently present the prescriptions to the Pharmacy within a two or three day time frame.'' RD, at 45 (citing *e.g.,* GX 18, at 11–16, 17–22, 27–32, 33–38, 39–44, 45–50, 77–82, 93–98). Respondents' Owner and PIC also filled prescriptions for morphine sulfate and diazepam on June 10, 2014. RD, at 45 (citing GX 18, at 41–44).

The patient's profile notes that on April 15, 2013,[55] Respondent Pharmacy received a letter of medical necessity from Dr. P. GX 18, at 99. The letter describes K.B.2's chronic pain and spine injuries and provides an MRI performed on July 30, 2012. *Id.* at 101. Dr. Gordon testified that nothing in the file, including the letter and MRI, resolves the red flags. Tr. 164–166. She stated, ''It's the distance. Why is somebody taking a long-acting opioid, immediate-release acting opioid, and Valium driving so far?''[56] *Id.* at 165.[57]

h. A.G.

From December 20, 2013, to March 20, 2015, Respondent Pharmacy filled prescriptions for patient A.G., whose address on the fill stickers[58] was listed as Indian Harbor, Florida, which was 65 miles from the prescriber in Orlando, Florida. GX 19, at 1–68; RD, at 46 (citing Stipulation 39). Dr. Gordon testified that these prescriptions raised multiple red flags, including the fact that two immediate-release opioids were prescribed and dispensed at the same time, the distance traveled to the prescriber, and paying for prescriptions with cash. Tr. 167–168; RD, at 46. Respondents' Owner and PIC filled prescriptions for A.G. for oxycodone and hydromorphone on February 21, 2014. RD, at 46 (citing GX 19, at 9–12). The ALJ concluded that Respondent Pharmacy filled the two immediate-release opioids 17 times between December 20, 2013, and March 20, 2015. RD, at 46 (citing GX 19, at 1–68). The OSC alleged that A.G. presented both prescriptions every 28 days based on his 28-day prescription for hydromorphone, even though his prescription for 5 oxycodone tablets a day was for a 30-day supply.[59] OSC, at 8; RD, at 46 (citing GX 19, at 13–60). Therefore, the ALJ concluded, and I agree, that between March 21, 2014, and January 23, 2015, A.G. filled the oxycodone prescription early 11 times with 2 days of 5 tablets each amounting to 10 tablets extra each fill, and as a result, had received an extra 110 tablets of oxycodone over what had been prescribed. RD, at 46 (citing GX 19, at 19–20, 23–24, 27–28, 31–32, 34–36, 39–40, 43–44, 47–50, 55–58). Dr. Gordon testified that two days early she would

[52] Dr. Gordon's testimony did not include a specific conclusion regarding corresponding responsibility for J.D.; however, I find that the record is clear that the red flags are the same as the other patients' prescriptions and therefore I draw the conclusion that these were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility.

[53] It is noted that one of the records contains a physical exam that notes that the patient's back is normal and does not identify any pain. GX 17, at 33.

[54] The ALJ noted, and I agree, that although the Government did not allege the drug cocktails in the OSC for K.B.2, they were noticed in the prehearing statement. RD, at 45 n.23; Govt Prehearing, at 16.

[55] The letter predates by several months any of the prescriptions in the Government's records; however, Respondent submitted evidence that it had been filling similar prescriptions for K.B.2 since November 2011. GX 18, at 100; GX 18, at 1; RX H, at 324.

[56] The ALJ found, and I agree, that there was no evidence demonstrating that the patients themselves were driving their cars, but whether or not the patient was driving the car, the distances had to be traveled by some mode of transportation in order to obtain the prescriptions. Tr. 165. Further, I credit Dr. Gordon's testimony that traveling a long distance with lower back pain is a red flag. Tr. 98.

[57] Dr. Gordon's testimony did not include a specific conclusion regarding corresponding responsibility for K.B.2; however, I find that the record is clear that the red flags are the same as the other patients' prescriptions and therefore I draw the conclusion that these were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility.

[58] There is no address on the prescriptions. GX 19.

[59] The oxycodone prescription was for 150 tablets of oxycodone 30 milligrams to be taken 5 times a day. GX 19, at 14. Therefore, filling the prescription in full every 28 days resulted in A.G. receiving two days extra of tablets of oxycodone.

let go, but she would not be willing to fill for a patient two days early repetitively. Tr. 233. Dr. Grant testified that ''after a long period of time . . . . There would be a considerable amount. But I don't know until I have the conversation.'' Tr. 510. He further testified that repeatedly filling a prescription two days early would require a conversation first with the patient and then with the prescriber. Tr. 510. Therefore, I agree with the ALJ that the record supports that the repeated filling of these prescriptions constituted an early refill and in accordance with the testimony of Respondents' Owner and PIC, an early refill is a red flag. Tr. 727. There is no evidence that this red flag was resolved.[60]

The patient's profile notes a March 22, 2014, letter of medical necessity from Dr. K,[61] four months after Respondent Pharmacy began filling A.G.'s prescriptions. GX 19, at 69. The letter stated that it was necessary for A.G. to use this medication, but did not identify the type of medication. GX 19, at 70; RX H, at 334. Dr. Gordon testified that nothing in the file resolves the red flags and the treatment plan ''does not address why there's two—why the need for two immediate-release opioids, because that doesn't make any pharmacological sense.'' Tr. 168–69; 171. Further, Dr. Gordon stated that the MRI that was included for A.G. raised additional questions, because it was from 2011 and was ''dated.'' Tr. 305. She concluded that the prescriptions dispensed to A.G. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 169.

i. K.B.1 and C.K.

Respondent Pharmacy filled prescriptions for patients K.B.1 and C.K., whose prescriptions lack addresses. GX 20. The address on fill stickers for K.B.1 was listed as Malabar, Florida, which is 73 miles from the prescriber in Orlando, and the address for C.K. is listed as Cocoa Beach, Florida, which is 51 miles from the same prescriber. GX 20, at 1–64; RD, at 47 (citing Stipulations 40 and 42). Dr. Gordon testified that these prescriptions raised multiple red flags, including the type of medication being a commonly sought-after opioid (oxycodone) of the highest dosage,[62] the distance traveled to the prescriber, and paying for prescriptions with cash. Tr. 172–175; RD, at 47. Furthermore, Dr. Gordon pointed out that these two patients obtained their prescriptions from the same provider on the same date, so it ''seems this was a group, a small group of two going to the same doctor on the same date and filling similar prescriptions.'' Tr. 173. Further, on March 31, 2015, K.B.1 and C.K. filled a prescriptions for oxycodone prescribed on the same day from Dr. K. with sequential fill numbers. GX 20, at 29–30, 64–65; Tr. 173–174. The ALJ further found that Respondent Pharmacy filled prescriptions for ''these two individuals on the same day 14 times between April 1, 2014, and March 31, 2015.'' RD, at 48; (citing GX 20, at 3–30, 37–64).[63] Respondents' Owner and PIC filled two prescriptions for oxycodone for these two patients one minute apart on May 28, 2014, and November 11, 2014. RD, at 48 (citing GX 20, at 7–8, 41–42, 19–20, 53–54).

The patient's profile for C.K. notes an April 15, 2013, letter of medical necessity from Dr. K. GX 20, at 67. The letter seemed to be in response to a letter from Respondent Pharmacy requesting medical necessity, because it was attached to the letter, and it referred to an attached MRI, which was not in the file. GX 20, at 68–69. The patient's profile for K.B.1 notes receipt of a letter of medical necessity on April 1, 2014, which gives his diagnosis and does not identify the medication. *Id.* at 65. Dr. Gordon testified that nothing in the file resolves the red flags. Tr. 174–76. She concluded that the prescriptions dispensed to C.K. and K.B.1 were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility in dispensing these prescriptions. *Id.* at 175–76.

j. J.M. and M.M.

Respondent Pharmacy filled prescriptions for patients J.M. and M.M., whose prescriptions lack addresses, but the address on fill stickers for both patients was listed as Satellite Beach, Florida, which is about 65 miles from Dr. K., the prescriber, in Orlando. GX 21, at 1–42; RD, at 49 (citing Stipulations 46–47). Dr. Gordon testified that these prescriptions raised multiple red flags, including the medication, the distance traveled to the prescriber, drug cocktails of Xanax and oxycodone and carisoprodol and oxycodone and that the doctor's education was not in pain management, but OB–GYN.[64] Tr. 177–80; RD, at 49. The OSC also alleged and the evidence clearly supports that ''M.M. always sought to pay cash for the prescriptions and J.M. occasionally sought to pay cash.'' OSC, at 8. Dr. Gordon also identified a red flag in that the records show a group of patients ''going to the same doctor on the same day and then going to the pharmacy and getting their medications dispensed on the same day.'' Tr. 178. The ALJ further found that Respondent Pharmacy filled prescriptions for ''these two individuals on the same day 15 times between January 7, 2014, and March 31, 2015.'' RD, at 49 (citing GX 21, at 3–30, 37–64). It is noted also that these individuals were coming in sequentially during the same timeframe as the C.K. and K.B.1 and all four were patients of Dr. K. The ALJ further found that ''many times the prescriptions [sic] numbers on the fill stickers were sequentially only one number apart, and other times they were separated only by a few numbers, and the prescriptions were frequently picked up within minutes of each other.'' *Id.* (citing GX 21, at 1–12, 15–30, 33–36, 39–42, 57–60, 63–66, 69–76, 79–82, 85–88, 95–102, 105–116, 119–22, 129–32, 135–38; RX H, at 419). Respondents' Owner and PIC filled sequential prescriptions for oxycodone for these two patients on January 7, 2014, May 27, 2014, July 22, 2014, December 9, 2014, January 6, 2015, March 3, 2015, and March 31, 2015. RD, at 48 (citing GX 21, at 1–4, 23–26, 33–36, 63–66, 69–72, 79–82, 85–88, 109–12, 135–38.). These prescriptions were dropped off within minutes of each other and the fill numbers were in sequence in all but one instance. *Id.* Additionally, the majority of the prescriptions that Respondent

[60] Although I agree with the ALJ that these early fills were a red flag, I find that the other red flags for A.G. were egregious enough to demonstrate that filling his prescriptions violated the pharmacist's corresponding responsibility.

[61] Dr. Gordon remarked that Dr. K's residency was an OB–GYN and that a pharmacist should look up a practitioner's credentials where there is a red flag. Tr. 168, 177. She further explained in relation to other patients of this doctor that she thought that the education of the doctor as an OB–GYN was a red flag, because she ''didn't specialize in pain management.'' *Id.* at 177. Although I accept Dr. Gordon's rationale as to why the doctor's education is a red flag, her practice at the time of the prescriptions was clearly in pain management, and therefore, I am not relying on this possible red flag in my final determination. *See* GX 19, at 70.

[62] The ALJ noted and I agree that initially the prescription for K.B.1 was for 15 mg of oxycodone, but it was increased to 30 mg on September 16, 2014. RD, at 47 n.25 (citing GX 20, at 3–4, 15–16).

[63] Although Respondents argued that the Government had not presented evidence that the two patients were visiting Respondent Pharmacy as a group, Respondents' Owner and PIC testified that ''I don't know why they would come in at the same time. But in recollection, they do, I think they do know each other, but I don't know the relationship.'' Tr. At 671; Resp Posthearing, at 34. Respondents' Owner and PIC testified that she could resolve the red flag of coming in together ''by handling them individually.'' Tr. 672. However, Dr. Gordon testified that the red flag was presented by the fact that they were a group—handling them individually would ignore the red flag entirely.

[64] As explained above, I am not considering the doctor's training as a red flag.

Pharmacy filled for these two patients were for drug cocktails of oxycodone and Soma, and oxycodone and Xanax. RD, at 48–49. Respondents' Owner and PIC filled drug cocktail prescriptions for these two patients on January 7, 2014, May 27, 2014, July 22, 2014, December 9, 2014, January 6, 2015, March 3, 2015, and March 31, 2015. *Id.* (citing GX 21, at 3–4, 89–90, 25–26, 103–04, 33–34, 111–12, 35–36, 109–10, 63–64, 127–28, 65–66, 125–26, 69–70, 133–34, 79–80, 137–38, 81–82, 135–36, 87–88, 139–40).

The patient's profile for J.M. notes a March 29, 2013 letter of medical necessity from Dr. K. GX 21, at 143. The letter states that Dr. K. ''feels it medically necessary to prescribe Roxicodone 15 mg'' and attaches an MRI stating Lumber IVD degeneration. *Id.* at 144–45. The patient's profile for M.M. notes receipt of a letter of medical necessity on March 14, 2013, which gives his diagnosis and attaches an MRI of his ankle showing mild-to-moderate arthritis and mild synovitis/arthritis in his elbow. *Id.* at 147–49. Dr. Gordon testified that nothing in the file resolves the red flags. Tr. 181–82. She testified that the file contained a drug test for M.M., ''which is ''[g]etting better,'' but the ALJ noted, and I agree, that it is unclear what the drug test indicates as a ''pass.'' *Id.* Dr. Gordon concluded that the prescriptions dispensed to J.M and M.M. were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility. *Id.* at 183–84.

k. H.B.

From November 27, 2013, to March 31, 2015, Respondent Pharmacy filled prescriptions for patient H.B. whose address on some of the fill stickers [65] was listed as Melbourne, Florida, which was approximately 54 miles from multiple prescribers in Orlando, Florida.[66] GX 22, at 1–122; RD, at 51 (citing Stipulation 48). Dr. Gordon testified that these prescriptions raised multiple red flags. Tr. 185–190. She testified that H.B. was receiving ''uppers and downers'' including Adderall, which is an amphetamine and central nervous system (hereinafter, CNS) depressant, and a red flag was ''the necessity for Ambien and Xanax at the same time. Both suppress the CNS system.'' *Id.* at 185. She stated that the combination of an amphetamine with a depressant is contraindicated, ''because one suppresses the central nervous system and one stimulates the central nervous system. They're working against each other.'' *Id.* at 189. Further, Dr. Gordon noted that a doctor in Orlando was prescribing H.B. oxycodone and the distance traveled was a red flag. *Id.* at 186. H.B. was also obtaining prescriptions for both 15 mg. and 30 mg. of oxycodone at the same time, which Dr. Gordon testified is ''called therapeutic duplication.'' *Id.* at 186–87. Dr. Gordon testified that H.B. was also receiving the highest dose of Ambien, ''[s]o on top of the Xanax and on top of the oxys, it's just a dangerous combination. Cocktail.'' *Id.* at 187. The ALJ found that Respondents' Owner and PIC filled prescriptions constituting therapeutic duplication on July 1, 2014, and one [67] of the two prescriptions constituting therapeutic duplication on September 23, 2014. RD, at 51 (citing GX 22, at 15–26, 49–52, 71–72). She also filled one of the two prescriptions constituting therapeutic duplication on May 8, 2014—the other was dispensed on May 7, 2014. GX 22, at 41 and 40.

I agree with the ALJ's findings that Respondent Pharmacy filled multiple drug cocktails for H.B. between February 12 and February 20, 2014, for oxycodone, Xanax, and Ambien, on March 12, 2014, for two prescriptions of oxycodone and one of Adderall, and on February 3, 2015, for oxycodone and Soma. RD, at 52 (citing Tr. 187–90; GX 22, at 15–18, 21–26, 28–32, 109–112).

The OSC alleged that H.B. also received early refills. OSC, at 9. The ALJ found, and I agree, that H.B. received early refills: On February 12, 2014, for Adderall, after having received a 30-day supply on January 31, 2014; on February 20, 2014, for alprazolam, after having received a 30-day supply on February 12, 2014; and on February 3, 2015, after having received a 30-day supply on January 13, 2015. RD, at 51–52 (citing GX 22, at 13–14, 19–20, 21–22, 25–26, 107–10). Respondents' Owner and PIC admitted that a fill with a similar timeframe was an early fill and that an early fill was a red flag. *See supra* Section II(G)(2)(k) (citing Tr. 727).

The records for H.B. include two letters of medical necessity for H.B. GX 22, at 124–25. The letter from Mid Florida Health stated that it was necessary for H.B. to have her medications, but did not identify the type of medication, nor was it clear which prescriptions in H.B.'s file originated from this practice. GX 22, at 124. The other letter is an unsigned form letter from Dr. S. describing office diversion protections with H.B.'s name and her diagnosis as a ''lumber tear'' and ''lumbago,'' but does not, as the ALJ pointed out, explain why it was necessary to have the medications or what they were. Dr. Gordon testified that nothing in the file resolved the red flags. Tr. 190. Dr. Gordon also stated that she ''didn't see any documentation that showed that the pharmacy contacted one doctor and told them what was going on with the other doctor,'' which would be done under the normal standard of practice. *Id.* at 189.[68]

Based on all of the record evidence, I find that the prescriptions for J.C., M.B., C.A., D.B., J.D., K.B.3, K.B.2, A.G., K.B.1, C.K, J.M., M.M., H.B. raised red flags, because customers arrived in groups, purchased prescriptions with cash, traveled long distances, refilled their prescriptions early, and because the prescriptions were for highly sought after controlled substances at highest strengths. I further find that the letters of medical necessity in Respondents' files did not resolve the multiple red flags on these prescriptions and that, even if these red flags were resolvable, Respondent Pharmacy produced no contemporaneous documentary evidence to support its claim that it resolved them before it filled the prescriptions.

H. Relationship Between Respondent Pharmacy and Respondent LLC

The OSC was addressed to both Respondent Pharmacy and Respondent LLC, but the allegations in the OSC

[65] As the ALJ remarked, ''[i]t is unclear where H.B. actually lived, because [GX] 22 reports several different addresses;'' however, the OSC did not contain any allegations regarding H.B.'s address. RD, at 51; *see* GX 22.

[66] Respondents noted that, ''[O]n February 3, 2015, the patient transferred to another provider'' who prescribed the same medication and whose office was within Respondent Pharmacy's county. Resp Posthearing, at 37 (citing GX 22, at 109). It is noted that the prescriptions written on February 3, 2015, March 3, 2015, March 31, 2015, appear to be written from a different physician in Merritt Island, FL, which does not pose the same distance concern from the pharmacy or residence. (GX 22, at 109, 111, 113). Respondents note that the new doctor prescribed H.B. Oxycodone 30 mg., ''the same medication prescribed by Dr. [S.] on previous occasions;'' however, Dr. S. notably did not prescribe the duplicative prescriptions of oxycodone that H.B. had received previously. RX H, at 435; Resp Posthearing, at 37. Furthermore, although I find that the prescriptions on March 3, 2015, and March 31, 2015, do not present the red flag of distance traveled or therapeutic duplication, the red flag of drug cocktail remained unresolved, and the February 3, 2015 prescriptions were for a drug cocktail and one was refilled early.

[67] The ALJ noted and I agree that it appears that B.S. filled the other duplicative prescription. RD, at 51 n.32.

[68] Dr. Gordon's testimony did not include a specific conclusion regarding corresponding responsibility for H.B.; however, I find that the record is clear that the red flags are the same as the other patients' prescriptions and therefore I draw the conclusion that these were not dispensed within the usual course of professional practice and the pharmacist did not fulfill his or her corresponding responsibility.

relate only to the actions of Respondent Pharmacy, and not Respondent LLC.[69] OSC, at 1; RD, at 100; Resp Posthearing, at 77. However, the ALJ found, and I agree, that Respondents are ''essentially one and the same.'' RD, at 100. In particular, Respondent Pharmacy and Respondent LLC share the same Owner and PIC.[70] RD, at 52 (citing Tr. 337–43; 345–46; 348–52, 356; GX 27,[71] 28). The DI testified that, although Respondents have separate doors, they share a lobby entrance, entering either door allows access to either business, and they are ''separated by a partition wall which comes approximately three-quarters of the way up through the business but stops just shy of the lobby.'' Tr. 347; RD, at 52. Further he testified that ''the offices in the back seem to be collocated,'' and that ''during the execution of the admin warrant, the computer that [DEA was] using to access [Respondent Pharmacy's] data was located on the [Respondent LLC] side of the wall in an office.'' Tr. 347.

The DI testified that he had confirmed through Florida Department of Revenue that M.P. was the only employee of Respondent LLC during the last two quarters of 2016. Tr. 354–55; RD, at 53. M.P. testified that he is the Manager of Respondent LLC and his boss is Respondents' Owner and PIC. Tr. 409–410. M.P. also handles human resources, discipline, interviewing, and payroll for Respondent Pharmacy, but he considers himself to be employed by Respondent LLC, because he is paid out of its funds.[72] *Id.* at 395, 404, 410; RD, at 53. Additionally, M.P. has been engaged in ''managing marketing, and developing [Respondent Pharmacy] for over nine years'' and he is the senior individual in both Respondents other than the Respondents' Owner and PIC. GX 30, at 8; Tr. 395, 416.

The DI testified that he inquired with Respondents' supplier and Respondent LLC had never purchased any controlled substances under its DEA registration; therefore, the ALJ concluded, and I agree, that Respondent LLC ''does not handle controlled substances.'' RD, at 53; Tr. 356.

III. Discussion

A. Allegation That Respondents' Registrations Are Inconsistent With the Public Interest

Under Section 304 of the Controlled Substances Act (hereinafter, CSA), ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' defined in 21 U.S.C. 802(21) to include a ''pharmacy,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *U. S. Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

Under DEA's regulation, ''[a]t any hearing for the revocation . . . of a registration, the . . . [Government] shall have the burden of proving that the requirements for such revocation . . . pursuant to . . . 21 U.S.C. [§] 824(a) . . . are satisfied.'' 21 CFR 1301.44(e). In this matter, while I have considered all of the factors, the Government's evidence in support of its *prima facie* case is confined to Factors Two and Four.[73] I find that the Government's

[69] Respondents also argue that the claims against Respondent LLC should be ''dismissed as a matter of law for lack of notice.'' Resp Posthearing, at 77. The OSC clearly is addressed to both Respondents and the hearing proceeded with the consent of the Respondents to consolidate the two cases; therefore, I find this argument meritless.

[70] Records from the Florida Health Department show Respondents' Owner and PIC as the Supervising Pharmacist for both Respondents. GX 27, at 8–9; GX 28, at 8–9; Tr. 350–51. Additionally, she is listed as the point of contact on both DEA registrations. GX 27, at 1; GX 28, at 1; Tr. 338–39.

[71] Respondents' counsel objected to Page 2 of GX 27, because he noted that it cannot be considered a business record due to its inclusion of notes related to the investigation. Tr. 363. This part of the exhibit was produced only to demonstrate that Respondents' Owner and PIC was listed as the point of contact for both DEA registrations. Respondents' Owner and PIC testified that she was ''the sole owner of both;'' and the record does not reflect that there is any dispute of fact about the Respondents' Owner and PIC's ownership of both entities, to which she, herself, attested. Tr. 529.

[72] M.P. testified that he had ''never been employed by Respondent Pharmacy,'' but to the extent that his statements were intended to demonstrate that he lacked authority over Respondent Pharmacy or support the notion that the two entities were distinct, I do not find his testimony to be credible. Tr. 395. He admitted that he was basing his definition of employment only on the origin of his paycheck. *Id.* He also admitted that he identified himself as the manager of Respondent Pharmacy on the Notice of Inspection. *Id.* at 320; GX 32. I do not find that the information related to which of Respondents employed M.P. to be relevant to the underlying issues in this case, because I do not find that the Government unlawfully searched Respondent Pharmacy. *See infra* III(B)(1).

[73] Respondents note that the Florida Board of Pharmacy has not made a recommendation in this matter, nor have the Respondents been convicted of any state or federal crimes related to controlled substances. Resp Posthearing, at 50. As Respondents have noted, the record in this case contains no evidence of a recommendation regarding Respondent Pharmacy's privilege to operate as a pharmacy by the relevant state licensing board or professional disciplinary authority or any action by the state licensing board that demonstrates that it has considered the same facts in relation to Respondent Pharmacy's continued licensure. *See John O. Dimowo,* 85 FR 15,800, 15,809 (2020). Prior Agency decisions have found that where the record contains no evidence of a recommendation by a state licensing board, that absence does not weigh for or against revocation. *See, e.g., Ajay S. Ahuja, M.D.,* 84 FR 5479, 5490 (2019) (finding that ''where the record contains no evidence of a recommendation by a state licensing board that absence does not weigh for or against revocation.''); *Holiday CVS LLC dba CVS Pharmacy Nos 219 and 5195,* 77 FR 62,316, 62,340 (2012); *Roni Dreszer, M.D.,* 76 FR 19,434, 19,444 (2011). Accordingly, I agree with the ALJ's finding that Factor One does not weigh for or against revocation in this matter. RD, at 61. I also agree with the ALJ that, because there is no evidence related to any convictions ''relating to the manufacture, distribution, or dispensing of controlled substances,'' Factor Three does not weigh for or against revocation in this case. RD, at 61 (citing 21 U.S.C. 823(f)(3)).

evidence with respect to Two and Four satisfies its *prima facie* burden of showing that Respondents' continued registrations would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). I further find that Respondents failed to produce sufficient evidence to rebut the Government's *prima facie* case.

1. Factors Two and Four—The Respondents' Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Under the CSA, it is ''unlawful for any person knowingly or intentionally . . . to . . . distribute[ ] or dispense, or possess with intent to . . . distribute[ ] or dispense, a controlled substance'' ''except as authorized'' by the Act. 21 U.S.C. 841(a)(1). A pharmacy's registration authorizes it to ''dispense,'' or ''deliver controlled substance to an ultimate user . . . by, or pursuant to the lawful order of . . . a practitioner.'' 21 U.S.C. 802(10).

(a) Allegations Regarding Respondent Pharmacy's Failure To Exercise its Corresponding Responsibility

According to the CSA's implementing regulations, an effective controlled substance prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). While the ''responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, . . . a corresponding responsibility rests with the pharmacist who fills the prescription.'' *Id.* The regulations establish the parameters of the pharmacy's corresponding responsibility.

> An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of . . . 21 U.S.C. 829 . . . and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Id. ''The language in 21 CFR 1306.04 and caselaw could not be more explicit. A pharmacist has his own responsibility to ensure that controlled substances are not dispensed for non-medical reasons.'' *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4730 (1990) (citing United *States* v. *Hayes,* 595 F.2d 258 (5th Cir. 1979), *cert. denied,* 444 U.S. 866 (1979); *United States* v. *Henry,* 727 F.2d 1373 (5th Cir. 1984) (reversed on other grounds)). As the Supreme Court explained in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

The evidence in this case demonstrates that Respondent Pharmacy filled prescriptions from a group of Dr. R's patients repeatedly ''at approximately the same time, one after the other.'' RD, at 71; *supra* Section (II)(G)(1)(a). Dr. Gordon testified that these red flags are not resolvable and she would not have filled the prescriptions. *Id.;* Tr. 111. The record demonstrates numerous red flags associated with the prescriptions issued to patients of Dr. R. For example, S.P. and E.H. made a 340 and 350 mile-round trip respectively to see Dr. R. and received the highest dosage of opioids and paid cash. RD, at 72; *supra* Section (II)(G)(1)(a), (e). In addition, J.S.1 and J.S.2 lived at the same address, received their prescriptions often on the same day for highly diverted and abused controlled substances, and travelled long distances. RD, at 75. In accordance with the testimony of Dr. Gordon, these prescriptions should not have been filled and Respondent Pharmacy violated its corresponding responsibility in filling them. Further, the ALJ found, and I agree, that nothing in Respondent Pharmacy's files resolved any of the red flags for the prescriptions for the patients of Dr. R., where they may have been resolvable, and Respondent Pharmacy violated its corresponding responsibility by filling the prescriptions in the Government's evidence for Dr. R.'s patients. RD, at 71–80; *supra* Section (II)(G)(1).

Further, the evidence shows that Respondent Pharmacy filled prescriptions written by other physicians that contained multiple red flags indicating that the prescriptions were not issued for a legitimate medical purpose. J.C. presented five prescriptions for the same short-acting opioid and the doctor's instructions allowed J.C. to be taking all of them at once. Dr. Gordon testified that she would not have filled these prescriptions. Respondents' Owner and PIC offered two different justifications for filling them. There is nothing in Respondent Pharmacy's records that resolves the red flags and Respondents' post-hoc justification is inconsistent, which clearly demonstrates that her memory of events is not adequate to determine whether the red flags were resolved. Section (II)(G)(2)(a). The prescriptions that Respondent Pharmacy filled for M.B. raised unresolved red flags for highly abused opioids and cocktails, payment by cash, long distances to obtain and fill prescriptions, and high dosages. Finally, the ALJ found, and I agree, that Respondent Pharmacy filled prescriptions for C.A., D.B., J.D., K.B.3, K.B.2, and A.G. in violation of its corresponding responsibility and outside the course of professional practice of pharmacies, because the numerous red flags of highly diverted and abused controlled substances, distance travelled, cash payments, early refills, and cocktails were unresolved.

To prove a pharmacist violated his corresponding responsibility, the Government must show that the pharmacist acted with the requisite degree of scienter. *See* 21 CFR 1306.04(a) (''[T]he person *knowingly* filling [a prescription issued not in the usual course of professional treatment] . . . shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'') (emphasis added). DEA has also consistently interpreted the corresponding responsibility regulation such that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Bertolino,* 55 FR at 4730 (citations omitted); *see also JM Pharmacy Group, Inc. d/b/a Pharmacia Nueva and Best Pharmacy Corp.,* 80 FR 28,667, 28,670–72 (2015) (applying the standard of willful blindness in assessing whether a pharmacist acted with the requisite scienter). Pursuant to their corresponding responsibility, pharmacists must exercise ''common sense and professional judgment'' when filling a prescription issued by a physician. *Bertolino,* 55 FR at 4730. When a pharmacist's suspicions are aroused by a red flag, the pharmacist must question the prescription and, if unable to resolve the red flag, refuse to fill the prescription. *Id.; Medicine Shoppe-Jonesborough,* 300 F. App'x 409, 412 (6th Cir. 2008) (''When pharmacists' suspicions are aroused as reasonable professionals, they must at least verify the prescription's propriety, and if not satisfied by the answer they must refuse to dispense.'').

In this matter, the Government did not allege that Respondent dispensed the subject prescriptions having actual

knowledge that the prescriptions lacked a legitimate medical purpose. Instead, the Government alleged that Respondent violated the corresponding responsibility regulation as evidenced by it ''repeatedly distribut[ing] controlled substances pursuant to prescriptions that contained one or more unresolved red flags for diversion.'' Govt Posthearing, at 41.

As I already found, many prescriptions from Respondent Pharmacy presented multiple, red flags including long distances, cash payments, drug cocktails, high doses/quantities of high-alert controlled substances, patients with the same address presenting the same prescription within a short period of time, patients sequentially presenting prescriptions prescribed by the same doctor on the same day, therapeutic duplication (two drugs in the same class prescribed together), and early refills. Agency decisions have consistently found that prescriptions with the same red flags at issue here were so suspicious as to support a finding that the pharmacists who filled them violated the Agency's corresponding responsibility rule due to actual knowledge of, or willful blindness to, the prescriptions' illegitimacy. 21 CFR 1306.04(a); *see, e.g., Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR 10,876, 10,898, *pet. for rev. denied,* 789 F. App'x 724 (11th Cir. 2019) (long distances; pattern prescribing; customers with the same street address presenting the same prescriptions on the same day; drug cocktails; cash payments; early refills); *Hills Pharmacy,* 81 FR 49,816, 49,836–39 (2016) (multiple customers presenting prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting similar prescriptions on the same day; long distances; drug cocktails); *The Medicine Shoppe,* 79 FR 59,504, 59,507, 59,512–13 (2014) (unusually large quantity of a controlled substance; pattern prescribing; irregular dosing instructions; drug cocktails); *Holiday CVS,* 77 FR 62,316, 62,317–22 (2012) (long distances; multiple customers presenting prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting virtually the same prescriptions within a short time span; payment by cash); *East Main Street Pharmacy,* 75 FR 66,149, 66,163–65 (2010) (long distances; lack of individualized therapy or dosing; drug cocktails; early fills/refills; other pharmacies' refusals to fill the prescriptions). Dr. Gordon credibly testified as to the presence of red flags on the prescriptions that Respondent Pharmacy filled. Respondents' Owner and PIC also testified that she recognized red flags on the prescriptions.

I agree with the ALJ that Respondent Pharmacy ''repeatedly filled numerous prescriptions for highly abused and diverted controlled substances in the face of blatant red flags. The Pharmacy did little to nothing to resolve these numerous red flags, but instead relied on 'rubber stamped' types of letters of medical necessity that were often not tailored towards a particular patient, and were obviously missing information.'' RD, at 97. When asked by Respondents' counsel if she ''believe[d] pharmacists can make decisions about the treatment of patients' medical conditions,'' Dr. Gordon testified, ''Pharmacists are part of the medical care team. We're there, we're the stop gate to make sure that that patient is safe and taking a medication that's appropriate for them.'' Tr. 217. The evidence in this case shows that Respondent Pharmacy failed at the responsibility described by Dr. Gordon.

Dr. Gordon credibly testified that a Florida pharmacist should have recognized these red flags and that a Florida pharmacist exercising his or her corresponding responsibility would not dispense controlled substances without investigating, documenting the investigation, and resolving any red flags. Respondents' Owner and PIC also admitted during her testimony that she had actual knowledge of some of the red flags on the prescriptions, but that she felt like she had resolved them.

I have considered and reject Respondent Pharmacy's claim that it investigated and resolved the red flags on the subject prescriptions before they were filled and therefore complied with its corresponding responsibility. Tr. 796. Respondents' Owner and PIC testified that she relied on written policies and procedures that she stated Respondent Pharmacy had in place, which by virtue of being followed would have resolved the red flags prior to dispensing; however, Respondent Pharmacy produced neither the procedures themselves [74] nor any evidence that, if they had been in place, they had been followed. For example, she stated that payment of cash is not a red flag because Respondent Pharmacy's policy was to ask for insurance from every customer, and then concluded that if a customer paid cash, it was a result of a negative answer regarding insurance, thereby resolving the red flag. Tr. 719. She stated that she is not assuming it happened, because ''it is the policy.'' *Id.* However, despite the policies that she so strongly asserted were in place, according to her testimony, B.S. filled dozens of prescriptions in violation of those policies and had to be counseled. *Id.* at 560, 770. In addition, she admitted to making exceptions to the policies herself without documenting her rationale for the departures. Tr. 773. The prescriptions or patient profiles from Respondent Pharmacy do not contain pharmacist remarks regarding the resolution of red flags on the prescriptions, and Dr. Gordon testified that the letters from the prescribers, which were often issued after controlled substances had already been dispensed, did not adequately resolve the red flags. *See United States* v. *Hayes,* 595 F.2d at 260 (''Verification by the issuing practitioner on request of the pharmacist is evidence that the pharmacist lacks knowledge that the prescription was issued outside the scope of professional practice. But it is not an insurance policy against a fact finder's concluding that the pharmacist had the requisite knowledge despite a purported but false verification. . . . What is required by [a pharmacist] is the responsibility not to fill an order that purports to be a prescription but is not a prescription within the meaning of the statute because he knows that the issuing practitioner issued it outside the scope of medical practice.''). Furthermore, Dr. Gordon credibly testified that some of the prescriptions, particularly to groups of Dr. R.'s patients, contained red flags that were not resolvable and the prescriptions should not have been filled. *Id.* at 110–11. Finally, I agree with the ALJ that Respondents' Owner and PIC's testimony was not always credible, particularly where she exaggerated her relationship with her customers in order

[74] Respondents contest that requiring them to document their resolutions of red flags is inappropriately ''requiring Respondents to prove their innocence.'' Resp Exceptions, at 17. The Government in this case demonstrated that the standard of practice in Florida required documentation of the resolution of red flags and Respondent Pharmacy did not document. The Government proved that Respondent Pharmacy repeatedly filled multiple prescriptions with red flags demonstrating that Respondent Pharmacy had violated its corresponding responsibility and that Respondent Pharmacy's registration is inconsistent with the public interest. The burden shifts to the Respondents to show why they can be entrusted with the responsibility carried by their registrations. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (citing *Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007)).

to suggest that she had resolved red flags. RD, at 13–14.

Respondents further contest that when Respondents' Owner and PIC was confronted with one employee, B.S., who ''exercised his own independent judgment and filled prescriptions from South Florida, she halted the practice and counseled the employee.'' Resp Posthearing, at 52. Although Respondents' Owner and PIC stated that, although she had no personal knowledge that the prescriptions were legitimate, she thought that Dr. R. was legitimate, but she also stated that she had counseled B.S., ''because we don't want the scrutiny of it.'' *Id.* at 560, 770, 557; RX H, at 62. She clearly understood that there was a high probability that the prescriptions were illegitimate due to the red flags that they presented and that they suggested the need for ''scrutiny.'' Yet in filling the prescriptions, neither she nor B.S. provided any documentation regarding the ''scrutiny'' that the prescriptions presented. As stated above, she also testified that she, herself, filled Dr. R.'s prescriptions twice. Tr. 771; 560.

Further, I reject the insinuation that Respondent Pharmacy should not be held responsible for the actions of its pharmacist B.S. When considering whether a pharmacy has violated its corresponding responsibility, the Agency considers whether the entity, not the pharmacist, can be charged with the requisite knowledge. *See Pharmboy Ventures Unlimited, Inc.,* 77 FR 33,770, 33,772 n.2 (2012) (''DEA has long held that it can look behind a pharmacy's ownership structure 'to determine who makes decisions concerning the controlled substance business of a pharmacy.'''); *S&S Pharmacy, Inc.,* 46 FR 13,051, 13,052 (1981) (the corporate pharmacy acts through the agency of its PIC). Knowledge obtained by the pharmacists and other employees acting within the scope of their employment may be imputed to the pharmacy itself.

At times during her testimony, Respondents' Owner and PIC stated that she relied on the personal judgment of her pharmacists, while also stating that the pharmacy's policy is ''updated regularly, but it's generally just a day-to-day hands-on training. I'm there all the time.'' Tr. 709. Ultimately, as the Owner and PIC, she is responsible for the actions of Respondents, and her own statements support that notion. She chose to hire someone while knowing that he had a criminal history and Board of Pharmacy disciplinary history, she had the means to meaningfully supervise his work because she was present at Respondent Pharmacy ''all the time,'' and further, as the individual responsible for the entity, she had a duty [75] to ensure that the pharmacists she employed, while acting in the scope of their employment, were following her policies and the law. Finally, the violations of corresponding responsibility and standard of practice in this case are not limited to the actions of B.S. The Government's evidence clearly demonstrates that Respondents' Owner and PIC herself filled prescriptions with multiple red flags herself for customers such as H.B., C.A., D.B., K.B.2, and J.S.2.

I have also considered and reject Respondents' argument that Dr. Gordon relied only on DEA decisions to identify red flags. Resp Exceptions, at 7. Dr. Gordon testified that ''[r]ed flags is just a term . . . that the lawyers and the Courts have come up with, but . . . there's always been red flags, since inception of pharmacy.'' Tr. 209–10. She further stated that ''[t]he Courts called it red flags. Pharmacists just call it checking to make sure that that medication is safe or legitimate.'' *Id.* at 211. Dr. Gordon's testimony is further supported by Respondents' Owner and PIC's testimony, that she was aware that when a pharmacist spots a red flag for a prescription, that she must ''resolve it, and if [she] cannot resolve it, not to fill it.'' Tr. 566; RD, at 24. Respondents' Owner and PIC also testified that she understands the concept of red flags and that she recognized that there are red flags in Respondent Pharmacy's prescriptions. Tr. 796. There is no evidence that the Agency has set a standard independent of pharmacy practice as Respondents have contended. Resp Exceptions, at 9. Dr. Gordon testified repeatedly that documentation was ''the standard of practice, if there's something questionable about a prescription, you document it after you speak with the patient or the doctor,'' and further, she gave a credible rationale as to why it was the standard of practice, ''so that you can let other pharmacists know what happened the time before.'' Tr. 215, 44–45. If there were red flags on a prescription, which were necessary to be resolved in order to confirm the prescription's legitimacy, it is unclear how another pharmacist filling a subsequent prescription would know that they had been resolved without documentation. Dr. Gordon's testimony is supported by the facts in this case, because Respondents' Owner and PIC blamed B.S. for filling prescriptions not in accordance with policy, but then filled prescriptions for the same patients with the same red flags. Without documentation of the resolution of the red flags, there was no way for her to know whether B.S. had resolved them, or in fact, whether she had resolved them. Her memory of her own conversations with customers that supposedly resolved the red flags did not always prove to be reliable. *See e.g.,* Tr. 596, 671, 673, 716, 720.

Respondents argue in their Exceptions that DEA is acting outside of its statutory authority in determining that the course of professional practice in Florida requires a pharmacist to resolve and document red flags. Resp Exceptions, at 8–10. Part of Respondents' argument is that the Florida statutes cited by the Government do not require the documentation of red flags. *Id.* at 10. Respondents admit that under Florida law, ''if a pharmacist identifies one of the enumerated 'red flags' in the regulations, 'the pharmacist shall take appropriate steps to avoid or resolve the potential problems which shall, if necessary, include consultation with the prescriber.' '' Resp Exceptions, at 11 (quoting Fla. Admin. Code Ann. r. 64B16–27.810.) However, Respondents argue that the regulations do not require the documentation of the resolution of such red flags. *Id.*

The Florida Board of Pharmacy requires a pharmacist to conduct prospective drug use review on each prescription and identify such issues as ''[o]ver-utilization,'' ''[d]rug-drug interactions,'' ''[i]ncorrect drug dosage,'' and ''[c]linical abuse/misuse,'' and shall take appropriate steps to avoid or resolve the potential problems which shall, if necessary, include consultation with the prescriber. Fla. Admin. Code Ann. r. 64B16–27.810 (2020). A preceding section of the regulations

[75] I reject Respondents' claim that imposing a duty on its pharmacists to ensure that they were meeting their corresponding responsibility would violate Florida Rule 64B16–27.831(2)(a), which provides that '' '[w]hen validating a prescription, neither a person nor a licensee shall interfere with the exercise of the pharmacist's independent professional judgment.' '' Resp Posthearing, at 69 (quoting Fl. Admin Code Ann. r. 64B16–27.831(2)(a)). There is no evidence that the State of Florida's provision would prevent an employer from ensuring that an employee was resolving and documenting red flags. The judgment in question is resolving ''any concerns about the validity of the prescription,'' not complying with pharmacy policies, to include documenting the pharmacist's rationale for deciding to fill a prescription whose legitimacy was in question. *Id.* In fact, the regulation itself requires that the pharmacist resolve the concerns. *Id.* I decline to permit Respondent Pharmacy to hire an employee, whom it knew to have disciplinary issues and a criminal record, to fill dozens of prescriptions whose legitimacy was in question and then to relinquish all responsibility for that pharmacist's actions. The DEA registration is issued to the pharmacy, not the individual pharmacist, and the pharmacy has responsibility under federal law to ensure compliance with the law in order to maintain its registration.

states that ''a patient record system shall provide for the immediate retrieval of information necessary for the dispensing pharmacist to identify previously dispensed drugs at the time a new or refill prescription is presented for dispensing.'' Fla. Admin. Code r. 64B16–27.800(1). The regulation further states that among the information required to be maintained in the patient records is the ''pharmacist comments relevant to the individuals' drug therapy, including any other information peculiar to the specific patient or drug.'' *Id.* at (1)(f). Respondents argue that ''there is no definition available as to what constitutes 'peculiar' information'' and that it ''should be read to mean peculiar information relevant to treatment.'' Resp Exceptions, at 11. The Government argued, and the ALJ found, that Florida law requires not only the resolution of red flags, but also a ''pharmacist is required to maintain a patient record, allowing for immediate retrieval of information relative to previously dispensed drugs and those records are to include comments peculiar to the patient, and information provided by a licensed health care provider.'' RD, at 65.

Agency decisions have examined whether the resolution of red flags is required by these provisions of Florida law. *See Trinity Pharmacy II,* 83 FR 7304, 7329–30 (2018); *Superior Pharmacy I and II,* 81 FR 31,310, 31,336 (2016) (stating that the regulation required documentation of the prospective drug review in the patient profiles). The Respondents do not argue that the drug review provision is inapplicable, merely that the documentation requirement is more appropriately read to require documentation of information ''relevant to treatment.'' Resp Exceptions, at 11. The drug review in Florida law appears to be an affirmative obligation on the part of the pharmacist, and therefore, it would be consistent with such an affirmative obligation to read the preceding section of the regulation to require documentation of the prospective drug review. As stated above, the documentation requirements in this section ''shall provide for the immediate retrieval of information necessary for the dispensing pharmacist to identify previously dispensed drugs at the time a new or refill prescription is presented for dispensing.'' Fla. Admin. Code r. 64B16–27.800(1). In its Posthearing Brief, the Government cited to these regulatory provisions, not as an individual violation of Florida law,[76] but as further evidence that Respondent Pharmacy filled prescriptions for controlled substances outside the usual course of practice in Florida. Gov Posthearing, at 44–45. I ultimately do not find it necessary to find a violation of this regulation in this case, because the Government has proven by substantial evidence that Respondent Pharmacy violated its corresponding responsibility and filled prescriptions outside the standard of practice in Florida by not documenting the resolution of the red flags through credible expert testimony. I do consider this regulation to further support the testimony of Dr. Gordon regarding the importance of documentation in the standard of practice of pharmacy in Florida.

Dr. Gordon testified repeatedly that the standard of practice of pharmacy in Florida required documentation of the resolution of red flags. When Respondents' counsel summarized her testimony and asked if she was stating that documentation was ''a requirement for pharmacists in the State of Florida to document red flags,'' she stated, ''Yes. To show that—for each red flag, if there was a specific situation where you felt that the medication was for a legitimate medical purpose, that should be documented.'' Tr. 206. Dr. Gordon is not a lawyer and is not an expert in the details of state law, but she is required as a pharmacist to understand what conduct is outside of the usual course of professional practice in her state, whether that is derived from state law, mandatory training, standards of care or otherwise. Respondents imply that Dr. Gordon's inability to draw a solid conclusion as to where the requirement to document the resolution of red flags is written somehow demonstrates that there is no such requirement in the standard of practice. Resp Exceptions, at 10. I reject such fallacious reasoning. In this case, I find that Florida state law can be reasonably interpreted to support Dr. Gordon's testimony, but that her testimony is independently credible that documentation of the resolution of red flags is a requirement of the practice of pharmacy in the State of Florida.

Accordingly, in summary, I agree with the ALJ's finding in the RD that the Government has proven by substantial evidence that Respondent filled prescriptions for controlled substances that the pharmacists knew were not prescribed for legitimate medical purposes, or were willfully blind to such, in violation of their corresponding responsibility under 21 CFR 1306.04(a) and outside the usual course of professional practice in violation of 21 CFR 1306.06. I find these violations of federal law and negative dispensing experience to weigh against the Respondents' continued registrations under Factors Two and Four.

I further find that the Government has demonstrated that pharmacists at Respondent Pharmacy violated Fla. Stat. § 893.04(2)(a) (2009). During the time period covered by the Show Cause Order, Florida law required that a pharmacist, before dispensing a controlled substance listed in schedules II through IV, first determine ''in the exercise of her or his professional judgment . . . that the order is valid.'' Fla. Stat. § 893.04(2)(a) (2009); *see also* Fla. Stat. § 893.02(22) (2011) (defining a ''prescription'' as an order for drugs ''issued in good faith and in the course of professional practice . . . and meeting the requirements of s. 893.04.''). In this case, I have found that the Government established by substantial evidence that pharmacists at Respondent Pharmacy filled prescriptions outside the usual course of professional practice of pharmacy. I find that the pharmacists did not exercise their professional judgment in acting outside of the usual course of practice and that this is evidence of Respondent Pharmacy's noncompliance with state law, which I consider under Factor Four and weigh against Respondents' continued registrations.

(b) Allegation That Respondent Pharmacy Filled Prescriptions Written for ''Office Use'' in Violation of 21 CFR 1306.04(b)

DEA regulations state that ''[a] prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.'' 21 CFR 1306.04(b). As I found above, Respondent Pharmacy dispensed testosterone to Dr. I's office on eight occasions and Dr. A's office once, between September 23, 2014, and January 28, 2015. GX 3; RD, at 29; *supra* Section II(F). As I also found above, the Government's expert witness testified that the fact that the prescriptions were labeled ''for office use,'' assigned a prescription number, issued fill stickers, and included the office name in the place of a patient's name demonstrated that the prescriptions were issued outside of the usual course of professional practice. Tr. 64–65.

[76] The Order to Show Cause alleged that in filling prescriptions with multiple red flags and not documenting their resolution, Respondent Pharmacy violated Fla. Admin. Code Ann. r. 64B16–27.800 and 64B16–27.810. OSC, at 10.

The Government's expert testified that ''if there were an invoice and the prescription was issued to a practitioner,'' it would have resolved the issue, but clarified that it was not within the acceptable standard of practice to order controlled substances from a pharmacy to be distributed to a dispensing practitioner and then report it to the Florida Prescription Drug Monitoring Program (E–FORCSE). *Id.* at 278–79; 288–89. Respondents' Owner and PIC maintained that these were ''wholesale transactions'' and not prescriptions. Tr. 697. She maintained that Dr. I. was registered as a dispensing practitioner. Tr. 578. Respondents also argued that Dr. I. was administering the controlled substances to patients in the office.[77] Resp Posthearing, at 10. The Government argued that these claims were based solely on conjecture and that the clear evidence was that prescriptions with fill stickers were dispensed ''for office use.'' Govt Exceptions, at 1–2; *id.* at 2 n.1.

The ALJ did not sustain the 21 CFR 1306.04(b) violation, because he found that in order to prove such a violation, ''it was incumbent upon the Government to prove that Drs. [I and A] were going to be dispensing the controlled substances to patients.'' RD, at 69. He noted that the prescriptions stated that they were ''for office use'' and that was consistent with Respondents' Owner and PIC's testimony that the practitioners were administering the testosterone and not dispensing it and that therefore, the prescriptions fell into an exception to the regulatory requirement. *Id.* at 69–70. The Government argued in its Exceptions that the ALJ had applied an exception to the regulation that does not exist and that the ALJ's reasoning related to his finding under 1306.04(b) incorrectly implied that it was ''incumbent upon the Government to prove that [the practitioners] were going to be dispensing the controlled substances to patients.'' RD, at 69; Govt Exceptions, at 3–4. The Government further argued that the ALJ's analysis of the ''office use'' prescriptions under Section 1306.04(b) was inconsistent with the Agency's decision in *Roberto Zayas, M.D.,* 82 FR 21,410, 21,424 (2017). Govt Exceptions, at 2.

Dr. Gordon clearly testified that if the purpose was to transfer the controlled substances, there was a lawful way in which to conduct such transactions, but issuing and dispensing pursuant to a prescription, using fill stickers and reporting to E–FORCSE was not within the usual course of professional practice of pharmacy in Florida. If Respondent Pharmacy had intended these documents to be invoices, they facially did not appear to be so, and Respondent did not produce any additional documentation that justified the filling of these prescriptions issued for ''office use.''[78] I agree with the Government that the prescriptions themselves appeared to violate 21 CFR 1306.04(b). *See Roberto Zayas, M.D.,* 82 FR 21,410, 21,425 (2017) (holding that prescriptions written ''for office use'' violated 21 CFR 1306.04(b) and holding the prescriber responsible for calling in the prescriptions).

In this case, the Government initially stated that Dr. Gordon would testify that these prescriptions raised red flags that were not resolved. Govt Prehearing, at 8. The Government's expert did not discuss red flags related to these prescriptions, but did conclude that they were issued outside the usual course of professional practice. Tr. 65–66. In its Posthearing Brief, the Government argued that the prescriptions were issued in violation of 1306.04(b) ''and accordingly were not dispensed in the usual course of professional practice.'' Govt Posthearing, at 9. However, the Government did not allege a violation of 21 CFR 1306.06[79] for these prescriptions, nor did it sufficiently establish through its expert witness that these prescriptions were dispensed in violation of Respondent Pharmacy's corresponding responsibility in violation of 21 CFR 1306.04(a), and even if the Government had established this, it appeared to abandon this theory in its Posthearing Brief. Therefore, I will not consider the allegation related to the prescriptions issued for ''office use,'' because the Government has not adequately established a legal basis for my finding of a violation for Respondent Pharmacy's *filling* ''office use'' prescriptions in this case. *Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR 10,876, 10,900 (2018) (noting that 21 CFR 1306.04(b) only prohibits the *issuance* of a prescription).

(c) Allegation That Respondent Pharmacy Filled Prescriptions That Were Issued by a Practitioner to Himself in Violation of Fla. Stat. § 458.331(1)(r)

The Order to Show Cause alleged that Respondent Pharmacy filled prescriptions for controlled substances ''despite unresolved red flags includ[ing] . . . . prescriptions [ ] written in violation of Florida law, Fla. Stat. 458.331(1)(r).'' The ALJ found that ''the Pharmacy violated its corresponding responsibility by filling prescriptions that J.S.3 wrote to himself . . . .'' RD, at 68. Respondents argued that the ALJ incorrectly interpreted Florida state law relating to Respondent Pharmacy's filling of J.S.3's prescriptions to himself. Resp Exceptions, at 5.

Respondents' primary argument is that ''[a] plain reading of the statute holds that a physician can prescribe to himself, so long as he is not the one dispensing the medication.'' Resp Exceptions, at 5. In making this argument, Respondents state that ''the statute prohibits a physician from prescribing to himself, unless another practitioner 'prescribed, dispensed, or administered' the controlled substances,''[80] [81] *Id.* (citing Fla. Stat. § 458.331(1)(r) (emphasis added by Respondents). Although the basis of the Respondents' argument that the term ''or'' would permit a physician to prescribe to himself as long as a different practitioner dispensed the controlled substance is well-grounded in canons of statutory construction, Respondent submitted, and I can find, no evidence that the State of Florida permits such a loophole in its prohibition against self-prescribing.[82] If

[77] It is noted that these two theories seem to contradict each other.

[78] Respondents claim that in November 2014, Respondent Pharmacy started using invoices in lieu of prescription pads. Resp Posthearing, at 64 (citing GX 3, at 5–13). The documents in question appear different from the other pages of the exhibit, with the exception of GX 3, at 11, but they state ''Prescription Form'' at the top. The Respondents have not adequately explained the difference between the different forms and there are fill stickers associated with all of them. However, ultimately, I have not sustained this allegation, so I find it unnecessary to determine the accuracy of Respondents' unexplained claim that some of the exhibits may have been invoices.

[79] Although the Government had alleged generally that Respondent Pharmacy acted outside the usual course of professional practice in the Order to Show Cause, the Government did not adequately notice a violation of 1306.06 in the context of the 1304.04(b) violation. I have reviewed the Respondents' filings on this matter and I do not find evidence that they were on notice of this theory regarding the 1306.06 violation in order to have litigated the issue by consent. *See Farmacia Yani,* 80 FR 29,053, 29,059 (2015).

[80] The prescriptions to J.S.3 involved testosterone and oxycodone, which are controlled substances under Fla. Stat. § 893.03.

[81] The ALJ found that the Respondents' evidence included multiple documents that indicated that J.S.3 had not been treated by another doctor, but had been self-prescribing. RD, at 68 (citing RX H, at 2–3, 15–22, 40–41). I agree with the ALJ on this point. Respondents clarify in their Exceptions that their argument is not that there was another practitioner involved in the prescribing or treatment, but that Respondent Pharmacy itself created the exception by dispensing the controlled substances. Resp Exceptions, at 5.

[82] For example, there is no indication or discussion of a distinction made on Respondents' alleged exception in this Florida disciplinary case on point, just that he violated Fla. Stat.

Continued

Respondents were correct in this interpretation, it would appear that a practitioner could only violate this law if he prescribed to himself and also dispensed the prescription to himself. Further, the testimony of Respondents' witnesses contradicts this reading of Florida law. D.M. and Respondents' Owner and PIC testified that the Board of Pharmacy visited in 2015 and told Respondents' Owner and PIC ''that it was not lawful'' to fill a prescription that a doctor had written for himself, after which D.M. changed his advice and Respondent Pharmacy did not fill any further prescriptions. Tr. 573; Tr. 809–10; *supra* Section (II)(E)(1). Therefore, the record contradicts Respondents' argument that the Florida Board of Pharmacy interprets the statute in the manner that Respondents suggest. However, as explained below, I do not believe that whether the law was or was not actually violated by J.S.3's self-prescribing is essential to a finding that Respondent Pharmacy violated its corresponding responsibility for these prescriptions.

The second argument that Respondents proffered is that Fla. Stat. § 458.331(1)(r) is only grounds for discipline of physicians, not pharmacists. The Florida statute specifically provides that its provisions do not apply to ''[o]ther duly licensed health care practitioners acting within the scope of their practice.'' Fla. Stat. § 458.303(1)(a); Resp Exceptions, at 4. Fla. Stat. § 456.001(4) includes pharmacists in the definition of ''health care practitioners.'' However, as established herein, Florida law clearly requires that a pharmacist, before dispensing a controlled substance listed in schedules II through IV, first determine ''in the exercise of her or his professional judgment . . . that the order is valid.'' Fla. Stat. § 893.04(2)(a) (2009). Additionally, as found above, Dr. Gordon credibly testified that ''[a] pharmacist should not have filled any prescription written by a physician that wrote it for himself, a controlled substance'' and concluded that these prescriptions were not filled within the standard of practice of pharmacy in Florida. Tr. 62. Therefore, based on Dr. Gordon's testimony, I find that a pharmacist filling these prescriptions could not have been acting within the scope of his or her practice in order to meet the exception set forth in Fla. Stat. § 458.303(1)(a), and the exception would not apply.

Most importantly, the Government's legal theory about these prescriptions was not that Respondent Pharmacy had directly violated this Florida statute in filling these prescriptions, but instead that J.S.3 wrote the prescriptions in violation of the law and the prescriptions raised red flags, which Respondent failed to resolve, resulting in a violation of its corresponding responsibility. OSC, at 4; Govt Prehearing, at 8; Govt Posthearing, at 7–8. *See supra* II(E)(1).

As to the testimony of D.M. that he had provided legal advice to Respondents' Owner and PIC in which he maintained that a physician could prescribe controlled substances to himself as long as a pharmacist dispensed the prescription, I do not find that this alleged advice resolved the red flags that were presented by these prescriptions for several reasons. First, Respondent did not produce documentation of the advice. Second, per D.M.'s testimony the advice was general and did not pertain to the particular circumstance of J.S.3's prescriptions. *Supra* II(E)(1). Most importantly, D.M. testified that at the time he used the word ''scrutiny'' in lieu of the term red flag, and that his advice was that ''it wasn't prohibited and it was permissible but required scrutiny.'' *Id.;* Tr. 810. Dr. Gordon testified that the usual course of professional practice in Florida required that the red flags be resolved prior to the pharmacists' dispensing of the prescriptions and that those resolutions be documented. There is no evidence of Respondent Pharmacy's documentation regarding this red flag. As D.M. testified, the fact that there was even a question about whether the prescriptions violated Florida law presented such ''scrutiny'' or a red flag, and the record evidence demonstrates that Respondent Pharmacy was advised by its attorney that this scrutiny was ''required.'' Therefore, I find that Respondent Pharmacy violated its corresponding responsibility [83] in dispensing prescriptions to J.S.3 without resolving the red flag due to Fla. Stat. § 458.331(1)(r), and that the filling of these prescriptions is appropriately considered under Factor Four as evidence that Respondent Pharmacy was not in ''compliance with applicable State, Federal or local laws relating to controlled substances.'' 21 U.S.C. 823(f)(4).

(d) The Legitimacy of the Prescriptions

Respondents cited,[84] and the ALJ applied, a clause written by one of my predecessors as part of a footnote in a prior Agency decision (hereinafter, the *Hills* footnote). *Hills Pharmacy, LLC,* 81 FR 49,816, 49,836 n.33 (2016) (''[I]t is true that a pharmacist cannot violate his corresponding responsibility if a prescription was nonetheless issued for a legitimate medical purpose.''). The clause is footnoted in one other subsequent Agency decision. *Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR 10,876, 10,899 n.36 (2018), *pet. for review den.,* 789 F. App'x 724 (11th Cir. 2019).

Although the sentence containing the clause is not entirely clear, the clause itself states as ''true'' that a pharmacist may not be found to violate his corresponding responsibility unless the prescription at issue violates 21 U.S.C. 829. The concept labeled ''true'' directly conflicts with DEA regulations and decades of Agency decisions interpreting those regulations.

I unequivocally reject the clause and the notion that a pharmacist may not be found to violate his corresponding responsibility unless the prescription at issue violates 21 U.S.C. 829. I affirm the part of the footnote rejecting the respondent's argument, which stated, ''Respondent argues that the Government cannot establish that a pharmacist has violated his corresponding responsibility unless it first establishes that the prescription lacked a legitimate medical purpose . . . . Respondent is mistaken.''

A pharmacist's corresponding responsibility is to assess prescriptions according to the applicable standard of practice, which typically requires the pharmacist to recognize and resolve red flags on the prescriptions prior to filling them, and to act on that assessment by filling or declining to fill the prescription.

The language in 21 CFR 1306.04 and relevant caselaw could not be more explicit. A pharmacist has his own responsibility to ensure that controlled substances are not dispensed for non-medical reasons. *See,*

§ 458.331(1)(r). *Department of Health vs. Nader W. Said, M.D.,* DOH Case No. 2014–08153 (December 19, 2016), at 19. *Available at https://appsmqa.doh.state.fl.us/MQASearchServices/Document/Mjk1Nzc5ODY%3D.* If the statute were as limited as Respondents argue, then it would seem that a charge would necessitate including self-dispensing as well or additional facts related to the dispensing of the prescriptions.

[83] Respondents' final argument is that the Government did not demonstrate that the prescriptions to J.S.3 ''lack[ed] a legitimate medical purpose.'' Resp Exceptions, at 6. The Respondents cite to the footnote in *Hills Pharmacy, LLC,* 81 FR 49,816, 49,836 n.33 to support this notion, which is further discussed *infra* Section III(A)(1)(d). I reject this argument the reasons discussed in relation to *Hills* below.

[84] Respondents argued that the Government must prove that the prescriptions Respondent Pharmacy filled lacked a legitimate medical purpose in order to show that Respondent Pharmacy violated its corresponding responsibility based on the language of the *Hills* footnote. Resp Exceptions, at 7.

United States v. *Hayes,* 595 F.2d 258 (5th Cir. 1979) *cert. denied,* 444 U.S. 866 (1979); *United States* v. *Henry,* 727 F.2d 1373 (5th Cir. 1984) (reversed on other grounds). A pharmacist must exercise professional judgment when filling a prescription issued by a physician.

Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy, 55 FR 4729, 4730 (1990). Respondents have presented no good reason for me to depart from DEA's decades-long statement of a pharmacist's corresponding responsibility, and I decline to do so.[85]

B. Other issues

1. Unlawful Search Allegation

Respondents alleged that many of the records in the Government's case were obtained as a result of an unlawful search. Resp Posthearing, at 77–78. As found above, the first inspection occurred on September 18, 2013, during which M.P. signed a DEA Form 82, identifying himself as the ''manager'' and consenting to the search. GX 32. Respondents objected to this search claiming that ''21 CFR 880 mandates that the 'owner, operator, or agent' in charge of such premises must receive notice of the inspection.'' [86] Resp Posthearing, at 77. Respondents contest that DEA's service was improper because: M.P. was not an employee of Respondent Pharmacy; [87] M.P. testified that he was never given authorization to sign the DEA Form 82; and Respondents' Owner and PIC confirmed that she did not authorize him to do so. *Id.* at 78 (citing Tr. 395; 541); *see also* Tr. 402. The ALJ rejected Respondents' argument, because the ALJ did ''not find the testimonies of [Respondents' Owner and PIC] and [M.P.] to be credible that [Respondents' Owner and PIC] did not give [M.P.] authority to sign the Notice of Inspection on September 18, 2013.'' RD, at 60 n.36. The ALJ further noted that Respondents' Owner and PIC arrived at Respondent Pharmacy shortly after M.P.'s signature and told the agents that she would provide copies of the pharmacy's records to them later, after which M.P. brought the records to the DEA Orlando District Office on September 23, 2013. *Id.;* GX 33 (DEA Form 12, Receipt for Cash or Other Items, signed by M.P.). I agree with the ALJ's determination that ''it strains credulity [88] to suggest that [Respondents' Owner and PIC] did not willingly consent to delivering the documents to the DEA five days later.'' RD, at 60 n.36

The second inspection was conducted as a result of an Administrative Inspection Warrant pursuant to 21 U.S.C. 880(d) in April of 2015, which the DI testified was obtained after Respondents' attorney D.M. failed to timely comply with a subpoena. *Supra* (II)(B)(2). Respondents did not appear to make any arguments related to the lawfulness of the second inspection.[89] *See generally* Resp Posthearing. I agree with the ALJ and reject Respondents' allegations regarding the legitimacy of the consent in the first DEA inspection. Respondents' Owner and PIC had five days to withdraw consent to the first inspection or refuse to provide copies of the documents, but nevertheless, she voluntarily chose to provide the documents using the same agent who had signed the initial consent form to deliver them.

2. Respondents' Integrated Enterprise

Respondents argue that DEA has not alleged a single violation against Respondent LLC, and therefore it is inappropriate to revoke Respondent LLC's registration ''simply because both companies share common ownership.'' Resp Posthearing, at 77. The ALJ found, and I agree, that ''Respondents' arguments ignore the obvious, that the Pharmacy and Suntree Medical are essentially one and the same.'' RD, at 100. Agency decisions ''treat[ ] two separately organized business entities as one integrated enterprise . . . based on the overlap of ownership, management, and operations of the two entities.'' *Jones Total Health Care Pharmacy, L.L.C., and SND Health Care, L.L.C.,* 81 FR 79,188, 79,222 (2016) (citing *MB Wholesale, Inc.,* 72 FR 71,956, 71,958 (2007) (citing *MB Wholesale, Inc.,* 72 FR 71,956, 71,958 (2007)). ''[W]here misconduct has previously been proved with respect to the owners, officers, or key employees of a pharmacy, the Agency can deny an application or revoke a registration of a second or subsequent pharmacy where the Government shows that such individuals have influence over the management or control of the second pharmacy.'' *Superior Pharmacy I and Superior Pharmacy II,* 81 FR 31,310, 31,341, n.71 (2016). Further, the Agency may revoke a registration, even if there is no misconduct that can be attributed to the registration, if the Agency finds that the registrant committed egregious misconduct under a second registration. *Roberto Zayas, M.D.,* 82 FR 21,410, 21,430 (2017) (revoking physician's DEA registration in Florida due to conduct attributed to a Texas registration that had expired).

Respondents argue that the terms of the CSA in requiring separate registrations for each entity or person and each principal place of business should be read to ''suggest two (2) separate entities are not to be considered as one (1).'' Resp Exceptions, at 18 (citing 21 U.S.C. 802(49)(a), 802(38), and 822(e)). When a practitioner registrant acts in a manner inconsistent with the public interest, in determining whether to revoke, DEA looks to whether the practitioner can be entrusted with a registration. *See e.g., Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016). If a practitioner holding multiple registrations cannot be entrusted with one, it would be difficult to justify entrusting the same practitioner with another in a separate location. Similarly, if a corporate entity is owned and operated by the same individuals, who have acted inconsistently with the public interest, I cannot ignore the fact that these same individuals have used one of their registrations not in

[85] In fact, I find compelling reasons to reject Respondents' proposed interpretation. For example, if I were to interpret a pharmacist's corresponding responsibility in the manner in which Respondents suggest, not only would it be a departure in the Agency position, but the administrative hearings would be mired in irrelevant complexity that is unnecessary given that a pharmacy must exercise its corresponding responsibility prior to the filling of a prescription in order to preserve the CSA's purpose of preventing addiction and abuse. *See Cove Inc. D/B/A Allwell Pharmacy,* 80 FR 29,037, 29,049 (2015) (finding that ''[t]he obligations are referred to as 'corresponding responsibilities,' as they impose duties on pharmacies and pharmacists that correspond with those of the treating sources.'')

[86] I have assumed that Respondents intended to cite to 21 U.S.C. 881.

[87] Although, M.P. stated, ''I do work for [Respondent] Pharmacy,'' Respondents' Counsel clarified with him that the work he does for Respondent LLC overlaps. Tr. 404.

[88] I agree with the ALJ that Respondents' argument strains credulity, because Respondents' Owner and PIC provided copies voluntarily five days later. I also find that the argument strains credulity, because M.P. signed the DEA Form 82 writing in the word ''Manager'' in the blank in the statement ''I hereby certify that I am the for the premises described in this Notice of Inspection,'' and further stating that ''I have the authority to act in this matter and have signed this Notice of Inspection pursuant to my authority.'' GX 32 (DEA Form 82). M.P. admitted that he spoke with Respondents' Owner and PIC after DEA arrived and that he did not refuse entry or request that DEA ''strike his signature.'' Tr. 408. M.P. also signed two DEA Forms 12 on September 23, 2013, and October 14, 2016, in which he listed his title as ''Manager.'' GX 33, 34. The record evidence shows that M.P. held himself out on numerous occasions to have the authority to act on behalf of both Respondents as its agent within the meaning of 21 U.S.C. 880(c).

[89] Respondents seem to conflate the facts surrounding the two inspections, alleging that the DI ''presented the DEA Form 82 directly to [Respondent Pharmacy] rather than go through the pharmacy's counsel'' and that the DI admitted to not knowing whether M.P. was authorized to sign the form. Resp Posthearing, at 78. However, the DI testified that he was not even present at the administrative inspection that occurred on September 18, 2013, so whether he knew about the status of M.P.'s authorization back in 2013, when he served the administrative warrant in April 2015 is irrelevant. Tr. 317–18.

accordance with the law. Respondents quoted the DI stating that Respondent LLC '''has never purchased any controlled substances under that DEA registration''' and that the two entities ''were two (2) separate businesses, one (1) supplying medication including controlled substances, the other involved in the sale of medical equipment;'' however, the lack of Respondent LLC's past use of the registration does not prevent it from using its registration in the future. Resp Exceptions, at 19–20.

The lens through which Congress has instructed me to assess each registration is whether or not such registration is inconsistent with the public interest. 21 U.S.C. 823(f). In this case, if Respondents were allowed to simply shift their operations to an entity with the same owner and essentially the same employees, the effect of the violations found herein against Respondent Pharmacy would be a nullity, and there would be nothing to prevent Respondent LLC from continuing to act in a manner inconsistent with the public interest. Contrary to Respondents' contention, it would be inconsistent with the intent of the CSA to permit such an easily implementable loophole, and it is consistent with Agency decisions to close the loophole by treating the two overlapping entities as one integrated enterprise for purposes of sanction.

Therefore, I agree with the ALJ that ''[b]ecause of the obvious commonality of ownership, management and operations, it is abundantly clear'' that if I revoke Respondent Pharmacy's registration, Respondent LLC ''could pick up where the Pharmacy left off without missing a beat. Accordingly, due to that commonality, it is appropriate to treat the [Respondent] Pharmacy and [Respondent LLC] as one integrated enterprise.'' RD, at 101.

Finally, Respondents argue that they were given no notice as to the charges against Respondent LLC and therefore a finding against Respondent LLC would violate Constitutional due process. I reject this argument, because the grounds for revocation of Respondent LLC's registration are the precise grounds that form the basis of the revocation of Respondent Pharmacy's registration, and Respondent Pharmacy has been afforded due process of law through this proceeding. Furthermore, the OSC was clearly issued to both Respondent LLC and Respondent Pharmacy. *See* OSC, at 1. Each was initially docketed separately, but prior to the hearing, the ALJ ordered that the two cases would be consolidated, to which the Respondents consented. ALJX 14 (Prehearing Ruling). Respondents simply cannot argue that they did not know that the adjudication of the alleged violations committed by Respondent Pharmacy were also being adjudicated against Respondent LLC.

C. Summary of the Public Interest Factors

As found above, Respondent Pharmacy filled hundreds of controlled substance prescriptions in violation of its corresponding responsibility and Florida law and outside the usual course of professional practice. Thus, I conclude that Respondent Pharmacy has engaged in misconduct which supports the revocation of its registration, and as explained above, it would be inconsistent with the public interest to permit Respondent LLC to maintain its registration given that Respondents are an integrated enterprise. I therefore find that the Government has established a *prima facie* case that Respondents' continued registrations ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

IV. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that the Respondents' continued registration is inconsistent with the public interest due to their violations pertaining to controlled substance dispensing, the burden shifts to the Respondents to show why they can be entrusted with the responsibility carried by their registrations. *Garret Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (citing *Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007)). The CSA authorizes the Attorney General to ''promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.'' 21 U.S.C. 871(b). This authority specifically relates ''to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute.'' *Gonzales* v. *Oregon,* 546 U.S. at 259. A clear purpose of this authority is to ''bar[ ] doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking.'' *Id.* at 270. In efficiently executing the revocation and suspension authority delegated to me under the CSA for the aforementioned purposes, I review the evidence and argument Respondents submitted to determine whether or not they have presented ''sufficient mitigating evidence to assure the Administrator that [they] can be trusted with the responsibility carried by such a registration.'' *Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (2007) (quoting *Leo R. Miller, M.D.,* 53 FR 21,931, 21,932 (1988)). '''Moreover, because ''past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.''' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (quoting *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Jackson,* 72 FR at 23,853; *John H. Kennnedy, M.D.,* 71 FR 35,705, 35,709 (2006); *Prince George Daniels, D.D.S.,* 60 FR 62,884, 62,887 (1995). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations or behavior and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016).

Regarding all of these matters, I agree with the analyses and conclusions contained in the Recommended Decision. RD, at 101–04. I agree with the ALJ that there is nothing in the record that suggests Respondent Pharmacy has accepted responsibility for its actions. In fact, as the ALJ found, ''the evidence is clear in this case that the Pharmacy has taken no responsibility for its egregious and repeated failure to fulfill its corresponding responsibility to ensure the proper prescribing and dispensing of controlled substances. The evidence is clear because the Pharmacy has specifically denied responsibility.'' RD, at 101. In fact, Respondents' attorney made very clear that Respondents were not accepting any responsibility. He stated, ''I'm well aware that I can't go into remediation unless we were to accept responsibility, Your Honor. And we won't unless we do.'' Tr. 567; RD, at 99. Further, even after the Florida Board of Pharmacy had told Respondents' Owner and PIC that a practitioner could not prescribe to himself, Respondents maintained that the law permitted them to fill those prescriptions. *See* Resp Exceptions; Tr. 573, 809–10. Respondent Pharmacy did cease filling the prescriptions as a result of the Board of Pharmacy's instructions; however, the fact that Respondent Pharmacy

relied on an interpretation involving a legal loophole to fill the prescriptions in the first place, and then continued to argue that the behavior was lawful in spite of the state's assertions to the contrary, not only demonstrates no remorse, but also demonstrates a willingness to push the boundaries of the law to maximize business. Such a willingness does not inspire optimism about Respondents' future compliance with the CSA.

I agree with the ALJ that the egregiousness of Respondent Pharmacy's conduct and the interests of specific and general deterrence support a sanction of revocation. RD, at 99. ''Specifically, pharmacists employed by the Pharmacy, as well as [Respondents' Owner and PIC], dispensed numerous prescriptions of controlled substances in violation of their corresponding responsibility.'' *Id.*

There is nothing in the record that lends support to the proposition that Respondent Pharmacy's future behavior will deviate in any positive respect from its past behavior. Due to the fact that Respondent Pharmacy has accepted no responsibility nor offered any remedial measures, it has given me no reassurance that I can entrust it with a registration and no evidence that it will not repeat its egregious behavior.

Regarding general deterrence, the Agency bears the responsibility to deter similar misconduct on the part of others for the protection of the public at large. *David A. Ruben,* 78 FR at 38,385. Based on the number and egregiousness of the established violations in this case, a sanction less than revocation would send a message to the regulated community that compliance with the law is not a condition precedent to maintaining registration.

A balancing of the statutory public interest factors, coupled with consideration of Respondent Pharmacy's failure to accept responsibility, the absence of any evidence of remedial measures to guard against recurrence, and the Agency's interest in deterrence, support the conclusion that Respondent Pharmacy should not continue to be entrusted with a registration. Further, the ALJ found, and I agree, that if I revoke Respondent Pharmacy's registration, Respondent LLC ''could pick up where the Pharmacy left off without missing a beat. Accordingly, due to that commonality, it is appropriate to treat the Pharmacy and Suntree Medical as one integrated enterprise.'' RD, at 101. Due to the commonality of ownership and procedures, I cannot entrust Respondent LLC with a registration any more than I can entrust Respondent Pharmacy with one.

Therefore, I shall order the sanctions the Government requested, as contained in the Order below.

V. Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificates of Registration Nos. BS7384174 and FS2194289 issued to Suntree Pharmacy and Suntree Medical Equipment LLC. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Suntree Pharmacy and Suntree Medical Equipment to renew or modify these registrations, as well as any other pending application of Suntree Pharmacy and Suntree Medical Equipment for registration in Florida. This order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25531 Filed 11–18–20; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

ECO Apothecary, LLC; Decision and Order

On December 2, 2019, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Eco Apothecary, LLC (hereinafter, Registrant or Registrant Pharmacy), of Salt Lake City, Utah. Government's Request for Final Agency Action Exhibit (hereinafter, RFAAX) 2 (OSC), at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. FE7288497. It alleged that Registrant is without ''authority to handle controlled substances in the State of Utah, the state in which [Registrant] is registered with the DEA.'' *Id.* (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that Registrant's Utah pharmacy license is expired. *Id.* The OSC further alleged that, because Registrant's Utah pharmacy license is expired, Registrant lacks the authority to handle controlled substances in Utah, and is, therefore, ineligible to maintain a DEA registration. *Id.* at 1–2.

The OSC notified Registrant of the right to either request a hearing on the allegations or submit a written statement in lieu of exercising the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 2–3 (citing 21 U.S.C. 824(c)(2)(C)).

I. Adequacy of Service

A DEA Diversion Investigator declared that he personally served James Ammon, Rph, with the OSC at the Registrant Pharmacy on December 10, 2019. RFAAX 4 (Declaration of Diversion Investigator). James Ammon signed Registrant's online application for a DEA registration on November 23, 2017. RFAAX 1 (Certification of Registration History). The DEA Diversion Investigator declared that he recognized James Ammon because the Diversion Investigator had previously met with him. RFAAX 4.

The Government forwarded its RFAA, along with the evidentiary record, to this office on May 19, 2020. In its RFAA, the Government represents that ''Registrant has not requested a hearing . . . .'' RFAA at 1. DEA did receive a letter from Registrant dated February 25, 2020, which stated that the purpose of the letter was ''to complete its duty, and report to the DEA the record of the pharmacy's final inventory, as well as report to the DEA its disposition and transfer of control of the controlled substances previously in the pharmacy's control.'' RFAAX 6, at 1. Registrant's February 25 letter did not request a hearing and was sent more than thirty days after Registrant received the OSC. *See id.*

Based on the Diversion Investigator's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on December 10, 2019. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

II. Findings of Fact

A. Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FE7288497 at the registered address of 3702 S. State Street, Suite 117, Salt Lake City 84115. RFAAX 2 (Certification of Registration History). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II–V as a retail pharmacy. *Id.*

B. The Status of Registrant's State License

Registrant was previously the holder of a Utah Pharmacy—Class B license. RFAAX 3 (Verification of Utah Licensure). Registrant's Utah pharmacy license expired on September 30, 2019. *Id.* A certified Verification of Utah Licensure dated November 13, 2019, from the State of Utah, Department of Commerce, Division of Occupational and Professional Licensing, shows the status of Registrant's Utah pharmacy license as ''Denied.'' *Id.*

According to Utah's online records, of which I take official notice, Registrant's pharmacy license status is still listed as ''Denied.'' [1] *https://secure.utah.gov/llv/search/index.html* (last visited October 27, 2020). Utah's online records further show that Registrant's Controlled Substance License also expired on September 30, 2019, and the license status is also listed as ''Denied.'' *Id.*

Accordingly, I find that Registrant does not have a valid pharmacy license or controlled substance license in Utah, the state in which Registrant is registered with DEA.

III. Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA), ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' A pharmacy is a ''practitioner'' under the CSA. 21 U.S.C. 802(21). With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., Palafox Pharmacy,* 84 FR 18,320 (2019); *James L. Hooper, M.D.,* 76 FR 71,371 (2011), pet. for rev. denied, 481 Fed. Appx. 826 (4th Cir. 2012); *Roots Pharmaceuticals, Inc.,* 76 FR 51,430 (2011); *Bourne Pharmacy, Inc.,* 72 FR 18,273 (2007); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician, . . . pharmacy, . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . ., to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess State authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices. *See, e.g., Palafox Pharmacy,* 84 FR at 18,321; *James L. Hooper,* 76 FR at 71,371–72; *Roots Pharmaceuticals, Inc.,* 76 FR at 51,430; *Bourne Pharmacy,* Inc., 72 FR at 18,274; *Frederick Marsh Blanton,* 43 FR at 27,617.

As found above, Registrant's state pharmacy and controlled substance licenses have expired, and thus, it no longer holds authority in Utah, the state in which it is registered with DEA, to dispense controlled substances. *See* Utah Code Ann. §§ 58–17b–302(1) (requiring a license to act as a pharmacy); 58–37–6(2)(a)(i) (requiring a license to dispense controlled substances) (West 2020). As such, Registrant is not qualified to dispense controlled substances as a ''practitioner.'' I will, therefore, order that Registrant's DEA registration be revoked.

IV. Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FE7288497 issued to Eco Apothecary, LLC. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Eco Apothecary, LLC to renew or modify this registration, as well as any pending application of Eco Apothecary, LLC for registration in Utah. This Order is applicable December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25533 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–09–P

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by email (*dea.addo.attorneys@dea.usdoj.gov*).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 20–11]

Monica Ferguson, F.N.P., R.N.; Decision and Order

On February 20, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Monica Ferguson, F.N.P., R.N., (hereinafter, Respondent) of Lake Oswego, Oregon. OSC, at 1. The OSC proposed the revocation of Respondent's Certificate of Registration No. MF1358298. *Id.* It alleged that Respondent is without ''authority to handle controlled substances in Oregon, the state in which [Respondent is] registered with DEA.'' *Id. See also* 21 U.S.C. 823(f) and 824(a)(3).

Specifically, the OSC alleged that the Oregon State Board of Nursing (hereinafter, Board) revoked Respondent's RN license number 099000287RN and her NP–PP Family license number 200650008NP effective on December 31, 2019. *Id.* This revocation, according to the OSC, demonstrated that Respondent lacks authority to handle controlled substances in Oregon. *Id.* (citing 21 U.S.C. 802(21), 823(f), and 824(a)(3)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing

to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated March 11, 2020, Respondent, *pro se,* timely requested a hearing.[1] Hearing Request, at 1. In the Hearing Request, Respondent requested that DEA defer proceedings on the proposed revocation of her DEA registration until there is a decision from the Oregon Appellate Court on her March 3, 2020, request for an immediate remand or reversal of the Board's revocation of her state licenses. *Id.* at 2. Respondent also requested an extension of time to prepare for the DEA revocation proceedings in light of a number of delineated personal circumstances which Respondent described as ''extreme hardship[s].'' *Id.* at 1.

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge Mark M. Dowd (hereinafter, ALJ). The ALJ issued a Briefing Schedule for Lack of State Authority Allegations, dated March 16, 2020. The Government timely complied with the Briefing Schedule by filing a Motion for Summary Disposition on March 20, 2020, (hereinafter, Government Motion or Govt Motion). Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge, dated May 5, 2020, (hereinafter, Summary Disposition or SD), at 3. In its Motion, the Government submitted evidence that Respondent's Oregon nurse practitioner licenses had been revoked and that she therefore lacked authority to handle controlled substances in Oregon, the state in which she is registered with DEA. Govt Motion, at 1; SD, at 3. In light of these facts, the Government argued that DEA must revoke her registration. Govt Motion, at 3.

On March 22, 2020, Respondent, asked that the Government Motion be denied, requested that the parties have a hearing, and referenced her Hearing Request, wherein she requested a deferral of proceedings or additional time to prepare evidence. *See* Email from Respondent, dated March 22, 2020; March 23, 2020 Order Granting Respondent Extension to File Response to Government's Motion for Summary Disposition (hereinafter, March 23, 2020 Order), at 1. In the March 23, 2020 Order, the ALJ denied Respondent's request to defer or stay proceedings. March 23, 2020 Order, at 3. The ALJ then granted Respondent an extension of time to respond to the Government Motion. *Id.* at 5. The March 23, 2020 Order also clearly explained to Respondent that the proceeding was focused on ''whether Respondent has lost her state authority to handle controlled substances,'' and that ''[t]he underlying merits of the Respondent's loss of state licensure are irrelevant.'' *Id.* at 2.

On April 12, 2020, Respondent again asked for an extension of time to respond to the Government Motion. *See* Email from Respondent dated April 12, 2020. On April 13, 2020, the ALJ granted Respondent another extension of time to respond and referred back to the March 23, 2020 Order outlining the relevant issues in dispute. Order Granting Respondent's Second Extension to File Response to Government's Motion for Summary Disposition, at 1. On May 4, 2020, Respondent timely filed her ''Response to Motion for Summary Disposition'' (hereinafter, Respondent's Response or Resp Response). In her Response, Respondent challenged the method of investigation and the merits of the underlying state action, and requested a stay of DEA's proceedings while she appealed the state action. *See generally* Resp Response; SD, at 4. Regarding the relevant issue—whether or not Respondent had state authority to handle controlled substances—Respondent explicitly admitted that she did not. Resp Response, at 8. Respondent ''agree[d] that she lacks the authority to handle controlled substance[s]'' and further ''acknowledge[d] that [her] license has been revoked.''[2] *Id.* at 8, 9.

In the Summary Disposition, the ALJ again denied the Respondent's request to stay DEA's proceedings.[3] SD, at 5–6. The ALJ noted that, even though the Respondent was actively engaged in negotiating or appealing a State Board decision, ''[i]t is not DEA's policy to stay [administrative] proceedings . . . while registrants litigate in other forums.'' SD, at 5 (citing *Newcare Home Health Servs.,* 72 FR 42,126, 42,127 n.2 (2007)). The ALJ then went on to grant the Government Motion. *Id.* The ALJ found that ''no dispute exists over the fact that the Respondent currently lacks state authority to handle controlled substances in the State of Oregon, . . . so there is no contested factual matter that could be introduced at a hearing that would, in the Agency's view, provide authority to allow the Respondent to continue to hold her DEA [registration].'' SD, at 8–9. By letter dated June 15, 2020, the ALJ certified and transmitted the record to me for final Agency action. In that letter, the ALJ advised that neither party filed exceptions. I find that the time period to file exceptions has expired. *See* 21 CFR 1316.66.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

Findings of Fact

Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. MF1358298 at the registered address of 18238 Tamaway Drive, Lake Oswego, Oregon, 97034. Govt Motion Exhibit (hereinafter, GX) 1, at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a ''MLP–NURSE PRACTITIONER–DW/30.'' *Id.* Respondent's registration expired on September 30, 2020.[4] *Id.*

The Status of Respondent's State License

On December 31, 2019, the Oregon State Board of Nursing issued a Final Order revoking Respondent's Nurse Practitioner's Certificate and Registered Nurse License. GX 2, at 33. According to the Final Order, Respondent ''engaged in fraud or deceit in the practice of nursing,'' ''fraud or deceit in the admission to [the practice of nursing],'' ''gross incompetence . . . [or] gross negligence with regard to patient care,'' and ''no less than six separate instances of conduct derogatory to the standards of nursing.'' *Id.* Examples of the misconduct that gave rise to these findings include, but are not limited to, Respondent operating a vehicle while impaired by prescription narcotics and possessing controlled substances that were stored in unlabeled bottles and that were not prescribed to her. *Id.* at 3–4, 10–12, 17.

According to Oregon's online records, of which I take official notice,

[1] The Hearing Request was deemed filed on March 16, 2020. Briefing Schedule for Lack of State Authority Allegations dated March 16, 2020, at 1. I, thus, find that the Government's service of the OSC was adequate.

[2] Respondent challenges the date her license was revoked (indicating that it was actually revoked in February 2020) and argues that the matter is still pending because it is being appealed. Resp Response, at 8–9.

[3] I find no error in the ALJ's decision to continue DEA's proceedings.

[4] The fact that Respondent allowed her registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68,474 (2019).

Respondent's registered nurse and family nurse practitioner licenses are still revoked.[5] Oregon State Board of Nursing License Verification Search, *http://osbn.oregon.gov/OSBNVerification/default.aspx* (last visited October 27, 2020). The Oregon records show that the end date for each of the license revocations is ''Ongoing.'' *Id.*

Respondent ''agrees that she lacks the authority to handle controlled substance[s]'' and further ''acknowledges that [her] license has been revoked.''[6] Resp Response, at 8, 9. Based on the entire record before me, I find that Respondent currently is not licensed to engage in the practice of nursing in Oregon, the State in which Respondent is registered with DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing[7] of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

Moreover, because ''the controlling question'' in a proceeding brought under 21 U.S.C. 824(a)(3) is whether the holder of a practitioner's registration ''is currently authorized to handle controlled substances in the state,'' *Hooper,* 76 FR at 71,371 (quoting *Anne Lazar Thorn,* 62 FR 12,847, 12,848 (1997)), the Agency has also long held that revocation is warranted even where a practitioner is still challenging the underlying action. *Bourne Pharmacy,* 72 F 18,273, 18,274 (2007); *Wingfield Drugs,* 52 FR 27,070, 27,071 (1987). Thus, it is of no consequence that the action is being appealed. What is consequential is my finding that Respondent is no longer currently authorized to dispense controlled substances in Oregon, the state in which she is registered.

According to Oregon's statute, ''[a] registered nurse *licensed* as a nurse practitioner is authorized to prescribe drugs for the use of and administration to other persons if approval has been given under [Oregon Revised Statutes] 678.390.'' Or. Rev. Stat. Ann. § 678.375 (West 2020) (emphasis added). Oregon Revised Statute § 678.390, provides that ''[t]he Oregon State Board of Nursing may authorize a *licensed* nurse practitioner or licensed clinical nurse specialist to write prescriptions, including prescriptions for controlled substances listed in schedules II, III, III N, IV and V.'' Or. Rev. Stat. Ann. § 678.390(1) (West 2020) (emphasis added). The Oregon statute also states that ''[t]he authority to write prescriptions or dispense prescription drugs may be denied, suspended or revoked by the Oregon State Board of Nursing upon proof that the authority has been abused.''[8] *Id.* Here, it is clear that Respondent is no longer a licensed nurse practitioner and it is thus clear that she is no longer authorized to prescribe, administer, or dispense controlled substances in Oregon.

The undisputed evidence in the record is that Respondent currently lacks authority to practice nursing in Oregon. As already discussed, a nurse practitioner must be a licensed nurse practitioner to prescribe or dispense a controlled substance in Oregon. Thus, because Respondent lacks authority to practice nursing in Oregon and, therefore, is not authorized to handle controlled substances in Oregon, Respondent is not eligible to maintain a DEA registration. Accordingly, I will order that Respondent's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MF1358298 issued to Monica Ferguson. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Monica Ferguson to renew or modify this registration, as well as any other application of Monica Ferguson, for additional registration in Oregon. This Order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25529 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–09–P

[5] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Respondent files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at *dea.addo.attorneys@dea.usdoj.gov.*

[6] Respondent challenges the date her license was revoked (indicating that it was actually revoked in February 2020) and argues that the matter is still pending because it is being appealed. Resp Response, at 8–9. I find these arguments to be irrelevant as Respondent is not currently authorized to dispense controlled substances in Oregon.

[7] ''[D]ispense[ ] means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance. . . .'' 21 CFR 802(10).

[8] Although it appears that the process for a nurse practitioner to become authorized for prescribing and dispensing controlled substances is distinct from the process of becoming a licensed nurse practitioner, the authorization does not appear to be separately listed on the verification website. However, it is clear from Oregon law that it is a prerequisite of prescribing authority to be licensed as a nurse practitioner.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Jeffrey M. Wolk, M.D.; Decision and Order

On February 14, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Jeffrey M. Wolk, M.D. (hereinafter, Registrant) of Sierra Vista, Arizona. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. BW2472051. *Id.* It alleged that Registrant is without ''authority to handle controlled substances in the State of Arizona, the state in which [Registrant is] registered with DEA.'' *Id.* (citing 21 U.S.C. 823(f) and 824(a)(3)).

Specifically, the OSC alleged that, on December 3, 2019, the Arizona Medical Board (hereinafter, Arizona Board) issued an ''Order for Surrender of License and Consent to the Same.'' *Id.* at 2. Pursuant to this Order, Registrant ''agreed to the immediate surrender of [his] license to practice allopathic medicine,'' and Registrant's ''Arizona license to practice allopathic medicine remains in a surrendered status.'' *Id.* Therefore, the OSC alleged that Registrant currently lacks authority to practice medicine in Arizona. *Id.*

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. OSC, at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated May 28, 2020, a Diversion Investigator (hereinafter, the DI) assigned to the Tucson District office, Phoenix Field Division, stated that she spoke with Registrant on the phone on December 13, 2019, and after verifying his identity, ''requested that he voluntarily surrender his DEA Certificate of Registration ('COR') because he was no longer authorized to handle controlled substances in the state in which he held a DEA registration.'' Request for Final Agency Action, dated June 2, 2020 (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 11 (DI's Declaration), at 2. The DI stated that she told Registrant that if he decided not to surrender his registration, DEA would issue an OSC, but that ''[Registrant] declined to surrender his DEA registration.'' *Id.* On February 24, 2020, the DI stated that she and another DI traveled to Registrant's registered address located at 3410 Canyon De Flores, Suite B, Sierra Vista, Arizona 8650 to serve him with an OSC. *Id.* The DI stated that there was a sign on the door at the registered address stating that the ''office was permanently closed.'' *Id.* The DI then called Registrant's business telephone number, but the ''number was no longer in service.'' *Id.* Later that day, the DIs traveled to Registrant's last known residence, but there was no answer. The DI also tried to call his cell phone twice and left a voicemail. *Id.* The DI stated, ''After multiple unsuccessful attempts at reaching [Registrant] to personally serve him with the [OSC], on April 14, 2020, [she] forwarded a copy of the [OSC] document to [Registrant] at his email address [ ] and captioned the email 'OTSC.' '' *Id.* She stated that she tracked the email and ''obtained a confirmation record from the internet Mail Delivery system that the OTSC document had been delivered to the recipient on April 14.'' *Id.;* RFAAX 5 (Delivery Confirmation). Later that day, Registrant responded to the DI's email. RFAAX 11; RFAAX 6 (Email from Registrant). Further, on April 17, 2020, Registrant forwarded the email and attachment to DEA attorneys along with a written statement explaining his the circumstances surrounding the underlying state action regarding the surrender of his medical license. RFAAX 7, at 1; RFAAX 11. He stated that he ''agreed to the Surrender as [he] had already retired.'' RFAAX 7, at 1.

The Government forwarded its RFAA, along with the evidentiary record, to this office on June 3, 2020. In its RFAA, the Government represented that ''more than thirty days have passed since Registrant received the [OSC]; however, Registrant has not submitted to DEA a request for a hearing . . . or otherwise submitted a response with the agency following the issuance of the [OSC].'' [1] RFAA, at 2. The Government requested ''a DEA Final Order for the revocation'' of Registrant's Certificate of Registration. *Id.* at 6.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on April 14, 2020, as demonstrated by Registrant's specific acknowledgment of receipt of the OSC via reply email to the DI. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I consider the email that DEA received from Registrant to be a written statement from Registrant in accordance with 21 CFR 1301.43(c). RFAAX 7, at 1. In the email, Registrant confirmed the underlying surrender of his Arizona state license and stated that ''it was never [his] intention to maintain a DEA license after retirement.'' *Id.* Although I have considered Registrant's statement, it does not present any issue of fact or law that could affect my final decision, as explained herein. I issue this Decision and Order based on the record submitted by the Government, including Registrant's statement, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. BW2472051 at the registered address of Arizona Urology Center PLLC, 3410 Canyon de Flores, Suite B, Sierra Vista, Arizona 85650. RFAAX 1. Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II–V as a practitioner. *Id.* Registrant's registration expired on May 31, 2020, and ''is in acting pending status until the resolution of administrative proceedings.'' [2] RFAAX 2 (Certification of Registration History).

The Status of Registrant's State License

On December 3, 2019, the Registrant entered into a Consent to Entry of Order (hereinafter, Consent Order) with the Arizona Board. RFAAX 3, at 2 (Consent Order). On December 11, 2019, the Arizona Board issued an Order for Surrender of License and Consent to the Same (hereinafter, Surrender Order). RFAAX 3, at 1 (Surrender Order). According to the Surrender Order, Registrant ''state[d] that he has retired from professional practice and wishe[d] to surrender his license.'' *Id.* The Order

[1] It is noted that the Government's Exhibits included an email from Registrant, which includes statements regarding the underlying surrender as discussed herein.

[2] The fact that a Registrant allows his registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68,474 (2019).

further stated that ''[t]he Board possesses statutory authority to enter into a consent agreement with a physician who admits to committing an act of unprofessional conduct.'' *Id.* at 2. The Order therefore ordered the immediate surrender of Registrants License. *Id.*

According to Arizona's online records, of which I take official notice, Registrant's license is still surrendered.[3] *https://gls.azmd.gov/glsuiteweb/clients/azbom/public/webverificationsearch.aspx* (last visited October 27, 2020).

Accordingly, I find that Registrant currently is not licensed to engage in the practice of medicine in Arizona, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

According to Arizona statute, ''[e]very person who manufactures, distributes, dispenses, prescribes or uses for scientific purposes any controlled substance within this state or who proposes to engage in the manufacture, distribution, prescribing or dispensing of or using for scientific purposes any controlled substance within this state must first: (1) Obtain and possess a current license or permit as a medical practitioner as defined in § 32–1901 . . .'' Ariz. Rev. Stat. Ann. § 36–2522(A) (2020). Arizona Statute § 32–1901 defines a ''[m]edical practitioner'' as ''any medical doctor . . . or other person who is licensed and authorized by law to use and prescribe drugs and devices for the treatment of sick and injured human beings or animals or for the diagnosis or prevention of sickness in human beings or animals in this state or any state, territory or district of the United States.'' Ariz. Rev. Stat. Ann. § 32–1901 (2020). Arizona regulations further clarify that ''[a] physician who wishes to dispense a controlled substance as defined in Ariz. Rev. Stat. § 32–1901(12),[4] a prescription-only drug as defined in Ariz. Rev. Stat. § 32–1901(65), or a prescription-only device as defined in Ariz. Rev. Stat. § 32–1901(64), shall be currently licensed to practice medicine in Arizona.'' Ariz. Admin. Code § R4–16–301(A) (2020).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in Arizona, as he no longer retains a medical license in that state. As already discussed, a physician can only dispense controlled substances if he is licensed to practice medicine in Arizona. Thus, because Registrant lacks authority to practice medicine in Arizona and, therefore, is not authorized to dispense controlled substances in Arizona, Registrant is not eligible to maintain a DEA registration in Arizona. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BW2472051 issued to Jeffrey M. Wolk. This Order is applicable December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25526 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–09–P

[3] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

[4] The subsection citations for the referenced sections of the statute moved since the publication of the regulation, but the intent of the regulation is clear.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 20–13]

Julie I. Dee, M.D.; Decision and Order

On February 26, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Julie I. Dee, M.D. (hereinafter, Respondent) of Mountain Green, Utah. OSC, at 1. The OSC proposed the revocation of Respondent's Certificate of Registration No. FD6139491. *Id.* It alleged that Respondent is without ''authority to handle controlled substances in Utah, the state in which [Respondent is] registered with DEA.'' *Id.* at 1–2 (citing 21 U.S.C. 823(f) and 824(a)(3)).

Specifically, the OSC alleged that on April 9, 2019, the Utah Division of Occupational and Professional Licensing and [Respondent] ''entered into a Disciplinary Limitation Stipulation and Order whereby [Respondent] agreed, *inter alia,* that [Respondent] will not 'engage in activity or employment where [Respondent] will have access to, or prescribe, controlled substance[s]' pending [Respondent's]

completion of certain terms and conditions.'' *Id.* at 1–2. The OSC further alleged that the terms and conditions were still in place and therefore alleged that Respondent lacks authority to handle controlled substances in Utah. *Id.* (citing 21 U.S.C. 824(a)(3)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 2–3 (citing 21 U.S.C. 824(c)(2)(C)).

On March 19, 2020, Respondent through counsel requested an Extension of Time to Respond to the Order to Show Cause, arguing that the OSC was mailed to Respondent on February 18, 2020, but she was not properly served until March 3, 2020, when her counsel received the OSC. Extension of Time to Respond, at 2–3.

The Office of Administrative Law Judges put the matter on the docket and assigned it to Chief Administrative Judge Law John J. Mulrooney II (hereinafter, Chief ALJ), who granted Respondent's request for an extension of time on March 20, 2020, finding that it was both timely and that Respondent provided good cause. Order Granting Respondent's Request for Extension of Time to Respond to Order to Show Cause, at 1. Respondent timely filed a Request for a Hearing on April 8, 2020, in which she argued that she has a ''temporary limitation'' in Utah, which ''is not a suspension, revocation, or denial as contemplated by 21 U.S.C. 824(a)(3). Upon completion of 2 requirements set forth by DOPL, the temporary limitation will be removed . . . It is anticipated that such temporary limitation will be lifted by November 31, 2020.'' Request for a Hearing, at 2. On April 9, 2020, the Chief ALJ issued an Order Directing the Filing of Government Evidence Regarding its Lack of State Authority Allegation and Briefing Schedule, with which the Government complied by filing a Motion for Summary Disposition and Argument in Support of Finding that Respondent Lacks State Authorization to Handle Controlled Substances (hereinafter, Govt Motion) on April 20, 2020.

In its Motion, the Government submitted evidence that Respondent and the Utah Division of Occupational and Professional Licensing entered into a Disciplinary Limitation Stipulation and Order in which ''the parties agreed, *inter alia,* that Respondent would 'not engage in any activity or employment where [she would] have access to, or prescribe, controlled substance[s]', and further, that she would not engage in 'any conduct described in Utah Code Ann. § 58–67–102(17).' '' Govt Motion, at 2 (quoting Utah Disciplinary Limitation Stipulation and Order). In light of these facts, the Government argued that DEA must revoke Respondent's registration. Govt Motion, at 5.

On May 4, 2020, Respondent filed a ''Motion to Enlarge Time for Respondent to Respond to the Government's Motion for Summary Disposition,'' which the Chief ALJ granted on May 5, 2020. On May 18, 2020, Respondent filed an Opposition to Government's Motion for Summary Disposition (hereinafter, Resp Opposition), in which she argued that ''Respondent's Utah Licenses are currently active with a temporary limitation. Because Respondent's Utah licenses have not be [sic] suspended, revoked, or denied, the power of revocation pursuant to 21 U.S.C. 824(a)(3) does not apply.'' Resp Opposition, at 1.

On May 20, 2020, the Chief ALJ issued an Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge (hereinafter, Summary Disposition or SD). The Chief ALJ noted that, ''[w]hile the parties disagree as to the legal significance of the Respondent's licensure status, there is no disagreement that at present, the Respondent does not have state authority to handle controlled substances and practice medicine.'' SD, at 7 (citing Govt Motion Exhibit (hereinafter, GX) 2 at 2–5; GX 3; GX 5; Resp Opposition, at 2–4). He further concluded that ''[i]t is her lack of state authority at the present moment, not some speculative moment in the future, that excludes the Respondent from the definition of a 'practitioner' under 21 U.S.C. 823(f).'' *Id.* (citing *John B. Freitas, D.O.,* 74 FR 17,524, 17,525 (2009)). By letter dated June 25, 2020, the ALJ certified and transmitted the record to me for final Agency action. I find that the time period to file exceptions has expired. *See* 21 CFR 1316.66.

A Proposed Corrective Action Plan was received on April 13, 2020. I agree with the decision of the Assistant Administrator of the Diversion Control Division on May 29, 2020, that the Proposed Corrective Action Plan provides no basis for me to discontinue or defer this proceeding. As explained herein, current state authority is necessary to retain a DEA registration.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

Findings of Fact

Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. FD6139491 at the registered address of 6496 Fairview Drive, Mountain Green, Utah 84050. GX 1, at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a ''practitioner.'' *Id.* Respondent's registration expires on June 30, 2022. *Id.*

The Status of Respondent's State License

On April 9, 2019, the Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah (hereinafter, Utah Licensing Division) entered a Disciplinary Limitation Stipulation and Order. GX 2 (Disciplinary Limitation Order). According to the Disciplinary Limitation Order, Respondent ''admitted to inappropriately taking fentanyl from her work and becoming addicted to the drug.'' *Id.* Respondent agreed in the Order ''not to engage in any activity or employment where she will have access to, or be able to prescribe, controlled substances, and she also agrees to not engage in any conduct described in Utah Code Ann. § 58–67–102(17).'' [1] *Id.* at 3. She further agreed that prior to engaging in such activity, she ''will submit to the Division at least six months of consecutive clean drug testing results before she applies for licensure.'' *Id.* at 4. The Order further stated that, ''practicing medicine without a license is a criminal offense and that engaging in any conduct described in Utah Code Ann. § 58–67–102(17) after the effective date of this Stipulation would, in effect, be practicing medicine without a license (or without a non-restricted license).'' *Id.* at 6.

The Government presented evidence that on, December 8, 2019, a Utah Assistant Attorney informed a DEA Diversion Investigator (hereinafter, DI) that based on conditions set forth in the April 2019 Order, Respondent '' . . . cannot engage in anything that

[1] It is noted that this section of Utah law defines the ''practice of medicine.'' Utah Code Ann. § 58–67–102(17) (2020). Therefore, I find that this provision of the Disciplinary Limitation Order restricted Respondent's practice of medicine.

constitutes the practice of medicine, including prescribing, administering, dispensing or handling [controlled substances] while her license is limited.'' GX 3 (email), GX 5 (Declaration of DI), at 2.

Respondent does not contest the contents of the documents or the fact that she cannot currently prescribe controlled substances. Resp Opposition, at 2–3; SD, at 7.

According to Utah's online records, of which I take official notice, Respondent's Physician and Surgeon license remains ''Limited Active.'' [2] Utah Division of Occupational and Professional Licensing Licensee Lookup and Verification System, *https://secure.utah.gov/llv/search/index.html* (last visited October 27, 2020).

Based on the entire record before me, I find that Respondent is currently prohibited from dispensing controlled substances in Utah, the state in which Respondent is registered with DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had [her] State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing[3] of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever the practitioner is no longer authorized to dispense controlled substances under the laws of the state in which the practitioner practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

Respondent argues that ''[i]n the present matter, the temporary limitation on Respondent's Utah licenses will be removed once she completes a fitness for duty certification and six months of clean drug tests. Respondent's reinstatement of handling controlled substances in Utah is not speculative, but rather is automatic upon completion of the fore mentioned tasks.'' Resp Opposition, at 6. Therefore, she argues that she has not been ''suspended'' under the terms of the CSA. *Id.* However, the agreement itself is clear that ''practicing medicine without a license is a criminal offense and that engaging in any conduct described in Utah Code Ann. § 58–67–102(17) after the effective date of this Stipulation would, in effect, be practicing medicine without a license (or without a non-restricted license).'' GX 2, at 6.

Furthermore, because ''the controlling question'' in a proceeding brought under 21 U.S.C. 824(a)(3) is whether the holder of a practitioner's registration ''is currently authorized to handle controlled substances in the state,'' *Hooper,* 76 FR at 71,371 (quoting *Anne Lazar Thorn,* 62 FR 12,847, 12,848 (1997)), the Agency has also long held that revocation is warranted even where a practitioner is still challenging the underlying action or where the state action is temporary. *Kambiz Haghighi, M.D.,* 85 FR 5989 (2020); *Bourne Pharmacy,* 72 FR 18,273, 18,274 (2007); *Wingfield Drugs,* 52 FR 27,070, 27,071 (1987). Thus, it is of no consequence that the action is temporary. What is consequential is my finding that Respondent is not currently authorized to dispense controlled substances in Utah, the state in which she is registered.

Here, the undisputed evidence in the record, in accordance with the explicit terms of the Disciplinary Limitation Order, is that Respondent is currently without authority to dispense controlled substance in Utah, the state in which she is registered with DEA, and I will order that Respondent's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FD6139491 issued to Julie I. Dee, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Julie I. Dee, M.D. to renew or modify this registration, as well as any other pending application of Julie I. Dee, M.D. for additional registration in Utah. This Order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25534 Filed 11–18–20; 8:45 am]

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[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Respondent files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at *dea.addo.attorneys@dea.usdoj.gov*.

[3] ''[D]ispense[ ] means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance. . . .'' 21 CFR 802(10).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Verne A. Schwager, M.D.; Decision and Order

On August 24, 2020, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government or DEA), issued an Order to Show Cause (hereinafter, OSC) to Verne A. Schwager, M.D., (hereinafter, Registrant), of Arlington Heights, Illinois. Government's Request for Final Agency Action (hereinafter, RFAA) Exhibit (hereinafter RFAAX) 4 (OSC), at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. AS2410075. It alleged that Registrant is without ''authority to

handle controlled substances in Illinois, the state in which [Registrant is] registered with the DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that ''[o]n March 12, 2020, the Illinois Department of Financial and Professional Regulation ([hereinafter,] ''IDFPR'') suspended [Registrant's] state Physician and Surgeon license . . . for a period of 12 months following its finding of [his] noncompliance with a February 2019 Consent Order that [he] entered into with IDFPR,'' and the license remains suspended. *Id.* The OSC further alleged that Registrant is not eligible to obtain or retain a DEA registration because he lacks state authority to handle controlled substances in the State of Illinois. *Id.*

The OSC notified Registrant of the right to either request a hearing on the allegations or submit a written statement in lieu of exercising the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

I. Adequacy of Service

On August 26, 2020, a DEA Diversion Investigator (hereinafter, DI) traveled with another DI to Registrant's registered location at 2025 South Arlington Heights Road, Suite 106, Arlington Heights, Illinois 60005 to serve Registrant with the OSC. RFAAX 7, at 2–3 (Declaration of Diversion Investigator, dated October 6, 2020). At Registrant's registered location, the DIs met with Registrant's office manager, who ''informed [them] that [Registrant] was out of the office, but was expected to return later that afternoon.'' *Id.* at 3. The DI ''provided [the office manager] with a copy of the [OSC] and [the DI's] business card, and asked her to provide both to [Registrant] once he returned to the office. Later in the afternoon of August 26th, [the DI] contacted the office of [Registrant] by telephone and was informed by [the office manager] that she provided the [OSC] copy to [Registrant].'' *Id.* The DI also ''sent a copy of the [OSC] via email, to [Registrant's] counsel,'' who ''replied to [the] email confirming her receipt of the [OSC].'' *Id.*

On September 25, 2020, Registrant, through counsel, explained that Registrant was ''continu[ing] to negotiate with the IDFPR'' and ''ask[ed] that the DEA forebear from proceeding to revoke his DEA registration pending resolution of this matter.'' RFAAX 5, at 2. Registrant further stated that ''at this time [he] waives his right to a hearing with the DEA.'' *Id.* at 3.

The Government forwarded its RFAA along with the evidentiary record, to this office on October 19, 2020. In its RFAA, the Government represents that ''[Registrant], through his legal counsel, has also informed DEA of [Registrant]'s decision to waive his right to a hearing.'' RFAA, at 6 (citing *Warren B. Dailey. M.D.,* 82 FR 46,525, 56,526 (2017); *David D. Moon, D.O.,* 82 FR 19,385, 19,387 (2017); 21 CFR 1301.43(e)). The Government argues that ''grounds exist for the revocation of [Registrant]'s DEA [registration] pursuant to 21 U.S.C. 823(f) and 824(a)(3)'' and requests ''the issuance of a DEA Final Order for the revocation'' of Registrant's registration. *Id.* at 6.

I find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations and Registrant's own statements, I find that neither Registrant, nor anyone purporting to represent Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. RFAA, at 2. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.46.

II. Findings of Fact

A. Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. AS2410075 at the registered address of 2025 S Arlington Heights Road, Suite 106, Arlington Heights, Illinois 60005. RFAAX 2 (Certification of Registration History). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration expired on its own terms on February 29, 2020, and a renewal application was timely filed on March 4, 2020. *Id.* The registration ''is in a renewal pending status until the resolution of administrative proceedings.'' *Id.*

B. The Status of Registrant's State License

On March 12, 2020, the IDFPR indefinitely suspended Registrant's Illinois Physician and Surgeon license ''for a minimum period of 12 months.'' RFAAX 3 (Suspension Order), at 3. The Suspension Order stated that Registrant's Physician and Surgeon License had been on indefinite probation since February 2019, and as a condition of probation, Registrant ''had agreed to comply with all of [its] terms and conditions,'' and Registrant ''has failed to comply.'' *Id.* at 2. Therefore, in accordance with the terms of probation, IDFPR suspended Registrant's Physician and Surgeon license. *Id.* at 3.

According to Illinois' online records, of which I take official notice, Registrant's medical license is still suspended and his ''Licensed Physician Controlled Substance'' license is ''inoperative.'' [1] IDFPR Search for a License, available at *https://ilesonline.idfpr.illinois.gov/DFPR/Lookup/LicenseLookup.aspx* (last visited October 27, 2020).

Accordingly, I find that Registrant currently is neither licensed to engage in the practice of medicine nor licensed to dispense controlled substances in Illinois, the state in which Registrant is registered with the DEA.

III. Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 Fed.

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by email (*dea.addo.attorneys@dea.usdoj.gov*).

Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

Pursuant to the Illinois Controlled Substances Act, a '''[p]ractitioner' means a physician licensed to practice medicine in all its branches . . . or other person licensed, registered, or otherwise lawfully permitted by the United States or this State to distribute, dispense, conduct research with respect to, administer or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.'' 720 Ill. Comp. Stat. Ann. 570/102(kk) (West). Illinois law requires that ''[e]very person who manufactures, distributes, or dispenses any controlled substances . . . . must obtain a registration issued by the Department of Financial and Professional Regulation in accordance with its rules.'' *Id.* at 570/302(a).

Further, under Illinois law, the Illinois Controlled Substances Act authorizes the IDFPR to discipline a practitioner holding a controlled substance license. ''A registration under Section 303 to manufacture, distribute, or dispense a controlled substance . . . may be denied, refused renewal, suspended, or revoked by the Department of Financial and Professional Regulation.'' *Id.* at 570/304(a).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to handle controlled substances in Illinois, as his controlled substance license is ''inoperative.'' As already discussed, a practitioner must hold a valid controlled substance license to dispense a controlled substance in Illinois. Thus, because Registrant lacks authority to handle controlled substances in Illinois, Registrant is not eligible to maintain a DEA registration. Accordingly, I order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. AS2410075 issued to Verne A. Schwager, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Verne A. Schwager, M.D. to renew or modify this registration, as well as any pending application of Verne A. Schwager, M.D. for registration in Illinois. This Order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Jeanne E. Germeil, M.D. Decision and Order

On March 5, 2018, a former Acting Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause and Immediate Suspension of Registration (hereinafter, collectively OSC) to Jeanne E. Germeil, M.D., (hereinafter, Respondent). Administrative Law Judge Exhibit (hereinafter, ALJX) 1 (Order to Show Cause), at 1. The OSC informed Respondent of the immediate suspension of her Certificate of Registration No. FG0560765 pursuant to 21 U.S.C. 824(d), because her continued registration constituted an imminent danger to the public health and safety. *Id.* The OSC also proposed the revocation of Respondent's Certificate of Registration (hereinafter, registration) pursuant to 21 U.S.C. 824(a)(4), ''because [her] continued registration is inconsistent with the public interest . . . .'' *Id.* (citing 21 U.S.C. 823(f)).

I. Procedural History

Specifically, the OSC alleged that Respondent ''prescribed controlled substances to [two] DEA confidential source[s], Patient Y.H. [and Patient L.G.], that [she] knew or should have known were not for a legitimate medical purpose, in violation of 21 U.S.C. 841(a) and 842(a), 21 CFR 1306.04(a), and Fla. Admin. Code r. 64B8–9.013.'' OSC, at 2; *see also id.* at 6. The OSC alleged that Respondent ''[was] aware that at least a portion of the controlled substances [she was] prescribing to Y.H. [and to L.G.] were being sold, given to third parties, or otherwise diverted, because Y.H. [and L.G.] told [her] so.'' OSC, at 2; *see also id.* at 6. Additionally, the OSC alleged that Respondent ''had been falsifying [her] medical records.'' *Id.* at 9. The OSC alleged that Respondent's ''falsification of the[ ] records violated state law, *see* Fla. Stat. § 458.331(1)(m), and further demonstrate[d] that [Respondent] issued prescriptions for controlled substances to Patients Y.H. and L.G. outside the usual course of professional practice and that these prescriptions were beneath the standard of care for the State of Florida, violating both 21 CFR [1306.04(a) [1]] and Fla. Admin. Code r. 64B8–9.013.'' *Id.*

On March 5, 2018, the former Acting Administrator made a preliminary finding ''that [Respondent had] issued prescriptions for controlled substances that [she] knew were without a legitimate medical purpose and outside the usual course of professional practice, which is inconsistent with the public interest . . . .'' *Id.* And that ''in light of the rampant and deadly problem of prescription controlled substance abuse, that [Respondent's] continued registration . . . would constitute an imminent danger to the public health or safety because of the substantial likelihood that [she would] continue to unlawfully prescribe controlled substances, thereby allowing the diversion of controlled substances unless [her] DEA [registration was] suspended.'' *Id.* The former Acting Administrator concluded that Respondent's ''continued registration . . . [would] constitute[ ] an imminent danger to the public health and safety.'' *Id.*

[1] The citation to 21 CFR 1604(a) throughout the OSC appears to be a typographical error (as no such regulation exists). It is clear from the surrounding text, that where the government typed 21 CFR 1604(a), it was referring to 21 CFR 1306.04(a). The Government also specifically notified Respondent that was alleging violations of 21 CFR 1306.04(a). OSC, at 2.

Pursuant to 21 U.S.C. 824(f) and 21 CFR 1301.36(f), the former Acting Administrator authorized DEA Special Agents (hereinafter, SA) and Diversion Investigators (hereinafter, DI) serving the OSC on Respondent to place under seal or to remove for safekeeping all controlled substances that Respondent possessed pursuant to the suspended registration. *Id.* The former Acting Administrator also directed those employees to take possession of Respondent's registration No. FG0560765 and any unused prescription forms. *Id.*

The OSC notified Respondent of the right to either request a hearing on the allegations or submit a written statement in lieu of exercising the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 10 (citing 21 CFR 1301.43). According to the Government's Notice of Service, a member of the DEA Miami Field Division personally served the OSC on Respondent on March 7, 2018. ALJX 2 (Government's Notice of Service of OSC), at 1.

By letter dated April 3, 2018, Respondent timely requested a hearing. ALJX 3 (Request for a Hearing), at 1. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Administrative Law Judge Charles Wm. Dorman (hereinafter, the ALJ). On April 6, 2018, the ALJ established a schedule for the filing of prehearing statements. ALJX 4 (Order for Prehearing Statements), at 1. The Government filed its prehearing statement on April 20, 2018. ALJX 6 (Government's Prehearing Statement), at 1. After requesting and receiving additional time, Respondent filed her Prehearing Statement on May 31, 2018. *See* ALJX 7 (Unopposed Motion for Extension of Time to File Prehearing Statement), ALJX 8 (Order Granting Respondent's Motion for Extension of Time to File Prehearing Statement), and ALJX 9 (Respondent's Prehearing Statement). Thereafter, the ALJ issued an Order denying Respondent's motion requesting discovery on the grounds that Respondent failed to establish that the documents she sought were relevant, material, and that the denial of access to the documents was prejudicial. ALJX 18 (Order Denying Respondent's Motion to Compel Discovery), at 4; *see also* ALJX 12 (Motion to Compel Discovery or in the Alternative Issuance of Subpoena), and ALJX 15 (Government's Response in Opposition to Respondent's Motion to Compel and Government's Motion to Quash Subpoena).

On June 6, 2018, the ALJ issued a Prehearing Ruling that, among other things, set out 18 agreed upon stipulations and established schedules for the filing of additional joint stipulations and for the hearing. ALJX 11 (Prehearing Ruling), at 3. Joint Stipulations were filed on June 19, 2018, and on June 26, 2018, the Respondent proposed additional Stipulations to which the Government had no objection. *See* ALJX 16 (Joint Stipulations) and ALJX 19 (Additional Stipulations Proposed by Respondent). The hearing in this matter took place in Miami, Florida and spanned three days. *See generally* Transcript of Proceedings in the Matter of Jeanne E. Germeil, M.D. (hereinafter, Tr.). Both parties filed posthearing briefs. *See* ALJX 27 (Government's Posthearing Brief) and ALJX 28 (Respondent's Posthearing Brief). The ALJ's Recommended Rulings, Findings of Fact, Conclusions of Law and Decision (hereinafter, RD) is dated August 31, 2018. Neither party filed exceptions to the RD. Transmittal Letter, at 2. I have reviewed and agree with the procedural rulings of the ALJ during the administration of the hearing.

Having considered the record in its entirety, I agree with the RD that the record established, by substantial evidence, that Respondent's ''continued registration is inconsistent with the public interest because of her improper prescribing and falsification of medical records.'' RD, at 106. I further agree with the RD that Respondent's ''failure to acknowledge any wrongdoing whatsoever'' and her ''fabrication of documentation to cover her tracks'' shows that she ''cannot be entrusted with the ability to continue prescribing controlled substances.'' *Id.* Moreover, I agree with the RD that revocation is the appropriate sanction. *Id.* I make the following findings of fact.

II. Findings of Fact

A. DEA Registration

The parties stipulated that Respondent is registered with DEA to handle controlled substances in schedules II through V under DEA Certificate of Registration No. FG0560765, at 951 North East 167th Street, North Miami Beach, Florida 33162. ALJX 11, at 1; Tr. 9; and GX 1 (Controlled Substance Registration Certificate). This registration expired on September 30, 2019.[2] GX 1.

B. The Investigation

DEA opened its investigation into Respondent after receiving information from the North Miami Beach Police Department that it had responded to Respondent's office several times due to ''altercations between the staff at the office and patients . . . [which] appeared to be over prescriptions for oxycodone.'' Tr. 28.

DEA used two confidential sources (hereinafter, CS), Y.H. and L.G., when conducting the investigation into Respondent. Tr. 28, 150. A DEA SA was the DEA handler for the two confidential sources. Tr. 150. SA would coordinate the undercover operation, meet with the confidential sources, give them direction as to what DEA wanted them to say or do, and provide them with electronic recording devices used to record audio and video of the interaction between the sources and Respondent. Tr. 151. After the undercover operation was finished, SA would obtain the recording devices from the confidential sources, download the information recorded to a DVD, and place the DVD into evidence. Tr. 151–53. SA would also provide a copy of the DVD to a DEA contractor, who would transcribe the DVD. Tr. 154. Thereafter, SA would compare the transcript to the recording for quality control and to make sure the transcript was accurate. Tr. 154–56, 163.

In November 2017, DEA executed a search warrant on Practice Fusion, an electronic medical record software company, to obtain Respondent's patient files. Tr. 29–30. DEA compared the obtained patient files for Y.H. and L.G. with the recordings made by Y.H. and L.G. and determined that there were inaccuracies in the medical records. Tr. 30. Thereafter, DEA retained a medical expert to review the patient files and recorded videos. *Id.*

C. Government's Case

The Government's documentary evidence consists primarily of video recordings[3] and transcripts of two confidential sources' visits with Respondent, and prescription records for the two confidential sources. *See* GX 1–19, 22. Additionally, the Government called five witnesses: A DI, confidential source Y.H., confidential source L.G., SA and an expert, Dr. Reuben Hoch, M.D.

DI testified about his investigation-related actions, including his role in

[2] The fact that a registrant allows his registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68,474 (2019).

[3] Respondent's counsel conceded that ''there can be [no] question that the video evidence is always going to be good evidence.'' Tr. 485.

executing a search warrant to obtain Respondent's patient files. Tr. 26–42; RD, at 5. Having read and analyzed all of the record evidence, I agree with the RD that DI ''presented his testimony in a professional, candid, and straightforward manner.'' RD, at 5. I also agree that DI's testimony is ''sufficiently objective, detailed, plausible, and internally consistent'' to be given full credibility. *Id.*

Y.H. testified about her role as a confidential source [4] during DEA's investigation into Respondent, identified the recordings she made while meeting with Respondent, and identified the prescriptions Respondent issued to her. Tr. 42–95. Y.H. also testified regarding her non-recorded interactions with the staff at Respondent's practice. Tr. 45–46, 52, 57. Y.H. is a felon; however, her last conviction occurred in 1996, and I agree with the ALJ that it is too distant to impact her credibility. RD, at 6; Tr. 43. Having read and analyzed all of the record evidence, I agree with the RD that Y.H. ''presented her testimony in a candid and straightforward manner.'' RD, at 6. I also agree that ''Y.H.'s testimony was sufficiently objective, detailed, plausible, and internally consistent with other evidence of record . . . [to] merit it as credible.'' [5] RD, at 6.

L.G. testified about his role as a confidential source [6] during DEA's investigation into Respondent, identified the recordings he made while meeting with Respondent, and identified the prescriptions Respondent issued to him. Tr. 96–145. Y.H. also testified regarding his non-recorded interactions with the staff at Respondent's practice. *Id.* at 98, 106–07, 113–14. On this topic (which I find is irrelevant, *see supra* n.5), the ALJ found that L.G.'s testimony was briefly evasive when he did not acknowledge on cross examination that hypothetical video evidence of his interactions with Respondent's staff would have been better evidence than L.G.'s live testimony. RD, at 7; Tr. 133–35. The RD found that this was relevant to L.G.'s credibility. RD, at 7. L.G. also testified that he was convicted of a felony in 2010 for impersonating a police officer and was released from confinement for that offense in 2015. Tr. 96, 119; RD, at 6. The ALJ found the felony conviction was relevant to L.G.'s credibility. RD, at 7. However, the ALJ found, and I agree, that the two items relevant to L.G.'s credibility, ultimately ''do not diminish L.G.'s overall credibility.'' RD, at 7. Having read and analyzed all of the record evidence, I agree with the RD that L.G. ''presented his testimony in a candid and straightforward manner.'' *Id.* I also agree that ''L.G.'s testimony was sufficiently objective, detailed, plausible, and internally consistent with other evidence of record . . . [to] merit it as credible.'' *Id.*

SA testified about the investigative work he did regarding Respondent, including his work as the handler for both Y.H. and L.G. Tr. 150–52. SA also testified regarding the integrity and authentication of the video evidence and the accompanying transcripts. *Id.* at 152–63. Having read and analyzed all of the record evidence, I agree with the RD that SA presented his testimony ''in a professional, candid, and straightforward manner.'' RD, at 8. I also agree that SA's testimony is ''sufficiently objective, detailed, plausible, and internally consistent'' to be given full credibility. *Id.*

Dr. Hoch, is Board-certified in anesthesiology and pain medicine. Tr. 193; GX 22 (Resume of Dr. Hoch); RD, at 8. He is the chief anesthesiologist at the Aventura Hospital, where he is involved in the administration of surgical anesthesia and the management of pain. *Id.* Dr. Hoch has been involved in pain management for at least 25 years, including managing his own pain medicine practice, working as an interventional pain specialist at the JFK Medical Center in Palm Beach, Florida, and working as the Chief of the Division of Pain Medicine at Brooklyn Hospital. Tr. 194–95; RD, at 8. Dr. Hoch is licensed in Florida and was accepted in this matter (and he has been accepted in other DEA matters) ''as an expert in pain management and prescribing controlled substances with respect to the standard of care for pain management in the State of Florida.'' RD, at 9; *see also* Tr. 198, 202. Having read and analyzed all of the record evidence, I agree with the RD that Dr. Hoch's testimony ''was sufficiently objective, detailed, plausible, and internally consistent . . . [to] merit it as fully credible.'' RD, at 10–11. Moreover, Dr. Hoch's expert testimony was unrebutted. *Id.* at 11.

D. Respondent's Case

The Respondent's documentary evidence consists primarily of medical and criminal records for the two confidential sources, photos of the Germeil clinic, employee resumes,[7] a list of continuing education courses Respondent attended,[8] discharge letters for various patients [9] (not including Y.H. or L.G.), and documents related to an Administrative Complaint filed by the State of Florida Department of Health against Respondent. *See* RX 1–8, 11. As for live testimony, Respondent called two witnesses: J.F. and J.W. The main arguments Respondent attempted to establish through the witness testimony were: (1) That Respondent's positive dispensing experience should be considered; (2) that the Germeil clinic's procedures were to conduct a physical exam at the first visit and that medical assistants conducted pain assessments as part of taking a patient's vitals and discussed the vitals (including the pain assessment) with Respondent; and (3) that Respondent demonstrated her acceptance of responsibility by instituting remedial measures. ALJX 28, at 12–15. Notably, Respondent did not testify in this matter.

[4] Y.H. has worked for DEA as a paid confidential source since 2002. Tr. 43.

[5] The Respondent requested that the ALJ treat the testimony of both Y.H. and L.G. as not credible and afford their testimony no weight. RD, at 58; Tr. 487; ALJX 28, at 13–14. In support, Respondent argued that Y.H. and L.G. were both convicted felons who were paid to serve as confidential sources and, as such, they had ''every incentive to . . . help the government.'' Tr. 486. I agree with the ALJ's thorough assessment of the credibility of Y.H. and L.G. RD, at 94–95. In short, the relevant testimony of Y.H. and L.G. with regard to their encounters with Respondent is fully supported by the video evidence which, as Respondent notes, ''speaks for itself.'' ALJX 28, at 13; *see also* Tr. 485; RD, at 94. I also agree with the ALJ that the unrecorded interactions that Y.H. and L.G. had with Respondent's office staff and medical assistants are irrelevant to what Respondent herself did or did not do. *See* RD, at 94. As Dr. Hoch testified, it is the physician's responsibility to examine the patient, to draw his or her own conclusions, and to maintain medical records. Tr. 326, 354; RD, at 94. As such, it is the physician's recorded interactions with the patients that are relevant to this case. I fully agree with the ALJ's determination that Y.H. and L.G. are credible witnesses. RD, at 95.

[6] L.G. has worked as a confidential source for DEA for about two and a half years. Tr. 96.

[7] Respondent's resume indicates that Respondent has been a licensed physician in the State of Florida since October 2007. RX 5 (Resume of Jeanne Esther Germeil), at 1. She has had her own medical practice, Germeil Medical, Inc., since September 2011. *Id.*

[8] Among other things, the CLE records show that on October 7, 2017, Respondent completed 5 credits in the educational activity titled ''Legal & Ethical Implications in Medicine: A physician's Survival Guide—Laws & Rules.'' RX 6 (List of Respondent's Completed Continuing Education Courses), at 7. On October 1, 2017, Respondent completed 8 credits in the live educational activity titled, ''Quality Medical Record Keeping for Health Care Professionals.'' *Id.* at 9. On December 27, 2017, the Florida Medical Association notified Respondent that her record keeping mentor ''noted that [Respondent's] follow-up records showed improvement and that the recommendations made during Phase I, for the most part, were successfully implemented.'' *Id.* at 8 (emphasis in original). The Florida Medical Association mentioned that there were additional suggestions for further improvements, but that documentation was not included in the record. *Id.* The CLE records also show that Respondent took courses in prescribing for pain in 2013. *Id.* at 2.

[9] I note, that there are 47 pages of discharge letters including 38 unique letters and 9 duplicates. *See* RX 8 (Discharge Letters), at 14, 16, 19, 21, 24–25, 26–27, 32).

J.F. is Respondent's husband and the general manager of the Germeil Medical Clinic. Tr. 362, 390. J.F. testified regarding his roll maintaining the clinic's records and regarding the Clinic's procedures. *Id.* at 362. Concerning records, J.F. testified that, since 2011, medical records were contained in the Practice Fusion system and that, early on, the Clinic had problems with the system losing medical records.[10] *Id.* at 368. He also testified that L.G. was ordered to have a urine test performed, and that Respondent would no longer see him as a patient when L.G. did not comply with the order. Tr. 376–78; RX 3 (Lab Order for L.G. dated October 4, 2017). On this issue, the ALJ found ''[J.F.'s] reasons why the Clinic had not issued termination letters to Y.H. and L.G. for failing to take urine tests to be less than credible.'' RD, at 12. J.F. stated that the Clinic's procedure for vitals included taking blood pressure, weight, height, and conducting a pain assessment. Tr. 372. Further, J.F. testified that he was not present when vitals were taken, but he made sure that the information was entered into Practice Fusion. *Id.* at 372–73. The ALJ found that J.F. lacked credibility when he testified that he had personal knowledge of what vitals were taken with Y.H. and L.G., when really, J.F. simply had to trust that the recorded information was accurate. RD, at 12–13; Tr. 392, 419–20. J.F. also testified regarding the general procedures Respondent used when seeing patients and regarding improvements that the Germeil Clinic had instituted in the year prior to the hearing. Tr. 385, 387–88; RD, at 12.

Having read and analyzed all of the record evidence, I agree with the RD that J.F.'s testimony was not presented in a straightforward and candid manner. RD, at 13. Still, the RD found, and I agree, that J.F. was generally a credible witness. *Id.* The RD went on to find that much of J.F.'s testimony was irrelevant because he had little personal knowledge of how Y.H. and L.G. were treated as patients and because Respondent did not accept responsibility for her actions. *Id.* I agree.

J.W. is the office manager of the Germeil Clinic and, in that role, he supervises the medical assistants. Tr. 433–34, 437; *see also* RX 7 (Resume of J.W.). J.W. testified concerning the office procedures for taking a patient's vitals (which J.W. occasionally did himself). Tr. 442–47. In taking vitals, a medical assistant obtains a patient's blood pressure, weight, height, and conducts a preliminary pain assessment. *Id.* at 443. The vitals are then provided to Respondent who occasionally asks questions about a patient's pain. Tr. 445, 447, 453. Diminishing J.W.'s credibility, the ALJ found that J.W. painted a picture of being able to consistently monitor (hear and observe) the medical assistants, while they took vitals, when he obviously had other responsibilities as the office manager to which he had to attend. Tr. 434, 459, 471–74. Moreover, while J.W. testified credibly as to the clinic's procedures for taking a patient's vitals, he provided no testimony that he observed the taking of Y.H. or L.G.'s vitals. RD, at 14. Thus, the RD found, and I agree, that J.W.'s testimony does not outweigh the direct testimony of both Y.H. and L.G. concerning how their vitals were taken and whether or not they were asked about their pain.[11]

The ALJ found the remainder of J.W.'s testimony to be generally credible. RD, at 14. He testified that if Respondent suspected that a patient was diverting drugs, she would send the patient for a urine drug test. Tr. 448. If the patient did not take the urine drug test, the patient would not be seen again until the test is taken. *Id.* If the patient refuses to take the test, the patient would be discharged. *Id.* J.W. testified that since he started in December 2016, the Germeil Clinic had worked to reduce patients' wait times, spend more time with patients, use a pain questionnaire, and give more attention to taking vitals. Tr. 449–50.

Having read and analyzed all of the record evidence, I agree with the RD that J.W.'s testimony was presented in a straightforward and candid manner. RD, at 14. The RD went on to find that, like J.F.'s testimony and for the same reasons, much of J.W.'s testimony was irrelevant to the issues in this case. *Id.* Again, I agree.

E. The Standard of Care in the State of Florida

According to the Controlled Substances Act (hereinafter, CSA), ''Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to . . . distribute, . . . dispense, or with intent to . . . distribute[ ] or dispense, a controlled substance.'' 21 U.S.C. 841(a)(1). The CSA's implementing regulations state that a lawful controlled substance order or prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a).

During the prehearing conference on June 6, 2018, the parties stipulated that Respondent ''is presently'' licensed in the State of Florida as a Medical Doctor. Dr. Hoch presented unrebutted testimony regarding the usual course of professional practice and the applicable standard of care for a Florida physician when prescribing controlled substances.

Dr. Hoch explained that Florida Administrative Code, Rule 64B8–9.013, Standards for the Use of Controlled Substances for the Treatment of Pain, lays out a physician's responsibilities when prescribing controlled substances for pain management.[12] RD, at 9; Tr. 203–05. Dr. Hoch acknowledged that Florida Administrative Code § 64B8–9.013 [13] provides guidelines rather than black-and-white rules, but he further acknowledged that those guidelines are authoritative regarding a physician's standard of care in Florida. RD, at 9; Tr. 272, 280–81. The Florida Code states that ''[t]he Board will not take disciplinary action against a physician for failing to adhere strictly to the provisions of these standards, if good cause is shown for such deviation.'' Fla. Admin. Code r. 64B8–9.013(1)(f) (West 2020).

According to Dr. Hoch, that regulation requires that a doctor: Take a complete medical history and conduct a physical examination [14] before issuing a prescription for a controlled substance; develop a written treatment plan; discuss the risks and benefits of controlled substances with a patient;

[10] DI testified that he has investigated at least three clinics that used the Practice Fusion program and he has not found that the program deletes or omits things. Tr. 32–33.

[11] Moreover, this testimony is irrelevant as this matter involves Respondent's failure to conduct physical examinations, not her failure to collect vitals. And as Dr. Hoch explains, Respondent's responsibility to conduct a physical exam cannot be satisfied by her medical assistants. *See infra* n.33; Tr. 307, 326.

[12] Moreover, the parties stipulated that ''a Florida licensed physician must follow the standards and rules set forth by the Florida Department of Health, Standards of Practice of Medical Doctors. ALJX 16, at 1; Tr. 10. The parties further stipulated that ''Florida Administrative Code, Rule 64B8–9.013, Standards for the Use of Controlled Substances for the Treatment of Pain, applies to a Florida licensed [p]hysician dispensing controlled substances.'' *Id.*

[13] The relevant portions of Florida Administrative Code § 64B8–9.013 have not been amended at any time during the relevant time period in this matter.

[14] The Florida Code does not define what constitutes a physical exam and does not necessarily require that a physician conduct a physical examination of a patient each time the patient presents for an appointment. RD, at 50; Tr. 289. However, Dr. Hoch opined that the standard of care requires a physician to perform a physical examination in certain circumstances including before first prescribing a controlled substance, when the patient requests a higher dose of controlled substances, presents with new symptoms or complaints, has a new diagnosis, or has not been seen for a period of months. *See* Tr. 290, 341–42, 345–46.

and maintain complete and accurate records with respect to a patient. RD, at 9; Tr. 205–06, 338. Additionally, a physician is required to conduct a periodic review of the course of treatment provided to a patient. RD, at 50; Tr. 337–38.

Further, a physician's medical records must also meet the standards set forth in Florida Administrative Code Rule 64B8–9.003 [15] and Florida Statute § 458.331(1)(m).[16] Under the Florida Administrative Code, ''[a] licensed physician shall maintain patient medical records . . . with sufficient detail to clearly demonstrate why the course of treatment was undertaken.'' Fla. Admin. Code r. 64B8–9.003(2) (West 2020). The regulation also states that physician's ''medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed . . . .'' *Id.* at 9.003(3). The Florida Statute provides that the ''following acts constitute grounds for denial of a license or disciplinary action . . .: [f]ailing to keep legible . . . medical records . . . that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.'' Fla. Stat. Ann. § 458.331(1)(m) (West 2020).

The Florida Administrative Code provides the following standards and record keeping requirements, *see* Fla. Admin. Code r. 64B8–9.013 (West 2020):

—''A complete medical history and physical examination must be conducted and documented in the medical record.'' Fla. Admin. Code r. 64B8–9.013(3)(a) (West 2020). A Florida physician ''is required to keep accurate and complete records to include . . . [t]he complete medical history and a physical examination, including history of drug abuse or dependence, as appropriate.'' Fla. Admin. Code r. 64B8–9.013(3)(f)(1) (West 2020).

—''The written treatment plan shall state objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function . . . .'' Fla. Admin. Code r. 64B8–9.013(3)(b) (West 2020). A Florida physician ''is required to keep accurate and complete records . . . [on t]reatment objectives.'' Fla. Admin. Code r. 64B8–9.013(3)(f)(4) (West 2020).

—''The physician shall discuss the risks and benefits of the use of controlled substances with the patient.'' Fla. Admin. Code r. 64B8–9.013(3)(c) (West 2020). A Florida physician ''is required to keep accurate and complete records to include . . . [d]iscussion of risks and benefits.'' Fla. Admin. Code r. 64B8–9.013(3)(f)(5) (West 2020).

—''[T]he physician shall review the course of treatment and any new information about the etiology of the pain. Continuation or modification of therapy shall depend on the physician's evaluation of the patient's progress. If treatment goals are not being achieved, despite medication adjustments, the physician shall reevaluate the appropriateness of continued treatment.'' Fla. Admin. Code r. 64B8–9.013(3)(d) (West 2020). A Florida physician ''is required to keep accurate and complete records to include . . . [p]eriodic reviews. Records must remain current, maintained in an accessible manner, readily available for review . . . .'' Fla. Admin. Code r. 64B8–9.013(3)(f)(10) (West 2020).

Dr. Hoch explained that the basic rule of thumb for medical documentation is a ''SOAP'' note. RD, at 51; Tr. 212. The ''S'' is a patient's subjective complaint; the ''O'' is the doctor's objective findings based on a physical examination; ''A'' is the doctor's assessment or impression or the diagnosis of the condition the doctor is treating; and the ''P'' is the plan where a doctor explains why a particular treatment has been selected. RD, at 51; Tr. 212. He testified that the plan is the most important part of the documentation because it allows a doctor to explain ''why [she's] doing what [she's] doing . . . [and] detail [her] decision-making.'' Tr. 212. Dr. Hoch explained that it is a doctor's responsibility to maintain patients' records. RD, at 50; Tr. 354.

The Florida Administrative Code provides that ''[p]hysicians should be diligent in preventing the diversion of drugs for illegitimate purposes.'' Fla. Admin. Code r. 64B8–9.013(1)(d) (West 2020). Dr. Hoch explained that, in Florida, ''it is a very big responsibility for prescribing physicians to be concerned about diversion.'' Tr. 224. When a patient tells a doctor that he or she is diverting his or her controlled substances that statement ''is a very big red flag that has to be addressed at that moment.'' RD, at 51; Tr. 224–25. In fact, Dr. Hoch stated that if a patient tells a doctor that he or she is selling or giving away controlled substances, ''that's sort of a deal breaker . . . .'' [17] Tr. 351. Therefore, in accordance with Dr. Hoch's testimony and the record as a whole, I find that the standard of care in Florida requires that a physician stop writing prescriptions for a patient following statements from the patient that are consistent with diversion. *See* Tr. 256–57.

F. The Florida Department of Health Complaint

The parties stipulated that Respondent's license to practice medicine has never been suspended or revoked by the State of Florida, Board of Medicine. ALJX 19 (Additional Joint Stipulations Proposed by Respondent), at 1.

On January 20, 2017, the Florida Department of Health issued an Administrative Complaint (hereinafter, Complaint) against Respondent. Respondent's Exhibit (RX) 11 (Records from the Florida Administrative Complaint against Respondent), at 16–24. The Complaint alleged, among other things, that Respondent's medical treatment of a patient M.N.,[18] between July 2013, and August 2015, ''fell below the prevailing professional standard of care,'' that she ''prescribed controlled substances inappropriately . . . , '' and that she ''failed to adequately create or maintain medical records that justified [the] amount and/or type of controlled substances she prescribed'' in violation of Florida Statute Section 458.331(1)(m) and Florida Administrative Code Rule 64B8–9.003. *Id.* at 20, 22–23. The facts alleged in support of the Complaint are that Respondent: Continued prescribing controlled substances to her patient upon learning that the patient was sharing another person's pain medication; failed to obtain a medical history; failed to list a chief complaint or history of present illness; recorded the patient's vitals only one time; and did not have the patient sign a pain medication contract. *Id.* at 17–18, 21. Based on the alleged violations, the Complaint sought ''permanent

[15] The relevant portions of Florida Administrative Code § 64B8–9.003 have not been amended at any time during the relevant time period in this matter.

[16] Florida Statute § 458.331(1)(m) has not been amended at any time during the relevant time period in this matter.

[17] Dr. Hoch's meaning by ''deal breaker'' is clarified by the totality of his testimony. Tr. 351. He testified that if he had a patient that admitted to diversion, he would not write another prescription for that patient. Tr. 256–57. Similarly, the Florida Administrative Complaint makes clear that the Florida Department of Health's position is that practitioners should ''discontinue prescribing scheduled medications after learning that the patient [engaged in diversion].'' RX 11, at 19. I also note that Respondent's Posthearing states, ''[Respondent] knows that she should not have issued the prescription for Y.H. and L.G. after they made statements consistent with diversion . . . she had a duty to investigate . . . [and] should have refused to give the prescription[s] and sent them for drug testing immediately.'' ALJX 28, at 15.

[18] There are no allegations of improper prescribing in this proceeding relevant to patient M.N.; however, this Complaint is relevant for other reasons as described herein.

revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand'' and/or other lesser penalties against Respondent. RX 11, at 24.

On February 8, 2017, Respondent signed a Settlement Agreement to settle the matters alleged in the Complaint. *Id.* at 6–15. Although Respondent neither admitted nor denied the allegations in the Complaint, she did admit that if the allegations were proven, they ''would constitute violations of Chapter 458, Florida Statutes.'' *Id.* at 7. The Settlement Agreement (as amended by the Florida Board of Medicine (hereinafter, State Board) pursuant to the Final Order, dated April 21, 2017) required Respondent to pay a fine of $10,000, reimburse $2,895.21 in costs, take four classes within a year, have a risk manager evaluate her medical practice, and comply with the risk manager's recommendations for improvements. *Id.* at 1–2, 6–15. Additionally the Settlement Agreement stated that ''[i]n the future, Respondent shall not violate Chapter 456, 458 or 893, Florida Statutes, or the rules promulgated pursuant thereto, or any other state or federal law, rule, or regulation relating to the practice or the ability to practice medicine . . . .'' *Id.* at 12.

G. Allegation of Improper Prescribing to Y.H.

Having read and analyzed all of the record evidence, I agree with the RD and find that the record contains substantial evidence that Respondent improperly prescribed controlled substances to Y.H. without a legitimate medical purpose, beneath the standard of care and outside the usual course of professional practice. RD, at 68, 71, and 73. Y.H. visited in the capacity as a confidential source for DEA a total of eight times between March 3, 2016, and January 25, 2017. Tr. 43–44; RX 1.[19] Y.H.'s first encounter with Respondent was on March 22, 2016. RX 1, at 30. According to the patient records, Y.H.'s chief complaint during the first visit was, ''I just came to hav[e] some pain meds. I am not function [sic.] w/o pain meds. . . . I share oxycodone 30 mg. I had 2 MVA and a bad slip[ ] about 2 years ago. I'd like flexeril as well.'' RX 1, at 30. Y.H.'s last three visits with Respondent, and the prescriptions resulting therefrom, presented as evidence in this case—September 8, 2016, October 12, 2016, and January 25, 2017.

1. Y.H.'s September 8, 2016 Visit

On September 8, 2016, Y.H. visited Respondent in her capacity as a confidential source and pursuant to the instructions given to her by her DEA handler. Tr. 43–44. During the visit, Y.H. wore a recording device that provided both audio and visual recordings of the office visit and she activated the device when she began interactions with Respondent. *Id.* at 44. As is evident from the records, Respondent spent approximately ten minutes with Y.H. GX 2 (Video Recording from September 8, Encounter). The vast majority of that time was spent discussing Y.H.'s sexuality and upcoming wedding. GX 3 (Transcript of Recording from September 8, Encounter), at 4–14.

During the visit, there was no discussion regarding the amount of Y.H.'s pain. *See generally* GX 3. Further, Y.H. testified that she was not asked to describe her pain levels by any member of Respondent's staff. Tr. 45, 87–88. The only discussion that occurred regarding pain occurred when Y.H. seemingly could not remember the location of her pain. GX 3, at 3

CS: I don't know. It's hurting my back.
Germeil: Uh—![20]
CS: Oh! I forgot. It's not my back—it's my neck.
Germeil: Uh
CS: It's my back and my neck. Yeah, 'cause [VOICES OVERLAP][21]
Germeil: So, it's not on your shoulder but [U/I]
CS: No. Not at all [U/I].

Id. After seemingly not knowing the location of her pain, Y.H. requested additional pills. ''Doc, remember last month you were going to give me one twenty (120)—for the Oxy's, but you didn't, and you told Josh to tell me this month you'd give me one forty (140).'' *Id.* at 10. After requesting additional pills, Y.H. informed Respondent that she had been giving, even selling, some of her pills to her brother. *Id.* at 17, 19.

CS: Okay, [my brother] is coming and he has to get pills because last month
Germeil: Uh-huh.
CS: when you didn't get—uh—you did not give him enough, and again, he wanted to borrow from me—and I was like ''No, I'm selling them to you this time''
Germeil: [U/I]
CS: ''You are going to give me money''
. . . .
CS: Last month he ran out—he's drinking three (3), four (4) pills a day—I said, ''Bro, you are not going [to] bum anything of me, you are going to give me money for these pills'' and he has to pay me first [U/I] because I'm not going to give them to him for free. I'm tired of him! I'm tired of him, doc!''

Id. Respondent's only response to Y.H.'s admission to diverting her controlled substances was ''Okay.'' *Id.* at 19.

Despite Y.H. not knowing the location of her own pain, requesting an increase in the number of pills prescribed, and admitting to diversion, Respondent wrote Y.H. prescriptions for controlled substances during the visit. GX 14 (Prescriptions issued to Y.H. on September 8), at 1. The parties stipulated that on September 8, 2016, Respondent prescribed Y.H. one hundred and forty[22] dosage units of oxycodone HCL 30 mg.[23] and sixty dosage units of alprazolam 2 mg.[24] ALJX 11, at 2; Tr. 9.

Y.H. testified that during this visit, Respondent did not conduct a physical exam, did not discuss other medical conditions Y.H. might have, did not discuss the medications that Y.H. was taking, did not discuss Y.H.'s diet or exercise. Tr. 48–49. Y.H. testified that the person who took her vitals on September 8, 2016, did not conduct a physical exam, discuss Y.H.'s medical condition, or ask about controlled substances Y.H. was taking. Tr. 45.

According to the patient records for that visit, Y.H.'s chief complaint was ''I need a little bit more of my pills, I ran out so fast. I really need them. I am getting married soon and I need a little bit more.'' RX 1, at 22. The patient records ''Plan'' stated that Respondent, among other things, explained the side effects of the medication, advised regarding adverse reactions, discussed lifestyle modifications to control weight and blood pressure, and that a

[19] No videos or transcripts of Y.H.'s earlier visits with Respondent were introduced in this matter. However, based on Y.H.'s credible testimony and the opinion of Dr. Hoch, I find that Respondent did not document or conduct a physical examination of Y.H. during any of her eight visits with Y.H. Tr. 92, 338–39. Respondent presented no evidence to demonstrate that a physical examination was conducted.

[20] Throughout the transcripts of the video recorded encounters (GXs 3, 5, 7, 9, 11, and 13), the transcriber used ellipses to depict pauses in the conversation. I have removed these and replaced them with dashes to prevent confusion between pauses and omissions of word from the quotations. Where they would have appeared at the beginning or end of a line, I have omitted them altogether.

[21] Bracketed text that describes the mechanics of the conversation between the confidential sources and Respondent, appear in the original transcript. Examples include, [VOICES OVERLAP], [U/I] which stands for unintelligible (Tr. 155, 159–60), [STUDDERS], and [WHISPERING].

[22] Y.H. requested an increase from one hundred and twenty to one hundred and forty pills a month, and this prescription shows that Respondent agreed to prescribe the additional pills. GX 3, at 10; GX 14.

[23] The parties stipulated that oxycodone HCL is listed by DEA as a Schedule II controlled substance. ALJX 11, at 2.

[24] The parties stipulated that alprazolam is listed by DEA as a Schedule IV controlled substance. ALJX 11, at 2.

''[d]etail[ed] explanation was provided about and against 'shopping' from physician to physicians [sic] and the harm (s) [sic] that can provoke.'' *Id.* According to the patient records, ''[a]pproximately 60 min was spent in this encounter,'' and Y.H.'s pain level was ''9.'' *Id.* However, Y.H.'s testimony and the recordings directly contradict the information in the ''Plan.''

Dr. Hoch opined that the two prescriptions issued by Respondent to Y.H. on September 8, 2016, (namely one hundred and forty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg.) were issued outside of the usual course of professional practice and beneath the applicable standard of care in the state of Florida. Tr. 208–09; GX 14. In support of his opinion, Dr. Hoch noted that the plan does not bear any resemblance to the actual visit and discussion between Respondent and Y.H. Tr. 218. *Compare* RX 1, at 22, *with* GX 2 and GX 3. Dr. Hoch explains that Y.H. is a female and the plan refers to a male. Tr. 213, RX 1 (Patient File for Y.H.), at 22. Additionally, the plan discusses managing blood pressure when Y.H. has ''quite a good blood pressure'' that does not need to be controlled. Tr. 214. Also, Dr. Hoch explains that Respondent did not discuss side effects with Y.H., fall precautions, or the harms that occur by shopping from physician to physician, but that those non-existent conversations were recorded in the plan. Tr. 213–218. Additionally, Dr. Hoch pointed out that the plan records that the visit lasted approximately 60 minutes when the visit did not last an hour. Tr. 215. Finally, Dr. Hoch found no indication that Respondent performed a physical exam or took a medical history at the visit. Tr. 227. Further, Dr. Hoch opined that there is no indication in the patient treatment notes that Respondent maintained on Y.H. that Respondent conducted a periodic review of her treatment of Y.H.'s conditions by prescribing controlled substances to her. Tr. 246.

Additionally, Dr. Hoch opined that there was nothing documented in the patient file to justify the oxycodone or alprazolam [25] prescriptions and that ''prescription of these medications together has to be qualified quite extensively in the medical record.'' Tr. 259; *see also id.* at 219. Respondent prescribed Y.H. oxycodone 30 mg. which is a ''very strong'' dosage, and prescribed her one hundred and forty pills which ''means approximately four to maybe five a day . . . [or] 120 milligrams of [o]xycodone a day.'' Tr. 219. According to Dr. Hoch, the oxycodone prescription can cause a number of side effects that Respondent did not discuss with Y.H. Tr. 220–21. He further testified that the side effects of opioid use, in the order of ''the least to the most disabling,'' include pruritus or itching, urinary retention, nausea and vomiting, and constipation. *Id.* at 220.

Dr. Hoch explained that ''the most devastating complication or side effect of an opioid [like oxycodone] is respiratory depression, and that's what kills people.'' Tr. 221–22. Dr. Hoch explained that the risk is particularly high where, as here, the opioid is given with a benzodiazepine like alprazolam. Tr. 222. In light of the medications prescribed, Dr. Hoch explained that Respondent was required to warn Y.H. about the risk of respiratory depression and instruct the patient to make sure there was at least a three to four hour gap between administering the two different medications. *Id.* Based on Dr. Hoch's credible and uncontroverted testimony and based on the video recording and transcript, I find that there was no discussion of the risks at this visit. *Id.*

Dr. Hoch explained that in Florida, ''it is a very big responsibility for prescribing physicians to be concerned about diversion.'' Tr. 224. Accordingly, when Y.H. informed Respondent that ''she[was] either giving or selling pills that she[was] receiving from the doctor,'' Respondent should have been ''[t]remendous[ly] concern[ed].'' *Id.* Dr. Hoch concludes that Y.H.'s diversion admission was ''a very big red flag that [had] to be addressed at that moment.'' Tr. 224–25. I find that Respondent did not address Y.H.'s diversion admission on September 8, 2016. *See also* RD, at 68.

Accordingly, based on the credible and uncontroverted testimony of Dr. Hoch, I find that the two prescriptions issued by Respondent to Y.H. on September 8, 2016, (namely one hundred and forty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg.) were issued outside of the usual course of professional practice and beneath the applicable standard of care in the state of Florida. *See* RD, at 68.

2. Y.H.'s October 12, 2016 Visit

On October 12, 2016, Y.H. visited Respondent in her capacity as a confidential source and pursuant to the instructions given to her by her DEA handler. Tr. 43–44. During the visit, Y.H. wore a recording device that provided both audio and visual recordings of the office visit and she activated the device when she began interactions with Respondent. RD, at 27; Tr. 52, 183. As is evident from the records, Respondent spent less than seven minutes with Y.H. GX 4 (Video Recording from October 12, Encounter); GX 5 (Transcript of Recording from October 12, Encounter), at 13. The majority of that time was spent discussing Y.H.'s cancelled wedding and a potential hurricane. GX 5, at 2–9; RD, at 69.

Towards the end of the visit, Y.H. informed Respondent that she had been selling some of her pills to her brother. GX 5, at 12–13.

CS: I tell [my brother], doc. ''Go get your own stuff.'' I'm tired of selling him my pills.
Germeil: You're right!
CS: But I sold him the pills, I sure did it, at twenty (20) bucks a pop, and he paid for them. I said, ''You don't go see the doctor?''
Germeil: You're right about that, but . . . . He has to learn.
CS: Exactly, doc.

Id. The video and transcription of the appointment show that Respondent did not express any concern about Y.H. selling her controlled substances to her brother. RD, at 69; GX 4; GX 5. Instead, Respondent seems to have acknowledged Y.H.'s admission of diversion and to have condoned the conduct. *Id.;* Tr. 231. Dr. Hoch explained, ''[Y.H.] is clearly indicating to [Respondent] that they are diverting the medication to someone else . . . selling their [p]ills at $20 a pop. The doctor notes it, addresses it and condones it.'' Tr. 231. Dr. Hoch explains that Respondent's actions with regard to Y.H.'s admission of diversion were ''a tremendous cause for concern.'' *Id.*

Not only did Respondent fail to address Y.H.'s admission of diversion, but Respondent, as the parties stipulated, went on to prescribe Y.H. one hundred and forty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg. ALJX 11, at 2; Tr. 9. *See also* GX 15 (Prescriptions Issued to Y.H. on October 12).

Dr. Hoch opined that the two prescriptions issued by Respondent to Y.H. on October 12, 2016, were issued outside of the usual course of professional practice and beneath the applicable standard of care in the state of Florida. Tr. 228–29; GX 15. In support of his opinion, Dr. Hoch noted that the plan documented for the October 12, 2016, visit was identical to, and has the same problems as the plan for the September 9, 2016 visit. Tr. 234, 236. As with the prior visit, Y.H. is a female and the plan refers to a male. Tr.

[25] Dr. Hoch explains that ''[t]wo milligrams of [a]lprazolam is a very high dose of [a]lprazolam.'' Tr. 222.

235; RX 1, at 20. Additionally, the plan discusses managing blood pressure when Y.H.'s does not require management. Tr. 236. Dr. Hoch opined that the plan was too generic and failed to identify what Respondent was ''doing for that particular problem.'' Tr. 235. Dr. Hoch also points out that in the patient record '' . . . Subjective is empty . . . [O]bjective is empty . . . Assessment is empty.'' Tr. 233. Additionally, Dr. Hoch explained that ''back pain'' is an indication of a complaint, but that a proper complaint, unlike this one, would explain ''what the patient is actually feeling, where, . . . what part of their back, the nature and quality of the pain.'' Tr. 234. Dr. Hoch's credible and uncontroverted testimony is that the patient chart does not justify the prescriptions that Respondent gave to Y.H. on October 12, 2016. Tr. 236.

Additionally, Dr. Hoch explained that these were the same two prescriptions issued on October 12, 2016, as were issued on September 9, 2016, and that the same issues about which he had already opined regarding the issuance of both an opioid and a benzodiazepine were present here. Tr. 232. Also, once again Dr. Hoch pointed out that Respondent failed to discuss with Y.H. the risks involved with prescribing opioids and benzodiazepines together. Tr. 232.

Further, Dr. Hoch explained, that Respondent's October 12, 2016 visit with Y.H. lacked the required ''encounter between the physician and the patient [and] discussion of the ongoing problem as this is a chronic pain problem.'' Tr. 229. Dr. Hoch explained that Respondent did not address the patient's pain, conduct a physical examination, take a complete medical history, discuss the risks of controlled substances, develop a treatment plan, or conduct a periodic review of the treatment of Y.H.'s conditions. Tr. 230, 246.

Based on Dr. Hoch's uncontroverted and credible testimony, the ALJ found, and I agree, that Respondent failed to make any statements that addressed Y.H.'s medical concerns during the October 12, 2016 visit. RD, at 27 (citing GX 4 and GX 5). Respondent did not ask any questions to determine Y.H.'s current medical condition, assess Y.H.'s level of pain or determine whether the treatment regimen she had prescribed to Y.H. was effective. RD, at 28 (citing GX 5); Tr. 87–88, 230. Respondent failed to: Conduct a physical examination of Y.H.;[26] discuss the side effects of the medication she was prescribing to Y.H. or the risks of using controlled substances; discuss the risks of doctor shopping; discuss Y.H.'s diet and exercise; discuss any medications Y.H. was taking; take a complete medical history of Y.H.; or develop an adequate treatment plan for Y.H. RD, at 28 (citing Tr. 54, 230, 232); GX 4; GX 5; RX 1, at 20.

In contrast, the patient notes that Respondent created concerning Y.H.'s October 12, 2016 appointment indicate that: The encounter lasted 60 minutes; and that Respondent discussed ''side effects,'' ''adverse reactions,'' ''safety precautions,'' and doctor shopping with Y.H. RD, at 28 (citing RX 1, at 20). The ''Plan'' for the October 12, 2016, visit was identical to the ''Plan'' for the September 8, 2016, visit and did not accurately capture what happened during the October 12, 2016, visit. RD, at 29; *and compare* RX 1, at 20, *with id.* at 22. Y.H.'s chief complaint was recorded as ''I have a lot [of] back pain and I need my pain meds.'' RX 1, at 20. Y.H.'s pain level was recorded as ''9.'' *Id.* But Dr. Hoch explained that a patient who presents with a pain level of nine would show ''a tremendous degree of discomfort.'' RD, at 29 (citing Tr. 331). The October 12, 2016 records lacked any information in the ''Subjective,'' ''Objective,'' and ''Assessment'' sections. RX 1, at 20.

The ALJ found based on Dr. Hoch's testimony, and I agree, that Respondent should have recognized Y.H.'s admission that she was diverting controlled substances as a red flag and considered it a ''deal breaker'' such that Respondent should not have issued prescriptions to Y.H. on October 12, 2016. RD, at 71; Tr. 351. The ALJ found, and I agree, that the prescriptions Respondent issued to Y.H., on October 12, 2016, were not issued for a legitimate medical purpose, and were not issued in the usual course of professional practice in the State of Florida. RD, at 71; Tr. 229, 236.

3. Y.H.'s January 25, 2017 Visit

On January 25, 2017, Y.H. visited Respondent in her capacity as a confidential source and pursuant to the instructions given to her by her DEA handler. Tr. 43–44. During the visit, Y.H. wore a recording device that provided both audio and visual recordings of the office visit and she activated the device when she began interactions with Respondent. RD, at 30; Tr. 58, 183. As is evident from the records, Respondent spent approximately seven and a half minutes with Y.H. GX 6 (Video Recording from October 25, Encounter). The majority of that time was spent on small talk discussing Y.H.'s family matters, including Y.H.'s trip to Cuba following her aunt's death, her brother's drug dependency, and the financial strain that resulted. GX 7 (Transcript of Recording from October 25, Encounter); RD, at 72.

At several points during the visit, Y.H. informed Respondent that she had been selling some of her pills. GX 7, at 4, 6, 9–11. During a discussion regarding an aunt of Y.H.'s who died in Cuba, Y.H., stated, ''I didn't even have money—I had to actually sell my pills unfortunately. I had to make some money. I had to go over there. Everything was on me.'' GX 7, at 4. Y.H. went on to state, ''Thank God I had some—the—some of the—pills that I had I was able to get rid of them and get some money to help me out, which I had to do now, because—I had to pay my rent.'' GX 7, at 6. Then the visit concluded with a final conversation regarding diversion.

CS: You think is right that I have to sell my own pills, my meds to, to pay for stuff for—[STUTTERS] that's just crazy doc.
Germeil: Listen! [STUTTERS] You are a good person . . . good things happen to good people. . . .
CS: . . . Right now, I'll probably go and I'll take some of these, I have to keep some, and then the others I probably have to sell [to my brother]. He probably, he'll probably take some from me 'cause that's all he does.'' . . .
Germeil: I feel sorry for you but uh—that's your call. That's mine, too. . . .
CS: Yeah, [o]xycodone's—thirty milligrams—[MURMERS] Yeah, we're good. Quantity one-forty (140). This is great. You don't know how much this helps me out, doc. You just don't know.
Germeil: Relax! Do not say that to nobody.
CS: Of course, not. . . .
Germeil: I know. I don't want to . . . get into trouble.

Id. at 9–11.

Despite Y.H.'s admission of diversion, Respondent, as the parties stipulated, prescribed Y.H. one hundred and forty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg. ALJX 11, at 2; Tr. 9. *See also* GX 16 (Prescriptions Issued to Y.H. on January 25). Dr. Hoch found that the same two prescriptions were issued on January 25, 2017, as were issued on September 9, 2016, and October 12, 2016, and that the same concerns about which he had already opined regarding the issuance of both an opioid and a benzodiazepine were present here. Tr. 237–38.

Dr. Hoch's credible and uncontroverted opinion was that the two prescriptions issued by Respondent to Y.H. on January 25, 2017, (namely

[26] In fact, during the appointment, Dr. Germeil sat on one side of an office desk and Y.H. sat across the desk from her. RD, at 70 (citing GX 4).

one hundred and forty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg.) were issued outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida. Tr. 237, 244; GX 16. In support of his opinion, Dr. Hoch found that the plan documented for the January 25, 2017 visit is nearly identical to, and has the same problems as the plan for the September 9, 2016, and October 12, 2016 visits. Tr. 241. As with the prior visits, Y.H. is a female and the plan refers to a male. Tr. 241; RX 1, at 19. Further, as with the prior visits, the plan stated that side effects, adverse reactions, diet and exercise, blood pressure, doctor shopping, and other matters were discussed during the encounter when the transcript and video evidence make clear that they were not. Tr. 241–42. Dr. Hoch opined that the plan has ''a disconnect'' in so far as it fails to address Respondent's approach for treating the diagnoses identified in the assessment section (specifically anxiety disorder and back ache). Tr. 240. Again, Dr. Hoch identified flaws in the chief complaint section of Respondent's records for Y.H., which contained a list of diagnosis rather than a true complaint. Tr. 239. Dr. Hoch's opinion was that the patient chart reflects an incomplete medical record and does not justify the prescriptions that Respondent gave to Y.H. on January 25, 2017. Tr. 250.

Additionally, Dr. Hoch explained that, once again, Respondent failed to conduct a thorough physical exam, take a complete medical history, or conduct a periodic review of the treatment of Y.H. Tr. 242, 246. In fact, during the encounter, Respondent sat on one side of an office desk and Y.H. sat across the desk from her. GX 6; RD, at 72. Dr. Hoch's conclusion is further supported by Respondent's failure to address Y.H.'s admission of diversion. Dr. Hoch explained, that there was a statement from ''the patient to the physician that the pills were being sold[,]'' which ''is diversion[,]'' and that ''the rule states that diversion is not acceptable.'' Tr. 243–44.

Based on Dr. Hoch's expert testimony, the ALJ found, and I agree, that Respondent failed to make any statements that addressed Y.H.'s medical concerns during the January 25, 2017 visit. RD, at 30 (citing GX 6 and GX 7). Respondent did not ask any questions to determine Y.H.'s current medical condition, assess Y.H.'s level of pain or determine whether the treatment regimen she had prescribed to Y.H. was effective. RD, at 32 (citing GX 7; Tr. 87–88, 246). Respondent did not discuss the side effects of the medication she was prescribing to Y.H.; discuss the risks of doctor shopping; discuss Y.H.'s diet and exercise; discuss any medications Y.H. was taking; take a complete medical history of Y.H,; or develop an adequate treatment plan for Y.H. RD, at 32 (citing Tr. 59, 241–243; GX 6; GX 7; RX 1, at 19). Further, Y.H. testified that Respondent did not conduct a physical exam during the encounter. Tr. 59.

In contrast, the patient notes that Respondent created concerning Y.H.'s January 25, 2017, appointment indicate that: the encounter lasted 60 minutes; and that Respondent discussed ''side effects,'' ''adverse reactions,'' ''safety precautions,'' and doctor shopping with Y.H. RD, at 33 (citing RX 1, at 19). The ''Plan'' for the January 25, 2017 visit was nearly identical to the ''Plan'' for the September 8, 2016, and October 12, 2016 visits (the only difference is the first line regarding a request for a urine drug test) and did not accurately capture what happened during the January 25, 2017 visit. RD, at 33; *compare* RX 1, at 19, *with id.* at 20, 22, *and with* GX–6, GX–7. Y.H.'s pain level was recorded as ''10.'' RX 1, at 19. But Dr. Hoch explained that a patient who presents with a pain level of ten would be in ''excruciating pain'' and one would question how such a patient could ''even sit in front of you.'' RD, at 33 (citing Tr. 331). If a person has a pain level of ten, then that person is usually in the hospital. *Id.* As with the prior patient records, the January 25, 2017 records lacked any information in the ''Subjective,'' and ''Objective'' sections. RX 1, at 19.

The ALJ found, and I agree, that Respondent did not advise Y.H. not to sell her controlled substances or otherwise engage in any meaningful conversation about diversion with Y.H. RD, at 72–73; GX 6; GX 7. The ALJ found, and I agree, that Respondent should have recognized Y.H.'s admission that she was diverting controlled substances as a red flag and considered it a ''deal breaker'' such that Respondent should not have issued prescriptions to Y.H. on January 25, 2017. RD, at 73; Tr. 242–44, 351.

The ALJ found, and I agree, that based on Dr. Hoch's testimony, the prescriptions Respondent issued to Y.H., on January 25, 2017, were not issued for a legitimate medical purpose, and were not issued in the usual course of professional practice in the State of Florida. RD, at 73–74.

In summary, I find that the six controlled substance prescriptions Respondent issued to Y.H., on September 8, 2016, October 12, 2016, and January 25, 2017, were not issued for a legitimate medical purpose and were issued outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida.

H. Allegation of Improper Prescribing to L.G.

Having read and analyzed all of the record evidence, I agree with the ALJ and find that the record contains substantial evidence that Respondent improperly prescribed controlled substances to L.G. without a legitimate medical purpose, beneath the standard of care, and outside of the usual course of professional practice in the State of Florida. RD, at 77, 80, and 82; *infra.*

L.G. visited Respondent in the capacity as a confidential source for DEA a total of five times between July 2016, and August 2017. Tr. 96–97; RX 2 (Patient File for L.G.). L.G.'s first encounter with Respondent was on July 25, 2016.[27] RX 2, at 22. According to the patient records, L.G.'s chief complaint during the first visit was, ''I have been having this strong right shoulder pain since a few years back. It just started again. I am tired of: [sic] ibuprofen/bengay/tylenol.'' RX 2, at 22. L.G.'s last three visits with Respondent, and the prescriptions resulting therefrom, were presented as evidence in this case—February 3, 2017, July 18, 2017, and August 3, 2017.

1. L.G.'s February 3, 2017 Visit

On February 3, 2017, L.G. visited Respondent in his capacity as a confidential source and pursuant to the instructions given to him by his DEA handler. Tr. 96–97. During the visit, L.G. wore a recording device that provided both audio and visual recordings of the office visit and he activated the device shortly before he went into Respondent's office. Tr. 97, 183. As is evident from the records, Respondent spent approximately seven and a half minutes with L.G. GX 8 (Video Recording from February 3rd Encounter). The vast majority of that time was spent discussing L.G.'s family issues and travels. GX 9 (Transcript of Video Recording from February 3, Encounter). At this visit, there was no discussion between L.G. and Respondent regarding any medical concerns. RD, at 35; GX 8; GX 9.

[27] No videos or transcripts of L.G.'s other visits with Respondent were introduced in this matter. However, based on L.G.'s credible testimony, I find that Respondent did not document or conduct a physical examination of L.G. during any of his five visits with L.G. Tr. 137, 338–39. Respondent presented no evidence to demonstrate that a physical examination was conducted.

Although medical concerns were not discussed at the visit, L.G. made several statements indicating that he was diverting pills. GX 9.

CS: and—what I did last time—with one of the prescriptions—knowing I'm not supposed to do that, I flipped it—I took some for me . . . took the rest to make some money

. . .

CS: I'm not trying to get in trouble or nothing like this.

Germeil: I know. Sometimes you have to help.

. . .

Germeil: But don't worry—uh. [L.G.]. You are okay.

CS: No, I mean—I'm being honest with you. That's what I've been doing. I—I sold a few of them . . . I—kept some for me.

. . .

Germeil: That's okay. Relax. Okay? But try to keep it for yourself. Try to keep your medication for yourself, okay?

. . .

CS: I mean, like I said, I took some—I took some for me and then the rest—just sold some of them

Germeil: Okay.

CS: Well, the majority of them.

Germeil: The majority of them?

Germeil: Okay. That—that is—Isn't, is that illegal, . . . ?

CS: I don't—I don't believe so. I know that but I'm telling you 'cause uh

Germeil: You don't know?

CS: You're my doctor!

. . .

Germeil: Be careful, okay?

Id. at 7–8, 11–13.

Despite L.G. admitting to diversion, Respondent wrote L.G. prescriptions for controlled substances during the visit. GX 17 (Prescriptions Issued to L.G. on February 3). The parties stipulated that on February 3, 2017, Respondent prescribed L.G. one hundred and twenty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg. ALJX 11, at 2; Tr. 9.

During the encounter, there was no discussion regarding the amount of L.G.'s pain. GX 9. L.G. testified that on February 3, 2017, Respondent did not conduct a physical exam—in fact, the video evidence shows that Respondent sat on one side of an office desk and L.G. sat across the desk from her. Tr. 103; GX 8. Respondent also did not discuss any medical conditions L.G. had, did not discuss the side effects of or adverse reactions to the medications she was prescribing to L.G., did not discuss other medications L.G. was taking (other than the ones Respondent was prescribing), did not discuss L.G.'s diet or exercise. Tr. 103. L.G. testified that the employee at the Clinic who took his vitals on February 3, 2017, did not conduct a physical exam, ask any question about his medical conditions or ask about his pain. Tr. 98.

The ''Plan'' in L.G.'s records stated that Respondent, among other things, explained the side effects of the medication, advised regarding adverse reactions, discussed lifestyle modifications to control weight and blood pressure, and that a ''[d]etail[ed] explanation was provided about and against 'shopping' from physician to physicians [sic] and the harm (s) [sic] that can provoke.'' RX 2, at 20. According to the patient records, ''[a]pproximately 60 min was spent in this encounter,'' and L.G.'s pain level was ''9.'' *Id.*

Dr. Hoch opined that the two prescriptions issued by Respondent to L.G. on February 3, 2017 (namely one hundred and twenty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg.) were issued outside of the usual course of professional practice and beneath the applicable standard of care in the state of Florida. Tr. 248, GX 17. In support of his opinion, Dr. Hoch explained that the plan does not bear any resemblance to the actual visit and discussion between Respondent and L.G. Tr. 254. *Compare* RX 2, at 20, *with* GX 8 and GX 9. Additionally, the plan discusses managing blood pressure, when L.G.'s blood pressure does not require monitoring. Tr. 253. Also, Dr. Hoch explains that Respondent did not discuss side effects with L.G., fall precautions, or the harms that occur from shopping from physician to physician, but those conversations are recorded in the plan. Tr. 251–54. Additionally, Dr. Hoch explains the plan records that the visit lasted approximately 60 minutes when the visit did not last an hour. Tr. 252–53.

Dr. Hoch testified that the plan Respondent recorded for L.G.'s February 3, 2017 visit was ''very similar to,'' the plan for Y.H.'s September 9, 2016 visit which, as discussed above, was riddled with problems. Tr. 250. *Also compare,* RX 1, at 22, *with* RX 2, at 20.

Additionally, Dr. Hoch's credible and uncontested opinion was that there was nothing documented in the patient file to justify the oxycodone or alprazolam prescriptions. Tr. 250. As Dr. Hoch has mentioned, this combination of controlled substances is a particular concern due to the risk of respiratory depression—and Respondent did not discuss those risks with L.G. during this visit as was required. Tr. 247. Moreover, Dr. Hoch opined that it was ''a source of tremendous concern'' (for L.G.'s safety) that L.G. was prescribed this combination of a high-dose opioid and benzodiazepine after Respondent informed the physician that he drinks alcohol (and Respondent again did not discuss the risks with L.G.). Tr. 255.

Dr. Hoch, as discussed above, explained that in Florida, ''it is a very big responsibility for prescribing physicians to be concerned about diversion.'' Tr. 224; *see supra* II(E). Accordingly, when L.G. informed Respondent that he was selling these ''potentially deadly medications'' that was ''a huge issue for the community at large.'' Tr. 256. Dr. Hoch opined that Respondent failed to follow the ''state's recommendation of being always cautious about diversion of the medications . . .'' and that she should not have written another prescription for L.G. following his admission of diversion. Tr. 256–57. I find that Respondent did not engage L.G. in any meaningful discussion about diversion. RD, at 76; GX 8; GX 9.

Further, Dr. Hoch testified that Respondent did not conduct a periodic review of her treatment of L.G.'s conditions before prescribing controlled substances to him and also did not document a periodic review in the medical record. Tr. 250.

In conclusion, I concur with the ALJ and find that, based on Dr. Hoch's testimony, the two prescriptions for controlled substances issued by Respondent to L.G. on February 3, 2017, were not issued for a legitimate medical purpose and were issued outside of the usual course of professional practice and beneath the standard of care in the State of Florida. RD, at 77; Tr. 248.

2. L.G.'s July 18, 2017 Visit

On July 18, 2017, L.G. visited Respondent in his capacity as a confidential source and pursuant to the instructions given to him by his DEA handler. Tr. 96–97. During the visit, L.G. wore a recording device that provided both audio and visual recordings of the office visit and he activated the device shortly before he went into Respondent's office. Tr. 97, 183. As is evident from the records, Respondent spent approximately seven minutes with L.G. GX 10 (Video Recording from July 18, Encounter). Much of that time was spent discussing travel to Cuba. GX 11 (Transcript of Recording from July 18, Encounter), at 8–12. At this visit, discussion between L.G. and Respondent regarding medical concerns was limited to L.G. stating that he had pain ''like last time.'' GX 11, at 6–7; RD, at 40. However, there was no further elaboration of L.G.'s pain intensity or even where it was located, and Respondent and L.G. did not discuss pain at the prior visit. *Id.* Respondent also pointed out that L.G. did not visit Respondent often, in fact, his last

appointment had been more than four months prior, and that he could have an appointment every month. GX 11, at 11. Respondent did not ask L.G. how he had managed his pain between appointments without a prescription. *Id.*

Respondent and L.G. had a more elaborate conversation discussing diversion at the July 18, 2017 visit. GX 11. The conversation began with Respondent admonishing L.G. for selling his pills. GX 11.

CS: Between you and me, [WHISPERING] remember last time I told you I was selling my script.
Germeil: Yes, I know.
CS: I had to sell it to get to Cuba, to help somebody in the family, which I did. And that's why I say, ''Thank you!''
Germeil: Yeah, but you cannot sell that. That's a controlled medication, uh, ... [Y]ou have to keep that for your pain. . . .
Germeil: Don't do that or I can't give you the meditation—medication.

GX 11, at 2–3, 6. Following the admonition, Respondent stated that she was going to ''send [L.G.] to have a drug test done.'' GX 11, at 7. But then, Respondent said that she would still give L.G. a prescription because she knew that L.G. was in pain and she knew that L.G. was joking when he said that he was selling his pills. GX 11, at 8.

Germeil: I know that you have pain so, that's the reason I'm gonna give them to you.
CS: Okay, thank you.
Germeil: Yeah, but I shouldn't [U/I]. Never tell a doctor that you, you sell your medication. I know you didn't sell them, okay?
CS: Okay.
Germeil: You just wanted to be—to be—[i]t's fashionable now, okay?
CS: Okay.
Germeil: It's fashionable that everybody sells their medications but uh . . . I know that you don't do that.
CS: [CHUCKLES] Okay, no
Germeil: Because you joke, right?
CS: Yeah. A joke. Big joke.

Id.

Respondent wrote L.G. prescriptions for controlled substances during the visit. GX 18 (Prescriptions Issued to L.G. on July 18). The parties stipulated that on July 18, 2017, Respondent prescribed L.G. one hundred and twenty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg. ALJX 11, at 2; Tr. 9.

L.G. testified that on July 18, 2017, Respondent did not conduct a physical exam—in fact, the video recording reveals that Respondent sat on one side of an office desk and L.G. sat across the desk from her. Tr. 108–09, GX 10. Again, L.G. testified that Respondent did not discuss any medical conditions L.G. had, did not discuss the side effects of or adverse reactions to the medications she was prescribing to L.G., did not discuss other medications L.G. was on, did not discuss L.G.'s diet or exercise. Tr. 109. L.G. testified that the clinic employee who took his vitals on February 3, 2017, did not conduct a physical exam, ask any question about his medical conditions or ask about his pain. Tr. 107.

The ''Plan'' in the patient records for L.G.'s July 18, 2017, visit was identical to the plan for the February 3, 2017, visit. *Compare* RX 2, at 18 *with* RX 2, at 20. The ''Plan'' again documents that Respondent, among other things, explained the side effects of the medication, advised regarding adverse reactions, discussed lifestyle modifications to control weight and blood pressure, and that a ''[d]etail[ed] explanation was provided about and against 'shopping' from physician to physicians [sic] and the harm (s) [sic] that can provoke.'' RX 2, at 18. According to the patient records, ''[a]pproximately 60 min was spent in this encounter,'' and L.G.'s pain level was ''9.'' *Id.*

Dr. Hoch opined that the two prescriptions issued by Respondent to L.G. on July 18, 2017 (namely one hundred and twenty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg.) were issued outside of the usual course of professional practice and beneath the applicable standard of care in the state of Florida. Tr. 259; GX 18. In support of his opinion, Dr. Hoch noted that there was no indication that a physical exam was conducted or that a medical history was taken. Tr. 261.

Dr. Hoch explained that the plan Respondent recorded for L.G.'s July 18, 2017 visit was similar to the plan for L.G.'s February 3, 2017, visit. Tr. 262. *Also compare,* RX 2, at 18, *with* RX 2, at 20. Accordingly, Dr. Hoch opined that the patient's record does not bear any resemblance to the actual visit and discussion between Respondent and L.G. Tr. 264. *Compare* RX 2, at 18, *with* GX 10 and GX 11. Again, Dr. Hoch explained that Respondent did not discuss side effects or adverse reactions with L.G., fall precautions or safety measures, or the dangers of shopping from physician-to-physician, but those conversations are recorded in the plan as if they had happened. Tr. 263–64.

Additionally, Dr. Hoch opined that there was nothing documented in the patient file to justify the oxycodone or alprazolam prescriptions here. Tr. 258–59, 263. As found above, this combination of controlled substances, namely ''a very strong opioid with a very strong [b]enzodiazepine[,] . . . has to be qualified quite extensively in the medical record to justify that both of them are being given at the same time.'' Tr. 258–59. Dr. Hoch explained that the justification was not present here. Tr. 259.

Regarding diversion, Dr. Hoch again opined that L.G. ''was admitting to [Respondent] that he was diverting medications that were given to him, and regardless of that statement, he did, in fact, get the prescription[s].'' Tr. 259. Accordingly, I agree with the ALJ's finding that Respondent did not engage L.G. in any meaningful discussion about diversion. RD, at 79; GX 10; GX 11.

Further, Dr. Hoch opined that the record for L.G. did not indicate that Respondent conducted a periodic review of her treatment of L.G.'s conditions. Tr. 262. Dr. Hoch explained that Respondent's Medical record for L.G.'s July 18, 2020 visit was not accurate, complete, or otherwise sufficient to meet the Florida standard of care. Tr. 262.

In conclusion, based on the credible and uncontroverted opinion of Dr. Hoch, I concur with the ALJ that the two prescriptions for controlled substances issued by Respondent to L.G. on February 3, 2017, were not issued for a legitimate medical purpose and were outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida. RD, at 80; Tr. 259.

3. L.G.'s August 30, 2017 Visit

On August 30, 2017, L.G. visited Respondent in his capacity as a confidential source and pursuant to the instructions given to him by his DEA handler. Tr. 96–97, 113. During the visit, L.G. wore a recording device that provided both audio and visual recordings of the office visit and he activated the device shortly before he went into Respondent's office. Tr. 97, 183. As is evident from the records, Respondent spent approximately seven minutes with L.G. GX 12 (Video Recording from August 30, Encounter); RD, at 45. The vast majority of that time was spent on small talk and discussing potential appointments for people L.G. knew. GX 13 (Transcript of Recording from August 30, Encounter).

At this visit, there was limited discussion between L.G. and Respondent regarding a new medical concern. RD, at 35; GX 12; GX 13.

CS: . . . Can you, really quick, check my knees right here, cause it's discomfort—Ouch, you saw, you heard?
Germeil: Let me see, let me see.
CS: It's still in discomfort. . . .

Germeil: Uh-huh. Yeah, you have arthritis, bones against bones . . . . Listen, you have to put [STUTTERS] a, uh, support. . . .
CS: Yeah, cause it's always been in discomfort.
Germeil: Uh-huh. Maybe you had a, a trauma in this knee before? You, you hit—did you hit it—somewhere? . . .
CS: I mean, I think so. . . .
Germeil: You have arthritis, the worst arthritis . . . . [Y]ou need to put a, a support, and then massage. Buy Bengay

GX 13, at 9–10. In response to the newly identified knee problem, L.G. testified that Respondent touched his knee; she ''grabbed [his] knee [right on his kneecap] with her two fingers and her thumb, and for like no more than three seconds, and she said [he] had arthritis.'' Tr. 143. L.G. further testified that Respondent did not conduct ''a thorough physical exam.'' Tr. at 115. *See also* RD, at 81; GX 12.

In addition to the limited discussion of his knee concern, L.G. stated during this appointment that he was no longer selling his pills. GX 13, at 4–5. Later in the visit, Respondent seemed to advise L.G. to ''be careful with the medications.'' GX 13, at 7. L.G. also explained to Respondent that the guys he was selling to would like to become Respondent's patients and Respondent told him to check with the front desk. GX 13, at 4–5.

CS: Anyways—pss—[WHISPERING] I'm not selling no more. I'm taking my own stuff.
Germeil: Okay. . . .
CS: . . . I was gonna mention it to you, if I can, the guys that I was, whatever they need to see a doctor. I don't know if you want new patients or you might need new patients, because they want to get the meds. . . . The [o]xycodone or whatever. . . .
Germeil: You can, you can, you can ask [at the front desk] if they have any, any, uh—any, any spot . . . [f]or new patients.
CS: Yeah, they guys, okay the guys I was selling to, but they are good people, they're reliable people. They won't even miss their appointments or nothing. They are good people. . . .

Id.

Respondent wrote L.G. prescriptions for controlled substances during the visit (prior to touching L.G.'s knee). GX 19 (Prescriptions Issued to L.G. on August 30); GX 12. The parties stipulated that on August 30, 2017, Respondent prescribed L.G. one hundred and twenty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg. ALJX 11, at 2; Tr. 9.

Prior to issuing the prescriptions on August 30, 2017, there was no discussion of the amount of L.G.'s pain. GX 12. After receiving the prescriptions, L.G. mentioned that he had ''discomfort'' in his right knee, which Respondent quickly looked at and claimed was the result of arthritis. GX 13, at 9; Tr. 115; RD, at 45. L.G. testified that Respondent did not conduct a thorough physical exam. Tr. 115. For most of the appointment, Respondent sat on one side of an office desk and L.G. sat across the desk from her. GX 13; RD, at 81. Respondent also did not discuss any medical conditions L.G. had, did not discuss the side effects of or adverse reactions to the medications she was prescribing to L.G., did not discuss other medications L.G. was on, did not discuss L.G.'s diet or exercise. Tr. 115–16. L.G. testified that the person who took his vitals on August 30, 2017, did not conduct a physical exam, ask any question about his medical conditions or ask about his pain. Tr. 113–14.

The ''Plan'' in Respondent's records on L.G. for the August 30, 2017, visit, was identical to the plans for L.G.'s July 18, 2017, and February 3, 2017, visits; and was nearly identical to the plan sections purporting to capture Y.H.'s three visits at issue in the case. *Compare* RX 2, at 16, *with* RX 2, at 18 and 20, and RX 1, at 19, 20, and 22. Once again, the ''Plan'' stated that Respondent, among other things, explained the side effects of the medication, advised regarding adverse reactions, discussed lifestyle modifications to control weight and blood pressure, and that a ''[d]etail[ed] explanation was provided about and against 'shopping' from physician to physicians [sic] and the harm (s) [sic] that can provoke.'' RX 2, at 16. According to the patient records, ''[a]pproximately 60 min was spent in this encounter,'' and L.G.'s pain level was ''9.'' *Id.*

Dr. Hoch opined that the two prescriptions issued by Respondent to L.G. on August 30, 2017, (namely one hundred and twenty dosage units of oxycodone HCL 30 mg. and sixty dosage units of alprazolam 2 mg.) were issued outside of the usual course of professional practice and beneath the applicable standard of care in the state of Florida. Tr. 270–71; GX 19. In support of his opinion, Dr. Hoch explained that the plan differs from the actual visit and discussion between Respondent and L.G. Tr. 267–69. *Compare* RX 2, at 16, *with* GX 12 and GX 13. Dr. Hoch explained that Respondent did not discuss side effects or adverse reactions with L.G., fall precautions, or the harms that occur by shopping from physician to physician, but those conversations are recorded in the plan. Tr. 268–69. Dr. Hoch explained that the plan Respondent recorded for L.G.'s August 30, 2017 visit was ''identical'' to the plan for L.G.'s July 18, 2017, and February 3, 2017, visits. Tr. 267–68. *Compare* RX 2, at 16, *with* RX 2, at 18 and 20.

Additionally, Dr. Hoch's expert opinion was that the patient file was insufficient to justify the oxycodone or alprazolam prescriptions here. Tr. 267. He also explained that the record was not complete and accurate. Tr. 269. As found above, per Dr. Hoch, this combination of controlled substances is a particular concern due to the risk of respiratory depression, and Respondent did not discuss those risks with L.G. during this visit as was required. Tr. 247, 265–66.

Regarding diversion, Dr. Hoch pointed out that once again at this visit, L.G. informed Respondent that he had been selling his medication. Tr. 266. Dr. Hoch noted that Respondent did inform L.G. that he needed to be careful with the medications, but opined that the statement was not sufficient to warn L.G. of the dangers of diversion. Tr. 270.

Further, Dr. Hoch opined that Respondent did not conduct a periodic review of her treatment of L.G.'s conditions before prescribing controlled substances to him (let alone document it in the medical record). Tr. 269. He also opined that there was no indication in the record that Respondent gave a physical exam [28] or took a full and complete medical history. Tr. 269.

In conclusion, and based on the credible and uncontroverted testimony of Dr. Hoch, I concur with the ALJ that the two prescriptions for controlled substances prescriptions issued by Respondent to L.G. on August 30, 2017, were not issued for a legitimate medical purpose and were outside the usual course of professional practice and beneath the applicable standard of care in the State of Florida. RD, at 83; Tr. 270–71. In summary, I find that the six controlled substance prescriptions Respondent issued to L.G., on February 3, 2017, July 18, 2017, and August 30, 2017, were issued outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida.

[28] Dr. Hoch testified that merely touching a knee is insufficient for a doctor to determine that a patient has arthritis. Tr. 330. To adequately conduct a physical examination regarding knee pain, a physician would ''have to do flexion extension exercises . . . palpate or examine the knee, press it and try to find particular locations and then if you['re] very concerned . . . [t]his is where x-rays and perhaps MRIs do come into play.'' Tr. 329. Thus, I agree with the ALJ's finding that Respondent's touching of L.G.'s right knee on August 30, 2017, did not constitute a sufficient physical examination. RD, at 81.

I. Allegation of Recordkeeping Violations and Other State Law Violations

The medical records at issue in this case cover the six different encounters [29] discussed in detail above: Y.H.'s encounters with Respondent on September 8, 2016, October 12, 2016, and January 25, 2017; and L.G.'s encounters with Respondent on February 3, 2017, July 18, 2017, and August 30, 2017. *See* OSC; *supra* II. According to Dr. Hoch's credible and uncontroverted testimony, the records Respondent maintained for Y.H. and L.G. do not document a complete medical history, a physical examination, or a periodic review as required by state law. RD, at 50; Tr. 324, 338–39; RX 1; RX 2. Based on Dr. Hoch's testimony and the record as a whole, I find that the medical records for each of the six encounters are insufficient, inaccurate, and incomplete.

Consistent with the findings of the ALJ and based on the uncontroverted and credible testimony of Dr. Hoch, I find that the ''Plan'' sections of the patient records for each of the six encounters at issue in this case are identical (with the exception of Y.H.'s January 25, 2017, plan which contains one additional line regarding the need for a drug test). *Compare* RX 1, at 19, 20, 22; and RX 2, at 16, 18, 20; *see also* Tr. 234, 236, 241, 250, 262, 267–68. All six of the patient records document that Respondent, among other things, explained the side effects of the medication, advised regarding adverse reactions, discussed lifestyle modifications to control weight and blood pressure, discussed safety precautions, and that a ''[d]etail[ed] explanation was provided about and against 'shopping' from physician to physicians [sic] and the harm (s) [sic] that can provoke.'' RX 1, at 19, 20, 22; and RX 2, at 16, 18, 20. In contrast to the patient records, I have found that Respondent did not discuss the side effects of the medication, adverse reactions, lifestyle modifications to control weight and blood pressure, safety precautions, or shopping from physician to physician during any of the six encounters at issue. *See supra* and GX 3, GX 5, GX 7, GX 9, GX 11, and GX 13. My finding is consistent with Dr. Hoch's testimony that the plan section of the patient records does not bear any resemblance to the actual visits and discussions between Respondent and the confidential sources. *See* Tr. 218, 241–42, 251–54, 263–64, 268–69. I agree with the ALJ's finding that ''merely by comparing the recordings made by both Y.H. and L.G. when they met with [Respondent] with her treatment notes, it is readily obvious that the records [Respondent] prepared do not accurately report what happened during those encounters.'' RD, at 91.

Not only are the plans inaccurate, but even if they were accurate, Dr. Hoch opined that none of the plans explain what the objectives are that the Respondent was planning to use to determine the success of her treatment. Tr. 353. *See also* 230, 246. This is because, as Dr. Hoch characterized it, there was a ''generic rehashing of the same plan visit after visit'' and the plans fail to identify what Respondent was ''doing for [any] particular problem.'' Tr. 235.

I have found above that the patient records for each of the six encounters at issue reflect that ''[a]proximately 60 min was spent in [each] encounter.'' RX 1, at 19, 20, 22; and RX 2, at 16, 18, 20. In contrast to the patient records, I have found that the lengthiest encounter at issue in this matter was only approximately ten minutes, and that most of the encounters were around seven to seven–and-a-half minutes long. GX 2, GX 4, GX 6, GX 8, GX 10, and GX 12.

I have found above, based on the record as a whole and Dr. Hoch's testimony, that Respondent did not conduct a physical exam during any of the six encounters and that none of Respondent's medical records reflect that a physical exam was conducted at any of the six encounters at issue. GX 2, GX 4, GX 6, GX 8, GX 10, and GX 12; RX 1, at 19, 20, 22; and RX 2, at 16, 18, 20; Tr. 48–49, 54, 103, 109, 115, 230, 232, 242, 246, 269, 324, 339. Additionally, I find, consistent with Dr. Hoch's testimony, that none of the medical records at issue in this matter reflect a complete medical history. Tr. 324. Additionally, I find, consistent with Dr. Hoch's testimony, that there was no periodic review conducted at any of the six encounters at issue here. Tr. 230, 242, 246, 250, 262, 269. Therefore, I agree with the ALJ and find substantial evidence that Respondent issued a total of twelve prescriptions to two different CSs without maintaining sufficient, accurate or complete records.

To summarize my findings above, I agree with the ALJ and find substantial evidence that Respondent issued these twelve prescriptions for controlled substances outside of the usual course of professional practice and beneath the standard of care in the State of Florida in violation of federal and state law.

III. Discussion

A. Allegation That Respondent's Registration is Inconsistent With the Public Interest

Under Section 304 of the CSA, ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined by such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
> (2) The applicant's experience in dispensing . . . controlled substances.
> (3) The applicant's conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
> (5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie,* M.D., 68 F R 15,227, 15,230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *U. S. Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer,* M.D., 74 FR 459, 462

[29] Dr. Hoch explains that the word ''encounter refers to the direct encounter for the physician with the patient,'' and does not include time the patient spent with a medical assistant. Tr. 303.

(2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

Under DEA's regulation, ''[a]t any hearing for the revocation . . . of a registration, the . . . [Government] shall have the burden of proving that the requirements for such revocation . . . pursuant to . . . 21 U.S.C. [§] 824(a) . . . are satisfied.'' 21 CFR 1301.44(e). In this matter, while I have considered all of the factors, the relevant evidence is confined to Factors One, Two and Four. I find that the evidence satisfies the Government's *prima facie* burden of showing that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). I further find that Respondent failed to produce sufficient evidence to rebut the Government's *prima facie* case.

1. Factors One and Three: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority and Respondent's Conviction Record Under Federal or State Laws Relating to Controlled Substances

Respondent suggests that Factor One weighs in her favor because the parties stipulated and the ALJ found that Respondent holds a valid state medical license in Florida. ALJX 28 (Respondent's Posthearing Brief), at 11; ALJX 11, at 1; RD, at 59.

In determining the public interest, the ''recommendation of the appropriate State licensing board or professional disciplinary authority . . . shall be considered.'' 21 U.S.C. 823(f)(1). Two forms of recommendations appear in Agency decisions: (1) A recommendation to DEA directly from a state licensing board or professional disciplinary authority (hereinafter, appropriate state entity), which explicitly addresses the granting or retention of a DEA COR; and (2) the appropriate state entity's action regarding the licensure under its jurisdiction on the same matter that is the basis for the DEA OSC. *John O. Dimowo, M.D.,* 85 FR 15,800, 15,810 (2020); *see also Vincent J. Scolaro, D.O.,* 67 FR 42,060, 42,065 (2002).

In this case, neither the State Board nor any other state entity has made a direct recommendation to the Agency regarding whether the Respondent's registration should be suspended or revoked; however, as previously discussed, the State Board issued an Order incorporating a Settlement Agreement reached following an Administrative Complaint filed by the State of Florida Department of Health against Respondent based on Respondent's treatment of one patient, M.N., between July 2013 and August 2015. RX 11, at 19. The Florida allegations regarding Respondent's treatment of M.N. are similar [30] to the facts I found above regarding Respondent's treatment of Y.H. and L.G between 2016 and 2017; however, they clearly do not constitute the same matter as the facts alleged in the OSC (they involved an entirely different patient during a preceding timeframe). *See supra* II(F).

I have much more evidence of misconduct before me than the State Board had at the time that it made its decision. Further, the fact that the State Board did not choose to revoke Respondent's state medical registration carries minimal to no weight under Factor One, because there is no evidence that the State Board would have made the same decision in the face of the egregious conduct found herein involving two further patients, who were openly diverting their prescriptions, *after* the State Board had already disciplined Respondent for similar behavior.[31] Accordingly, the terms of the State Board Order have been considered, but I find that they have no impact on the public interest inquiry in this case. *See John O. Dimowo, M.D.,* 85 FR at 15,810.

As to Factor Three, the parties stipulated that Respondent has never been convicted of violating any federal or state law relating to the manufacture, distribution, or dispensing of controlled substances. ALJX 19; Tr. 11. *See also* 21 U.S.C. 823(f)(3). However, as Agency cases have noted, there are a number of reasons why a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49,956, 49,973 (2010). Agency cases have therefore held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

2. Factors Two and Four—the Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Respondent asks that I consider evidence of her positive dispensing experience. ALJX 28, at 12. In evaluating Respondent's dispensing experience, I note that Respondent has significant experience as a licensed physician in Florida since October 2007, and running her own medical practice since 2011. RX 5, at 1. Respondent claimed, without providing any evidence to support the claim, that she has treated ''thousands of patients for pain medicine, and there have been no reported overdoses or deaths during that period of time.'' [32] Tr. 19. The Agency assumes that all of the prescriptions Respondent issued were issued lawfully, except for those prescriptions that the Government alleged and established were issued unlawfully. *See Wesley Pope, M.D.,* 82 FR 14,944, 14,982–84 (2017). Respondent also claimed, and included 38 unique letters to patients as evidence, that she has discharged patients who refused urine testing. RX 8. However, Respondent's evidence shows that both Y.H. and L.G. were ordered to take urine drug tests, did not take those urine drug tests, and did not receive discharge letters (although they were not seen again). RX 1, at 13, 18; RX 3; RX 8; Tr. 405–06, 409–10, 413. Furthermore, even without the urine drug tests, Respondent knew that Y.H. and L.G. were not taking their medication as prescribed because they directly told her that they were diverting the controlled substances.

Respondent's handling of the two confidential sources as found herein demonstrates that her prescribing practices fell short of the applicable standard of care for twelve

[30] Respondent's Posthearing Brief states: ''In January 2017, a complaint was filed against Dr. Germeil before the Florida Board of Medicine for allegations similar to the instant case.'' ALJX 28, at 15. Additionally Respondent's counsel stated in her oral closing arguments, ''the allegations, as you'll see, are similar in prescribing medication for not a legitimate purpose and for medical records.'' Tr. 489–90.

[31] In *Dimowo,* the Acting Administrator found that ''[a]lthough statutory analysis [of the CSA] may not definitively settle . . . [the breadth of the cognizable state 'recommendation' referenced in Factor One], the most impartial and reasonable course of action is to continue to take into consideration all actions indicating a recommendation from an appropriate state;'' however, *Dimowo* also limited the ''recommendations'' DEA would consider to the ''actions of an appropriate state entity on the same matters, particularly where it rendered an opinion regarding the practitioner's medical practice in the state due to the same facts alleged in the DEA OSC.'' *John O. Dimowo,* 85 FR at 15,810. Although the same ''matters'' may include the same types of violations, in this case, I have no indication that the Board would have made a similar decision in the face of these additional egregious violations and continued misconduct. In fact, Respondent specifically agreed in the settlement not to commit further violations of law. RX 11, at 12.

[32] I decline to consider that ''no reported overdoses or deaths'' is an indicator of positive dispensing experience and there is no legal authority for the proposition that I must find death or an overdose before I may suspend or revoke a registration. Agency decisions have found that ''diversion occurs whenever controlled substances leave 'the closed system of distribution established by the CSA . . . .'' *Roy S. Schwartz,* 79 FR 34,360, 34,363 (2014)).

prescriptions. As I discuss further below, Respondent failed to address patient admissions of diversion, failed to conduct physical exams, failed to discuss the risks of controlled substances, and falsified medical records.

Factor four is demonstrated by evidence that a registrant has not complied with laws related to controlled substances, including violations of the CSA, DEA regulations, or other state or local laws regulating the prescribing of controlled substances.

(a) Allegation that Respondent Issued Prescriptions for Controlled Substances Outside the Usual Course of the Professional Practice

According to the CSA's implementing regulations, a lawful prescription for controlled substances is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). The Supreme Court has stated, in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, that ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

As I have found, in agreement with the RD and based on the credible expert testimony of Dr. Hoch, Florida regulations require that a doctor: Take a complete medical history and conduct a physical examination [33] before issuing a prescription for a controlled substance; develop a written treatment plan; discuss the risks and benefits of controlled substances with a patient; and maintain complete and accurate records with respect to a patient. RD, at 9; Tr. 205–06, 338. Additionally, a physician is required to conduct a periodic review of the course of treatment provided to a patient. RD, at 50; Tr. 337–38.

Based on the credible and uncontroverted testimony of Dr. Hoch, and in agreement with the RD, I find that Respondent issued a total of twelve prescriptions outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida in violation of 21 CFR 1306.04(a). RD, at 92.

i. Failure To Address Patients' Admissions of Diversion

The Florida Code provides that ''[p]hysicians should be diligent in preventing the diversion of drugs for illegitimate purposes.'' Fla. Admin. Code r. 64B8–9.013(1)(d) (West 2020). Dr. Hoch explained that when a patient tells a doctor that he or she is diverting his or her controlled substances that statement ''is a very big red flag that has to be addressed at that moment.'' Tr. 224–25; RD, at 51. In fact, Dr. Hoch stated that if a patient tells a doctor that he or she is selling or giving away controlled substances, ''that's sort of a deal breaker . . . .'' Tr. 351. In other words, as I found above the standard of care in Florida requires that a physician stop writing prescriptions for a patient following statements from the patient that are consistent with diversion. *See supra,* II(E).

I have found above that each of the CIs admitted to having engaged in diversion at each of the six encounters at issue in this matter. Y.H. clearly admitted to Respondent that she had been selling at least some of her pills to her brother on September 8, 2016, October 12, 2016, and January 25, 2017. GX 3, at 17, 19; GX 5, 13 12–13; GX 7, at 4, 6, 9–11. Yet, as I have found, Respondent did not advise Y.H. not to sell her controlled substances or otherwise engage in any meaningful conversation about diversion with Y.H. *See* RD, at 68, 71, 73. In fact, on October 12, 2016, Respondent clearly acknowledged Y.H.'s admission of diversion and seems to have even condoned the conduct. *See supra,* II(G)(2); GX 5, at 12–13. And on January 25, 2017, Respondent replied to Y.H.'s admission of selling pills by reassuring Y.H. that she was a good person. GX 7, at 9–11. The only counseling Respondent did with Y.H. regarding diversion was to warn Y.H. not to tell anyone that Respondent was helping her out because Respondent ''d[idn't] want to . . . get into trouble.'' *Id.* at 11.

L.G. also clearly admitted to Respondent that he had been selling at least some of his pills to people on February 3, 2017, July 18, 2017, and August 30, 2017. GX 9, at 7–8, 11–13; GX 11, at 2–3, 6; GX 13, at 4–5. Yet, as I have found above, Respondent did not engage in any meaningful conversation about diversion with L.G. either. *See supra,* II(H); RD, at 76, 79. Respondent did discuss diversion in greater detail with L.G. than she did with Y.H., and Respondent did provide warnings to L.G. at each of the three encounters including: That he needed to ''try to keep [his medication] for himself,'' GX 9, at 12; that ''[he] cannot sell [the scripts because] [t]hat's a controlled medication,'' GX 11, at 3; and that he should ''be careful with the medications.'' GX 13, at 7. However, Respondent issued prescriptions to L.G. immediately following these warnings, which renders her comments perfunctory. *See* RD, at 80.

Dr. Hoch opined that each of the twelve prescriptions at issue in this case were issued without a legitimate medical purpose because diversion was not appropriately addressed at any of the six visits in this case.[34] *See* Tr. 224, 231, 243–44, 256–57, 259, 270. Indeed, the confidential sources admitted to having engaged in diversion during each of the six visits and the parties have stipulated that prescriptions were issued during each of the six visits.

For all of these reasons, I find that Respondent violated federal law and Florida Administrative Code § 64B8–9.013(1)(d) by prescribing controlled substances to Y.H. and L.G. in spite of their admitting to engaging in diversion immediately prior to the issuance of the prescriptions.

ii. Failure To Conduct Physical Examinations

As I found above based on Dr. Hoch's testimony, the State of Florida requires that, when prescribing controlled

[33] The Florida Code does not define what constitutes a physical exam and does not necessarily require that a physician conduct a physical examination of a patient each time the patient presents for an appointment. RD, at 50; Tr. 289. However, Dr. Hoch opined that the standard of care requires a physician to perform a physical examination in certain circumstances including when the patient requests a higher dose of controlled substances, presents with new symptoms or complaints, has a new diagnosis, or hasn't been seen for a period of months. *See* Tr. 290, 341–42, 345–46.

[34] The ALJ found that diversion was not properly addressed at only five of the encounters. We both found that the prescriptions issued by Respondent to L.G. were not issued for a legitimate medical purpose on August 30. 2017; however, the ALJ found that Respondent did not have any obligation during this visit to address L.G.'s diversion, because L.G. stated that he was no longer selling pills and that the people he was selling pills to wanted to become patients. RD, at 81–82. I agree that L.G.'s statements indicate that he did not plan to engage in diversion in the future, however L.G. did still admit that he had engaged in diversion of Respondent's prescriptions in the past. Dr. Hoch seemed to be fully aware that L.G. was admitting to past diversion (stating, ''[t]he CS or patient informs the doctor that he was selling the medication . . .'' Tr. 266 (*emphasis added*), when he opined that Respondent's discussion of the dangers of diversion at the August 30, 2017, encounter were insufficient and that the prescriptions that followed were not issued in the usual course of professional practice. Tr. 270. I see no reason to stray from Dr. Hoch's credible and uncontroverted opinion. Further, the fact that the former customers of L.G. who previously obtained controlled substances unlawfully might visit Respondent to obtain controlled substances directly from Respondent hardly seems to address the diversion issue.

substances for pain, a ''physical examination must be conducted and documented in the medical record.'' Fla. Admin. Code r. 64B8–9.013(3)(a) (West 2020); *supra,* II(E). According to Dr. Hoch, the Florida Code does not define what constitutes an initial physical exam and does not necessarily require that a physician conduct a physical examination of a patient each time the patient presents for an appointment. RD, at 50; Tr. 289. However, Dr. Hoch opined that the standard of care requires a physician to perform a follow up physical examination in certain circumstances including when the patient requests a higher dose of controlled substances, presents with new symptoms or complaints, has a new diagnosis, or has not been seen for a period of months. *See* Tr. 290, 341–42, 345–46.

I found above that Respondent did not conduct a physical exam during any of the confidential sources' six visits.[35] *See supra,* II(I); Tr. 230, 232, 242, 246, 269, 324, 339. Not only did the confidential sources credibly testify that no physical examination was conducted during their respective encounters, *see* Tr. 48–49, 54, 59, 104, 109, 115, but Dr. Hoch's uncontroverted testimony was that there was no indication in the record (including the video evidence) that Respondent performed a physical exam during the six visits. Tr. 227, 230, 242, 249, 261, 269, 338–39. I find that Respondent's failure to perform a physical exam during any of the six visits in this matter violates the standard of care.

The record in the evidence establishes that Respondent never performed a physical examination on Y.H.[36] RD, at 22; Tr. 92. Additionally, Dr. Hoch opined that, even if an initial physical examination had been performed, Respondent would have been required to give a new physical examination to Y.H. on September 8, 2016, to justify the 40% increase in oxycodone HCL 30 mg. that Respondent prescribed. RD, at 25; Tr. 339–342.

Similarly, there is no indication in the record that Respondent ever performed a physical examination of L.G.[37] RD, at 79; RX 2, at 16, 18, 20–22. Additionally, Dr. Hoch opined that, even if an initial physical examination had been performed, Respondent would have been required to give a new physical examination to L.G. on February 3, 2017, because of the new diagnosis of chronic back pain on that date. Tr. 345–46. Per Dr. Hoch a new physical examination would also have been required on both February 3, 2017, and July 18, 2017, because it had been over five months between Respondent's prescriptions to L.G. for controlled substances for pain and the delay in treatment gives rise to the question of whether L.G. had such severe pain that he needed the controlled substances to relieve his pain. RD, at 37, 43, 76, 79; Tr. 345–48.

For all these reasons, I find that Respondent violated Florida Administrative Code § 64B8–9.013 and issued prescriptions outside the usual course of professional practice and beneath the applicable standard of care by prescribing controlled substances for pain without conducting a physical exam.

iii. Failure To Discuss Risk of Controlled Substances With Patients

In accordance with Dr. Hoch's opinion, I found above that the State of Florida requires that a doctor discuss the risks and benefits of controlled substances with a patient. *See supra,* II(E); RD, at 9; Tr. 205–06; Fla. Admin. Code r. 64B8–9.013(3)(c) (West 2020). Here Respondent prescribed each confidential source both oxycodone 30 mg., which Dr. Hoch stated is a very strong dose, and alprazolam 2 mg., which Dr. Hoch stated is a very strong dose, during each of the six encounters at issue in this case (for a total of twelve prescriptions). RX 1, at 16; RX 2, at 14; Tr. 219, 222.

Dr. Hoch explained that the oxycodone prescription alone can cause a number of side effects that Respondent did not discuss with Y.H. Tr. 220–221. Some of the less disabling side effects of opioid use include pruritus or itching, urinary retention, nausea and vomiting, and constipation. Tr. 220–221. Dr. Hoch explained that ''the most devastating complication or side effect of an opioid [like oxycodone] is respiratory depression, and that's what kills people.'' Tr. 221–222. Dr. Hoch explained that the risk is particularly high where, as here, the opioid is prescribed with a drug like alprazolam. Tr. 222.

In light of the medications prescribed, Dr. Hoch opined that Respondent was required to warn of the risk of side effects including respiratory depression and instruct the patient to make sure there was at least a three-to-four hour gap between administering the two different medications. *Id.* Based on Dr. Hoch's credible and uncontroverted opinion, I find that there was no discussion of the risks of using these controlled substances (much less the risk of respiratory depression that can occur when using them together) at any of the six encounters. Tr. 222, 230, 232, 237–38, 241, 247, 251, 258–59, 263, and 268.

Another example of Respondent's failure to discuss the risks of using controlled substances occurred when L.G. informed Respondent he drinks alcohol. Tr. 255. According to Dr. Hoch, when a physician learns that a patient could be drinking while being prescribed a high dose opioid and benzodiazepine, the patient ''should be warned very strongly'' that the medications and alcohol should not be taken together. Tr. 255. According to Dr. Hoch, ''[w]hen [patients] tell you that they're drinking, that's a huge issue for their safety.'' Tr. 256. Dr. Hoch opined that on February 3, 2017, L.G. informed Respondent that he drinks alcohol, Respondent was required to warn L.G. of the risks of taking the prescribed controlled substances with alcohol, and Respondent failed to issue the required warning. Tr. 255–56.

For all these reasons, I find that Respondent violated Florida Administrative Code § 64B8–9.013 and issued prescriptions outside of the usual course of professional practice and beneath the applicable standard of care by failing to discuss the risks of using the prescribed controlled substances with Y.H. and L.G.

In light of the above, the ALJ found, and I agree, that Respondent issued a total of twelve prescriptions outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida. RD, at 92.

iv. Recordkeeping Violations

Florida Administrative Code, Rule 64B8–9.013 lays out a physician's responsibilities when prescribing controlled substances for pain management.[38] *See supra,* II(E); RD, at 9; Tr. 203–05. With regard to medical records, the Florida Administrative Code provides that a physician is required to ''keep accurate and complete

[35] In fact, the ''objective'' section of each and every one of the patient records Respondent introduced into evidence was empty. *See* RX 1, and RX 2. Dr. Hoch testified that the ''objective'' section is where a doctor should identify her objective findings based on a physical examination. RD, at 51; Tr. 212. Based on the records and Dr. Hoch's testimony, it is fair to conclude that Respondent never conducted a physical exam of either confidential source.

[36] *See supra* n.19.

[37] *See supra* n.27.

[38] Admin. Code r. 64B8–9.013 provides guidelines that are authoritative on physicians in Florida; however, ''[t]he Board will not take disciplinary action against a physician for failing to adhere strictly to the provisions of these standards, if good cause is shown for such deviation.'' Fla. Admin. Code r. 64B8–9.013(1)(f) (West 2020); *see also* RD, at 9; Tr. 272, 280–81.

medical records'' to include, but not be limited to:

—''The complete medical history and a physical examination, including history of drug abuse or dependence as appropriate.'' Fla. Admin. Code r. 64B8–9.013(3)(f)(1) (West 2020).

—''Treatment objectives.'' Fla. Admin. Code r. 64B8–9.013(3)(f)(4) (West 2020).

—''[D]iscussion of risks and benefits.'' Fla. Admin. Code r. 64B8–9.013(3)(f)(5) (West 2020).

—''Periodic reviews. Records must remain current, maintained in an accessible manner, readily available for review, and must be in full compliance with Rule 64B8–9.003 . . . .'' Fla. Admin. Code r. 64B8–9.013(3)(f)(10) (West 2020).

Fla. Admin. Code r. 64B8–9.013(3)(f) (West 2020) (*emphasis added*).

Additionally, a physician's ''medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed . . . .'' Fla. Admin. Code r. 64B8–9.003(3) (West 2020) (*emphasis added*). Similarly, the Florida Statute provides that the ''following acts constitute grounds for denial of a license or disciplinary action . . .: Failing to keep legible . . . medical records . . . that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.'' Fla. Stat. Ann. § 458.331(1)(m) (West 2020).

Dr. Hoch testified that the ''plan'' portion of Respondent's records was where Respondent should have provided ''a justification as to why [she] was doing what [she was] doing'' with regards to her treatment of a patient. Tr. 212. Dr. Hoch further opined that the ''plans'' contained in Respondent's medical records concerning L.G. and Y.H. are not plans in so far as they did not contain any objective standards by which treatment success could be measured. Tr. 335–36, 353. In light of Dr. Hoch's testimony, I find that the Respondent's records were insufficient to meet the requirements set by the State of Florida. Dr. Hoch also testified that the plans do not bear any resemblance to the recorded corresponding visits they were meant to document. Tr. 218. In fact, the ALJ found, and I agree, that merely by comparing the recordings made by both Y.H. and L.G. when they met with Respondent with the treatment notes, it is readily obvious that the records that Respondent prepared do not accurately report what happened during these encounters. RD, at 91. I therefore find that Respondent did not maintain the records required by the State of Florida. In fact, Respondent admitted as much in her Posthearing Brief, stating ''that her medical records for Y.H. and L.G. were not complete and accurate.'' ALJX 28, at 15. Therefore, I find, consistent with the ALJ and Dr. Hoch's testimony, that in failing to keep sufficient and accurate records as required by the State of Florida, Respondent violated Florida Administrative Code § 64B8–9.013 and 9.003.

The Government further alleged that Respondent violated the state law by ''falsif[ying] numerous patient records in order to conceal [her] illegal prescribing.'' OSC, at 2. More specifically, the OSC alleged that Respondent falsified her records by documenting that 60 minutes was spent on each encounter when none of the encounters exceeded 15 minutes and by documenting that she discussed side effects, adverse reactions, safety precautions and the risks of physician shopping, when ''those issues were never discussed.'' OSC, at 9; *see also* RD, at 83.

To support the allegation that Respondent's recordkeeping was fraudulent, the Government points to the Administrative Complaint filed against Respondent by the State of Florida. ALJX 27 (Gov Posthearing Brief), at 29. The Government states that, regardless of the merits of the allegations contained in the Administrative Complaint, it clearly put Respondent on notice ''no later than January 2017 that the standard of care required her to discontinue prescribing controlled substances to patients engaged in diversion and required her to properly maintain medical records.'' ALJX 27 (Gov Posthearing), at 30. Despite this notice, Respondent continued to issue prescriptions for controlled substances to Y.H. and L.G, without maintaining proper records in violation of the relevant standard of care and Florida law.

The ALJ found, and I agree, that not only do Respondent's medical records for Y.H. and L.G. fail to contain the minimum information required under Florida law, they also clearly report events that did not occur during the medical appointments. RD, at 91. DEA has recognized that the falsification of medical records creates a ''fair inference'' that a prescriber is issuing prescriptions ''outside the usual course of professional practice and lacked a legitimate medical purpose.'' *Syed Jawed Akhtar-Zaidi, M.D.,* 80 FR 42,962, 42,964 (2015). Here, the ALJ found, and I agree, that Respondent falsified the medical records of Y.H. and L.G., and that these false entries allow for the fair inference that Respondent acted outside of the usual course of professional practice and beneath the standard of care in the State of Florida in issuing the twelve prescriptions to Y.H. and L.G. RD, at 91–92.

For all these reasons, I find that Respondent violated 21 CFR 1306.04(a), Florida Statute § 458.331(1)(m), and Florida Administrative Code §§ 64B8–9.013 and 64B8–9.003, by falsifying patient records.

In total, I find that the Government has proven by substantial evidence that Respondent issued twelve controlled substance prescriptions without a legitimate medical purpose and outside of the usual course of professional practice and beneath the applicable standard of care in the State of Florida in violation of 21 CFR 1306.04(a), Florida Statute § 458.331(1)(m), and Florida Administrative Code §§ 64B8–9.013 and 64B8–9.003. Overall, I find that the Government has established a *prima facie* case that Respondent's continued registration is inconsistent with the public interest.

B. Summary of Factors Two and Four and Imminent Danger

As found above, the Government's case establishes by substantial evidence that Respondent issued controlled substance prescriptions outside the usual course of the professional practice. I, therefore, conclude that Respondent engaged in misconduct which supports the revocation of her registration. *See Wesley Pope,* 82 FR 14,944, 14,985 (2017).

For purposes of the imminent danger inquiry, my findings also lead to the conclusion that Respondent has ''fail[ed] . . . to maintain effective controls against diversion or otherwise comply with the obligations of a registrant'' under the CSA. 21 U.S.C. 824(d)(2). The substantial evidence that Respondent issued controlled substance prescriptions outside the usual course of the professional practice establishes ''a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance . . . [would] occur in the absence of the immediate suspension'' of Respondent's registration. *Id.; see e.g.,* Tr. 256 (opinion of the Government's expert, Dr. Hoch, that Respondent was prescribing ''potentially deadly'' medications); Tr. 221–22 (opinion of Dr. Hoch that using ''an opioid [can result in] respiratory

depression, and that's what kills people'').

Not only was Respondent prescribing a ''potentially deadly'' combination of medications to confidential sources without properly warning them of the risks associated with taking those controlled substances, but, Respondent continued writing the prescriptions after the confidential sources admitted to diverting these ''potentially deadly'' controlled substances. *See supra,* III(A)(2)(a)(i) and (iii); Tr. 221. According to Dr. Hoch, when a patient diverts medication ''that's a huge issue for the community at large.'' Tr. 256.

Thus, as I have found above, at the time the Government issued the OSC/ISO, the Government had clear evidence of violations of law based on the two confidential sources, who had been unlawfully prescribed controlled substances, with no physical exam, with no explanation of the risks associated with the potentially deadly combination of controlled substances, and after the confidential sources had admitted to diverting the prescriptions.

IV. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that Respondent's continued registration is inconsistent with the public interest, the burden shifts to the Respondent to show why she can be entrusted with a registration. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases). Respondent has made little to no effort to establish that she can be trusted with a registration.

The CSA authorizes the Attorney General to ''promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.'' 21 U.S.C. 871(b). This authority specifically relates ''to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 259 (2006). A clear purpose of this authority is to ''bar[ ] doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking.'' *Id.* at 270.

In efficiently executing the revocation and suspension authority delegated to me under the CSA for the aforementioned purposes, I review the evidence and argument Respondent submitted to determine whether or not she has presented ''sufficient mitigating evidence to assure the Administrator that [she] can be trusted with the responsibility carried by such a registration.'' *Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (2007) (quoting *Leo R. Miller, M.D.,* 53 FR 21,931, 21,932 (1988)). '''Moreover, because ''past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.' '' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (quoting *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Jackson,* 72 FR at 23,853; *John H. Kennnedy, M.D.,* 71 FR 35,705, 35,709 (2006); *Prince George Daniels, D.D.S.,* 60 FR 62,884, 62,887 (1995).

The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations or behavior and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016).

In evaluating the degree required of a respondent's acceptance of responsibility to entrust him with a registration, in *Mohammed Asgar, M.D.,* 83 FR 29,569, 29,572 (2018), the Agency looked for ''unequivocal acceptance of responsibility when a respondent has committed knowing or intentional misconduct.'' *Id.* (citing *Lon F. Alexander, M.D.,* 82 FR 49,704, 49,728).

In this case, Respondent made statements to the confidential sources during their encounters that I believe demonstrate that she knew it was unlawful to prescribe controlled substances after the confidential sources had admitted to diversion. For example, on January 25, 2017, Y.H. told Respondent how much the prescriptions helped her out (in connection with her need to sell pills to make money) and Respondent replied, ''Relax! Do not say that to nobody . . . . I don't want to . . . get into trouble.'' [39] GX 7, at 10–11. Additionally, the State of Florida Administrative Complaint,[40] clearly notified Respondent that the professional standard of care required that Respondent discontinue prescribing scheduled medications upon learning that a patient was sharing medications. RX 11, at 19. The ALJ found, and I agree, ''it is clear that when [Respondent] issued prescriptions to Y.H. and L.G. after they told her they were selling their prescriptions, her actions constituted a knowing diversion of oxycodone HCL and alprazolam.'' RD, at 100.

But there is no clear acceptance of responsibility in the record. Here, Respondent did not testify on her own behalf, and did not attempt to explain why, in spite of her egregious misconduct, she can be entrusted with a registration.[41] Such silence weighs against the Respondent's continued registration. *Zvi H. Perper, M.D.,* 77 FR 64,131, at 64,142 (citing *Medicine Shoppe,* 73 FR at 387); *see also Samuel S. Jackson,* 72 FR at 23,853.

Respondent argued, that even though she did not testify in this case, her actions showed her acceptance of responsibility. ALJX 28, at 15. Respondent claimed that she updated the practice's procedures and equipment, completed continuing education courses, and discharged patients who refused to submit to urine drug screening.[42] *Id.;* RD, at 105. ''The degree of acceptance of responsibility that is required does not hinge on the respondent uttering ''magic words'' of repentance, but rather on whether the respondent has credibly and candidly demonstrated that [s]he will not repeat the same behavior and endanger the public in a manner that instills confidence in the Administrator.'' *Jeffrey Stein, M.D.,* 84 FR 46,968, 49,973 (2019). In this case, Respondent has not issued any words of repentance or acceptance of responsibility, because she has not testified, nor has she made any admissions of fault. As such, I cannot trust that Respondent would not repeat her behavior. *See MacKay,* 664 F.3d at 820 (upholding the Agency's finding that a respondent's failure to testify warranted an adverse inference,

[39] Additional examples include Respondent's statement on July 8, 2017, that if L.G. sells his medication then Respondent cannot give him medication. GX 11, at 3 and 6. And during the same appointment Respondent tried to cover herself by stating that she knew L.G. was just joking and really did not sell his medication. GX 11, at 8.

[40] Respondent seems to have received the Administrative Complaint on or about January 20–23, 2017, but certainly received it no later than February 8, 2017, when she signed the Settlement Agreement. *See* RX 11, at 15, 24.

[41] In *Zvi H. Perper,* the Respondent did not testify in this proceeding; therefore, the Agency found, ''he neither took responsibility for his misconduct nor provided any assurances that he has implemented remedial measures to ensure such conduct is not repeated.'' *Zvi H. Perper, M.D.,* 77 FR 64,131, at 64,142.

[42] The continuing education courses were required by Respondent's Settlement Agreement and the remaining actions appear to have been related to the Settlement Agreement's requirement to engage a risk manager to conduct a quality assurance consultation or risk management assessment. *See* RX 11, at 10–12; Tr. at 385–386.

because there was ''no evidence that [respondent] recognized the extent of his misconduct and was prepared to remedy his prescribing practices''); *see also T.J. McNichol, M.D.,* 77 FR 57,133 (2012) (stating that ''it is appropriate to draw an adverse inference from Respondent's failure to testify.'').

Indeed, the facts on the record irrefutably demonstrate that Respondent cannot be entrusted to amend her behavior. The State of Florida Administrative Complaint, dated January 20, 2017, notified Respondent that she should discontinue prescribing after learning that a patient is diverting. RX 11, at 19. Days later, on January 25, 2017, Respondent prescribed to Y.H. following an admission of diversion. *See supra* II(G)(3). On or about February 8, 2017, Respondent signed a Settlement Agreement (which became a Final Order on April 21, 2017), wherein Respondent agreed to not violate Chapters 456, 458 or 893 of the Florida Statutes or any other state or federal law relating to the practice of medicine. RX 11, at 15. Yet, on both July 18, 2017, and on August 30, 2017, Respondent violated those laws when she again issued prescriptions (this time to L.G.) following an admission of diversion. *See supra* II(H)(2) and (3).

The Agency also looks to the egregiousness and extent of the misconduct which are significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.,* 83 FR at 18,910 (collecting cases). In this case, I agree with the ALJ that Respondent's actions can be characterized as ''particularly egregious.'' RD, at 100. On six separate occasions over an eleven-month period, Respondent issued twelve prescriptions to confidential sources without having conducted a physical exam or warning of the potential risks in violation of state law. *Supra* III(A)(2)(a); RD, at 104. Furthermore, Respondent issued prescriptions to the confidential sources immediately after those confidential sources admitted to diverting the medication. *Supra* III(A)(2)(a)(i); Tr. 221. As a separate matter, the medical records that Respondent maintained on the confidential sources not only contained false information, but they did not document any physical examinations, medical history, or periodic reviews. *See supra* II(I). I agree with the ALJ's finding ''that [Respondent's] misconduct of diversion and falsifying records to cover it up, as proven in the Administrative Record, is egregious and supports the revocation of her registration.'' RD, at 104.

In sanction determinations, the Agency has historically considered its interest in deterring similar acts, both with respect to the respondent in a particular case and the community of registrants. *See Joseph Gaudio, M.D.,* 74 FR 10,083, 10,095 (2009); *Singh,* 81 FR at 8248. I agree with the ALJ who found ''that considerations of both specific and general deterrence weigh in favor of revocation in this case.'' RD, at 105. There is simply no evidence that Respondent's egregious behavior is not likely to recur in the future such that I can entrust her with a CSA registration; in other words, the factors weigh in favor of revocation as a sanction.

I will therefore order that Respondent's registration be revoked and that any pending applications be denied as contained in the Order below.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FG0560765 issued to Jeanne E. Germeil, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Jeanne E. Germeil, M.D. to renew or modify this registration, as well as any other pending application of Jeanne E. Germeil, M.D. for registration in Florida. This Order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Hil Rizvi, M.D.; Decision and Order

On July 20, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Hil Rizvi, M.D. (hereinafter, Registrant) of Tyrone, Pennsylvania. OSC, at 1, 3. The OSC proposed the revocation of Registrant's Certificate of Registration No. BR4988599. It alleged that Registrant is without ''authority to handle controlled substances in Pennsylvania, the state in which [Registrant is] registered with DEA.'' *Id.* at 1 (citing 21 U.S.C. 823(f) and 824(a)(3)).

Specifically, the OSC alleged that the Pennsylvania State Board of Medicine (hereinafter, the Board) revoked Registrant's license to practice medicine effective October 28, 2018.[1] *Id.* The OSC concluded that ''DEA must revoke [Registrant's] DEA registration based on [his] lack of authority to handle controlled substances in the State of Pennsylvania.'' *Id.* at 2.

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated August 20, 2020, the Chief of Police for the Borough of Tyrone Police Department, stated that on July 22, 2020, he, another police officer, and two DEA Diversion Investigators (hereinafter, DIs) traveled to Registrant's registered address located at 910 Pennsylvania Avenue, Tyrone, PA 16686. Request for Final Agency Action dated July 10, 2019 (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 8, at 2 (Chief of Police's Declaration). The Chief of Police stated that upon arrival at the registered address, ''[he] knocked repeatedly on the office door to no response.'' *Id.* The team then proceeded to Registrant's residence and again, ''knock[ed] repeatedly on the front door of the residence,'' but there was no answer. *Id.* The Chief of Police then stated that ''[a]fter unsuccessful attempts at reaching [Registrant] on his landline and cell telephone numbers, [he] left [his] business card in the front door slot of the residence.'' *Id.* Later that afternoon, the Chief of Police received a phone call from Registrant at the telephone number on his business card. *Id.* at 3. The Chief of Police stated that he had a letter to deliver, but Registrant ''insisted'' that he was not in town ''despite placing a call to [the Chief of Police] at the business card [he] left at the residence earlier that day.'' *Id.* Following the phone call, the Chief of Police ''immediately returned to [Registrant's] office location. When [he] knocked on the front door of the office, [Registrant] answered. [He] then handed the envelope containing the [OSC] to [Registrant] and left the premises.'' *Id.*

The DEA DI assigned to the case stated that ''[s]tarting immediately after his July 22, 2020 receipt of the [OSC], and on several occasions since, [the DI has] received numerous calls and an

[1] It is noted that the effective date of the Order was September 12, 2018. *See* Request for Final Agency Action, at 1 n.1; Exhibit 3, at 12.

email from [Registrant], all with regard to his disagreement with being served with the OTSC.'' RFAAX 12, at 4 (Declaration of DEA DI, dated September 2, 2020). The Government's evidence includes an email from Registrant on July 22, 2020, which was sent to the email address provided for submission of a Corrective Action Plan (hereinafter, CAP). RFAAX 6 (Email from Registrant on July 22, 2020). The Assistant Administrator for Diversion treated the email from Registrant as a proposed CAP and denied the CAP on July 23, 2020. RFAAX 7, at 1 (Letter Denying CAP). Based on all of the above, I find that the OSC was served on July 22, 2020.

The Government forwarded its RFAA, along with the evidentiary record, to this office on September 3, 2020. In its RFAA, the Government represents that ''more than thirty days have passed since Registrant received the [OSC]; however, Registrant has not submitted to DEA a request for a hearing . . . Aside from the aforementioned CAP request, and sporadic, nonpertinent communications with DEA personnel (outlined below), Registrant has not otherwise filed a response with the agency following the issuance of the [OSC].'' RFAA, at 2.

The Government asserts that DEA cannot ''maintain the registration of a practitioner not duly authorized to handle controlled substances in the state in which he conducts business'' and requests revocation. *Id.* at 6.

Based on the DI's and the Chief of Police's Declarations, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on July 22, 2020. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Accordingly, I find that Registrant has waived the right to a hearing and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). Although it is unclear whether the email that DEA received from Registrant is a written statement or a Proposed Corrective Action Plan from Registrant in accordance with 21 CFR 1301.43(c), I have considered it under both. RFAAX 6, at 12. In the email, Registrant stated that the license dispute is pending in Pennsylvania court and that ''the license dispute is NOT about clinical issues or malpractice or drug diversion.'' *Id.* (emphasis in original). Although I have considered Registrant's statement, it does not present any issue of fact or law that could affect my final decision, as explained herein. I also agree with the Assistant Administrator of the Diversion Control Division, that if the email was intended to be a Proposed Corrective Action Plan, it provides no basis for me to discontinue or defer this proceeding. *See* RFAAX 7, at 1. I issue this Decision and Order based on the record submitted by the Government, including Registrant's statement, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. BR4988599 at the registered address of 910 Pennsylvania Avenue, Tyrone, PA 16686. RFAAX 1 (Registrant's Certificate of Registration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner-DW/275. RFAAX 2 (Certification of Registration History). Registrant's registration expires on April 30, 2023, and is ''in an active pending status until the resolution of administrative proceedings.'' *Id.* at 1.

The Status of Registrant's State License

On September 12, 2018, the Commonwealth of Pennsylvania State Board of Medicine issued an Order (hereinafter, Board Order) revoking Registrant's license to practice medicine in Pennsylvania effective immediately. RFAAX 3, at 12. According to the Board Order, Registrant's Ohio license to practice medicine was revoked and his Maine application to practice medicine was denied. *Id.* at 8. The Board stated that those state actions ''indicate that [Registrant] has engaged in a multi-year and multi-state history of providing false, misleading or knowingly incomplete information in association with his applications for licensure and renewal and that he failed to properly advise a board of negative information regarding arrests as required.'' *Id.* The Board therefore concluded that Registrant was ''essentially an individual who cannot be effectively regulated by the Board.'' *Id.* at 9.

According to Pennsylvania's online records, of which I take official notice, Registrant's license is still revoked.[2] Pennsylvania Licensing System Verification Service, *https://www.pals.pa.gov/#/page/search* (last visited October 27, 2020).

Accordingly, I find that Registrant currently is not licensed to engage in the practice of medicine in Pennsylvania, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at *dea.addo.attorneys@dea.usdoj.gov.*

is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

Pennsylvania law defines a ''practitioner'' as ''(i) a physician . . . licensed, registered or otherwise permitted to distribute, dispense . . . or to administer a controlled substance . . . in the course of professional practice or research in the Commonwealth of Pennsylvania.'' 35 Pa. Stat. and Cons. Stat. Ann. § 780–102 (West 2020). Pennsylvania law further defines a ''physician,'' as a ''medical doctor,'' and a ''medical doctor,'' as an ''individual who has acquired'' a license ''to practice medicine and surgery issued by the board.'' Pa. Stat. and Cons. Stat. Ann. § 422.2 (West 2019). Pennsylvania law prohibits ''[t]he administration, dispensing, delivery, gift or prescription of any controlled substance by any practitioner . . . unless done (i) in good faith in the course of his professional practice; (ii) within the scope of the patient relationship; (iii) in accordance with treatment principles accepted by a responsible segment of the medical profession.'' 35 Pa. Stat. and Cons. Stat. Ann. § 780–113(14) (West 2019). Additionally, the statute prohibits ''knowingly or intentionally possessing a controlled . . . substance by a . . . practitioner not registered or licensed by the appropriate state board.'' *Id.* at § 780–113(15).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine and surgery in Pennsylvania. A practitioner, who is a physician and a medical doctor, must be licensed and cannot prescribe or possess controlled substances in his professional practice without a license. *Id.* § 780–113(14), (15). Because Registrant lacks authority to practice medicine in Pennsylvania and, therefore, is not authorized to possess or prescribe controlled substances in Pennsylvania, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BR4988599 issued to Hil Rizvi, M.D. This Order is effective December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25527 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 20–24]

Jonathan Rosenfield, M.D.; Decision and Order

On June 18, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Jonathan Rosenfield, M.D. (hereinafter, Respondent) of Houston, Texas, and Grand Forks, North Dakota. OSC, at 1. The OSC proposed the revocation of Respondent's Certificates of Registration Nos. FR7251642 and FR5327285. *Id.* It alleged that Respondent is without ''authority to handle controlled substances.'' *Id.* (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that on ''October 10, 2019, the Texas Medical Board issued an Order of Temporary Suspension, suspending [Respondent's] Texas medical license. That order remains in effect.'' *Id.* at 2. The OSC further stated that ''[s]ubsequently, on December 30, 2019, [Respondent] entered into a Stipulation and Non-Practice Agreement with the North Dakota Board of Medicine in which [Respondent] agreed not to practice medicine in the State of North Dakota and in which [Respondent] agreed that [his] North Dakota medical license will be inactive for all purposes.'' *Id.* The OSC concluded that ''DEA must revoke [Respondent's] DEA registrations based on [his] lack of authority to handle controlled substances in the State of Texas and the State of North Dakota.'' *Id.* (citing 21 U.S.C. 824(a)(3); 21 CFR 1301.37(b)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2–3 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

On July 30, 2020, Respondent, through counsel, requested a hearing, stating that his ''medical license in Texas is only temporarily suspended'' and he ''maintains an active medical license in Ohio and Georgia.'' Request for a Hearing, at 1.

The Office of Administrative Law Judges put the matter on the docket and assigned it to Chief Administrative Law Judge John J. Mulrooney II (hereinafter, Chief ALJ), who issued an Order Directing the Filing of Government Evidence Regarding its Lack of State Authority Allegation and Briefing Schedule on July 30, 2020, with which the Government complied by filing a Motion for Summary Disposition (hereinafter, Govt Motion) on August 10, 2020.

In its Motion, the Government submitted evidence that the ''Texas Medical Board issued an Order of Temporary Suspension, suspending Respondent's Texas Medical License,'' and ''Respondent entered into a Stipulation and Non-practice agreement with the North Dakota Board of Medicine in which Respondent agreed not to practice medicine in the State of North Dakota.'' Govt Motion, at 3–4. In light of these facts, the Government argued that DEA must revoke Respondent's registration. *Id.* at 5.

On August 20, 2020, Respondent filed a ''Memorandum Contra to the Government's Motion for Summary Disposition'' (hereinafter, Resp Opposition), in which he argued that ''[t]he matter in Texas is temporary in nature, as it is a Temporary Suspension.'' Resp Opposition, at 1. He also argued that he has active medical licenses in Georgia and Ohio and that Respondent ''contends that he does'' have state authority in Texas. *Id.* at 2.

On August 25, 2020, the Chief ALJ issued an Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge (hereinafter, Summary Disposition or SD). The Chief ALJ noted that, ''Respondent has made the confusing assertion that he 'has the authority to handle controlled substances' because the suspension imposed by Texas is temporary and 'can be lifted at any time' . . . .'' SD, at 4 (quoting Resp Opposition, at 1). However, he also noted that ''[t]he Respondent has represented that no superseding order from the Texas Board has been issued.'' *Id.* at 3 (citing Resp Opposition, at 1). Therefore, the ALJ determined that ''in view of the Respondent's current lack of state authority, revocation of the Respondent's [registrations] stands as the only legally available resolution.''

SD, at 5. The Chief ALJ further concluded that ''[s]ummary disposition is proper in an administrative enforcement proceeding where no genuine factual dispute exists.'' *Id.* at 6 (citing *Veg-Mix, Inc.* v. *U.S. Dept. of Agriculture,* 832 F.3d 601, 607 (D.C. Cir. 1987) (comparing the standard for summary disposition in an administrative proceeding to summary judgment in a civil proceeding); *Citizens for Allegan County, Inc.* v. *Federal Power Commission,* 414 F.2d 1125, 1128 (D.C. Cir. 1969) (affirming that ''the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing'')).

By letter dated September 22, 2020, the ALJ certified and transmitted the record to me for final Agency action. In that letter, the ALJ advised that neither party filed exceptions. I find that the time period to file exceptions has expired. *See* 21 CFR 1316.66.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

Findings of Fact

Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. FR7251642 at the registered address of 4561 Edfield Street, Houston, Texas 77051. Govt Motion Exhibit (hereinafter, GX) 1 (Certification of Registration History Texas),[1] at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a ''practitioner.'' *Id.* Respondent's registration expired on April 20, 2020, and is in ''a renewal pending status until the resolution of administrative proceedings.'' *Id.* Respondent is also the holder of DEA Certificate of Registration No. FR5327285 at the registered address of 1451 44th Avenue South, Unit E, Grand Forks, North Dakota 58201. GX 2 (Certification of Registration History North Dakota), at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a ''practitioner.'' *Id.* Respondent's registration expires on April 30, 2021, and is in ''an active pending status until the resolution of administrative proceedings.'' *Id.*

The Status of Respondent's State Licenses

Texas

On October 10, 2019, the Texas Medical Board (hereinafter, Texas Board) entered an Order of Temporary Suspension (hereinafter, Suspension Order) ''effective on the date rendered.'' GX 4 (Suspension Order), at 4. According to the Suspension Order, Respondent engaged in ''unprofessional or dishonorable conduct'' and the Texas Board had authority to discipline Respondent for ''prescribing, administering, or dispensing in a manner inconsistent with public health and welfare dangerous drugs . . . .'' *Id.* at 3. The Texas Board found that Respondent's ''continued practice of medicine would constitute a continuing threat to the public welfare.'' *Id.* at 3. The Order further stated that it ''shall remain in effect until it is superseded by an Order of the Board.'' *Id.* at 4.

According to Texas's online records, of which I take official notice, Respondent's registration status is ''suspended, active as of 10/10/2019'' and his disciplinary restrictions are ''suspended by board as of 10/10/2019.''[2] Texas Medical Board Healthcare Provider Search, *https://public.tmb.state.tx.us/HCP_Search/SearchNotice.aspx* (last visited October 27, 2020).

Based on the entire record before me, I find that Respondent currently is not licensed to engage in the practice of medicine in Texas, one of the two states where Respondent maintains a registration subject to this action.

North Dakota

On January 14, 2020, the North Dakota Board of Medicine (hereinafter, North Dakota Board) entered into a Stipulation and Nonpractice Agreement (hereinafter, Nonpractice Agreement) effective ''upon execution of [the] agreement.'' GX 5 (Nonpractice Agreement), at 1. According to the Nonpractice Agreement, Respondent agreed that ''he will immediately cease the practice of medicine in North Dakota'' and ''he will not practice medicine in the State of North Dakota until such time as the Board finalizes any disciplinary action that may be brought against him based on the information obtained by the Board from the Federation of State Medical Boards Physician Data Center, the Texas Medical Board and the United States District Court for the Southern District of Texas.'' *Id.*

According to North Dakota's online records, of which I take official notice, Respondent's registration status is ''inactive-other'' and his disciplinary history is ''Entered into a stipulated non-practice agreement.''[3] North Dakota Board of Medicine Find a Practitioner/Verify License Status, *https://www.ndbom.org/public/find_verify/verify.asp* (last visited October 27, 2020).

Based on the entire record before me, I find that Respondent currently is not licensed to engage in the practice of medicine in North Dakota, one of the two states where Respondent maintains a registration subject to this action

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had [her]State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing[4] of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person

[1] It is noted that the Government's Exhibits 1 and 2 list several other registrations held by Respondent that are not subject to these proceedings.

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Respondent files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at *dea.addo.attorneys@dea.usdoj.gov.*

[3] I take official notice of this fact. *See* n.1

[4] ''[D]ispense[] means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance . . . .'' 21 CFR 802(10).

licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . ., to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

Respondent argued that ''[t]he matter in Texas is temporary in nature, as it is a Temporary Suspension.'' [5] Resp Opposition, at 1. He also argued that he has active medical licenses in Georgia and Ohio and that he does have state authority in Texas. *Id.* at 2. However, the Suspension Order issued by the Texas Board clearly states that the suspension is in effect until the Board issues a superseding Order. GX 4, at 4. Further, I agree with the Chief ALJ that ''[a]s has been long established by Agency [decisions], state licensure in a state other than a respondent's [] registration state is irrelevant to a DEA enforcement proceeding. SD, at 4–5 (citing *Craig K. Alhanati, D.D.S.,* 62 FR 32,658, 32,658 (1997)).

Because ''the controlling question'' in a proceeding brought under 21 U.S.C. 824(a)(3) is whether the holder of a practitioner's registration ''is currently authorized to handle controlled substances in the state,'' *James L. Hooper,* 76 FR at 71,371 (quoting *Anne Lazar Thorn,* 62 FR 12,847, 12,848 (1997)), the Agency has also long held that revocation is warranted even where a practitioner is still challenging the underlying action or where the state action is temporary. *Kambiz Haghighi, M.D.,* 85 FR 5989 (2020); *Bourne Pharmacy,* 72 FR 18,273, 18,274 (2007); *Wingfield Drugs,* 52 FR 27,070, 27,071 (1987). Thus, it is of no consequence that the action is a suspension. What is consequential is my finding that Respondent is no longer currently authorized to dispense controlled substances in Texas and North Dakota, the two states where Respondent maintains the registrations subject to this action.

Under the Texas Controlled Substances Act, a practitioner in Texas ''may not prescribe, dispense, deliver, or administer a controlled substance or cause a controlled substance to be administered under the practitioner's direction and supervision except for a valid medical purpose and in the course of medical practice.'' Tex. Health and Safety Code Ann. § 481.071 (West 2019). The Texas Controlled Substances Act defines ''practitioner,'' in relevant part, as ''a physician . . . licensed, registered, or otherwise permitted to distribute, dispense, analyze, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state.'' *Id.* at § 481.002 (39)(A). Further, under the Texas Medical Practice Act, a person must hold a license to practice medicine in Texas. Tex. Occupations Code Ann. § 155.001 (West 2019) (''A person may not practice medicine in this state unless the person holds a license issued under [the Medical Practice Act].''); *see also id.* at § 151.002 (''Physician' means a person licensed to practice medicine in this state.''). Additionally, ''[a] person commits an offense if the person practices medicine in [Texas] in violation of'' the Act. *Id.* at § 165.152(a).

Under North Dakota law, '''[d]ispense' means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.'' N.D. Cent. Code § 19–03.1–01(10) (West 2019). Further, a ''practitioner'' is defined as, ''A physician, dentist, veterinarian, pharmacist, scientific investigator, or other person licensed, registered, or otherwise permitted by the jurisdiction in which the individual is practicing to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research.'' *Id.* at § 19–03.1–01(25)(a). Therefore, because Registrant currently is not licensed by the jurisdiction in which he is practicing, he is not authorized to dispense controlled substances in North Dakota.

Here, the undisputed evidence in the record is that Respondent currently lacks authority to practice medicine in Texas and North Dakota. I, therefore, find that Respondent is currently without authority to dispense controlled substance in Texas and North Dakota, two states in which he is registered with DEA, and I will order that Respondent's DEA registrations in these states be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificates of Registration Nos. FR7251642 and FR5327285 issued to Jonathan Rosenfield, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Jonathan Rosenfield, M.D. to renew or modify these registrations, as well as any other application of Jonathan Rosenfield, M.D. for additional registrations in Texas and North Dakota. This Order is applicable December 21, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–25524 Filed 11–18–20; 8:45 am]

BILLING CODE 4410–09–P

[5] It is noted that Respondent presented no arguments about the status of his medical license in North Dakota.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Overhead and Gantry Cranes Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Health and Safety Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 21, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open

for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie by telephone at 202–693–0456 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The paperwork provisions of the Standard specify requirements for: Marking the rated load of cranes; preparing certification records to verify the inspection of the crane hooks, hoist chains, and rope; preparing reports of rated load test for repaired hooks or modified cranes. Records and reports must be maintained and disclosed upon request. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 18, 2020 (85 FR 50838).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Overhead and Gantry Cranes Standard.

OMB Control Number: 1218–0224.

Affected Public: Businesses or other for-profits institutions.

Total Estimated Number of Respondents: 31,495.

Total Estimated Number of Responses: 642,566.

Total Estimated Annual Time Burden: 321,345 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: November 13, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020–25563 Filed 11–18–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Notice of Alleged Safety or Health Hazards

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Health and Safety Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 21, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie by telephone at 202–693–0456 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The OSHA–7 Form is used by OSHA personnel to report unhealthful and/or unsafe conditions in the workplace. The information is given to OSHA by employees who wish to report unhealthful and/or unsafe conditions at their place of employment. Employee reports are authorized by Section 8(f)(1) of the OSH Act. This information is used by OSHA to evaluate the alleged hazards and to schedule an inspection. The form is available in English and Spanish. OSHA–7 Form has also been translated into nine Asian American Pacific Islander languages. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 11, 2020 (85 FR 27765).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Notice of Alleged Safety or Health Hazards.

OMB Control Number: 1218–0064.

Affected Public: Businesses or other for-profits institutions.

Total Estimated Number of Respondents: 76,036.

Total Estimated Number of Responses: 76,036.

Total Estimated Annual Time Burden: 21,171 hours.

Total Estimated Annual Other Costs Burden: $336.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: November 13, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020–25562 Filed 11–18–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Portable Fire Extinguishers Standard (Annual Maintenance Certification Record)

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety and Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 21, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie by telephone at 202–693–0456, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The information collection requirement associated with the Portable Fire Extinguishers Standard is designed to reduce worker death or serious injury by ensuring that portable fire extinguishers are in safe operating conditions. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 23, 2020 (85 FR 44548).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Portable Fire Extinguisher Standard (Annual Maintenance Certification Record).

OMB Control Number: 1218–0238.

Affected Public: Private Sector, Businesses or other for-profits.

Total Estimated Number of Respondents: 586,911.

Total Estimated Number of Responses: 586,991.

Total Estimated Annual Time Burden: 293,496 hours.

Total Estimated Annual Other Costs Burden: $10,143,204.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Crystal Rennie,

Acting Departmental Clearance Officer.

[FR Doc. 2020–25571 Filed 11–18–20; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[20–096]

Notice of Centennial Challenges Break the Ice Lunar Challenge Phase 1

AGENCY: National Aeronautics and Space Administration (NASA).

SUMMARY: The Break the Ice Lunar Challenge is open and teams that wish to compete may now register. Centennial Challenges is a program of prize competitions to stimulate innovation in technologies of interest and value to NASA and the nation. The Break the Ice Lunar Challenge is a prize competition with up to a $5,000,000 USD total prize purse to incentivize innovative approaches for excavating icy regolith and optimize logistics to transport acquired resources, primarily water, in extreme lunar environments. At this time, NASA is opening Phase 1 of the competition, which has a $500,000 USD prize purse. In this phase of competition, teams will design a system architecture to excavate icy regolith and deliver water on the lunar surface in a hypothetical mission scenario based on anticipated mission operations and environmental features of human and robotic exploration of the lunar surface. NASA is funding the prize purse and administration of the challenge competition.

DATES: Phase 1 registration opens November 18, 2020, and will remain open until June 18, 2021. No further requests for registration will be accepted after this date.

Other important dates:

November 18, 2020

- Phase 1 registration opens

June 18, 2021

- Deadline for registration

August 13, 2021

- Phase 1 winners announced

ADDRESSES: The Break the Ice Lunar Challenge Phase 1 will be conducted virtually. The Challenge competitors will develop and submit system architecture, excavation plan and other submission elements from their own location.

FOR FURTHER INFORMATION CONTACT: To register for or get additional information regarding the Break the Ice Lunar Challenge, please visit: *www.nasa.gov/breaktheice.* For general information on the NASA Centennial Challenges Program please visit: *http://www.nasa.gov/challenges.* General questions and comments regarding the program should be addressed to Monsi Roman, Centennial Challenges Program, NASA Marshall Space Flight Center Huntsville, AL 35812. Email address: *hq-stmd-centennialchallenges@mail.nasa.gov.* Phone: 256–544–4071.

SUPPLEMENTARY INFORMATION:

Summary

Phase 1 of the Break the Ice Lunar Challenge is focused on incentivizing new ideas and approaches to a system architecture for excavation and movement of icy regolith and water on the lunar surface. The Challenge describes a hypothetical Mission Scenario and asks Teams to design a system architecture addressing

necessary hardware, concept of operations, lunar environmental conditions, and specific performance analyses, as well as supporting materials that address credibility and feasibility of the system architecture. In Phase 1, Teams will have approximately seven (7) months to register and submit a system architecture. Phase 1 will last a total of nine (9) months, including approximately two (2) months of judging.

I. Prize Amounts

The Break the Ice Lunar Challenge total prize purse is up to $5,000,000 USD (five million dollars) to be awarded across two (2) phases of competition.

Prize purse for Phase 1 will total up to $500,000, with the following prize distribution: 1st place $125,000, 2nd place $75,000, 3rd place $50,000, and up to ten (10) runners-up teams will receive up to $25,000 each as determined by the judging panel.

The Prize Purse for Phase 2, should there be promising submissions in Phase 1 that demonstrate a viable approach, will be worth up to $4,500,000.

II. Eligibility

Eligibility To Participate and Win Prize Money

To be eligible to win a prize:

- Individuals must be U.S. citizens or permanent residents of the United States and be 18 years of age or older.
- Organizations must be an entity incorporated in and maintaining a primary place of business in the United States.
- Teams must be comprised of otherwise eligible individuals or organizations and led by an otherwise eligible individual or organization.
- Team leader must be a U.S. citizen or permanent resident.

The eligibility requirements can be found on the official challenge site: *www.nasa.gov/breaktheice.*

III. Rules

The complete rules for the Break the Ice Lunar Challenge, can be found at: *https://breaktheicechallenge.com.*

Cheryl Parker,

NASA Federal Register Liaison Officer.

[FR Doc. 2020–25513 Filed 11–18–20; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0056]

Information Collection: Grants and Cooperative Agreement Provisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Grants and Cooperative Agreement Provisions.''

DATES: Submit comments by December 21, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0056 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–2020–0056. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2020–0056 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML20260H319.
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*).

Please include Docket ID NRC–2020–0056 in the subject line of your comment submission, in order to ensure that the NRC is able to make your current submission available to the public on this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted an existing collection of information to OMB for review entitled,

''Grants and Cooperative Agreement Provisions.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on July 1, 2020, (85 FR 39598).

1. *The title of the information collection:* Grants and Cooperative Agreement Provisions.
2. *OMB approval number:* 3150–0107.
3. *Type of submission:* Extension.
4. *The form number if applicable:* Not applicable.
5. *How often the collection is required or requested:* Technical Performance reports are required every 6 months; other information is submitted on occasion as needed.
6. *Who will be required or asked to respond:* Grants and Cooperative Agreement recipients.
7. *The estimated number of annual responses:* 542 (366 responses plus 176 record keepers).
8. *The estimated number of annual respondents:* 176.
9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 4,127 (3,851 reporting hours plus 276 record keeping hours).
10. *Abstract:* The Acquisition Management Division is responsible for the awarding grants and cooperative agreement provisions in order to administer the NRC's financial assistance program. The information collected under the provisions ensures that the Government's rights are protected, the agency adheres to public laws, the work proceeds on schedule, and that disputes between the Government and recipient are settled.

Dated: November 13, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–25480 Filed 11–18–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–27 and CP2021–27]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 23, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2021–27 and CP2021–27; *Filing Title:* USPS Request to Add First-Class Package Service Contract 114 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 13, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* November 23, 2020.

This Notice will be published in the **Federal Register.**

Erica A. Barker,

Secretary.

[FR Doc. 2020–25570 Filed 11–18–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90418; File No. SR–NYSEArca–2020–84]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.900–E To Adopt Generic Listing Standards for Managed Portfolio Shares

November 13, 2020.

On September 22, 2020, NYSE Arca, Inc. filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 8.900–E to adopt generic listing standards for Managed Portfolio Shares. On October 2, 2020, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on October 13,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

2020.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 27, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 11, 2021 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSEArca–2020–84), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25499 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[3] *See* Securities Exchange Act Release No. 90104 (October 7, 2020), 85 FR 64598.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90414; File No. SR–NYSEArca–2020–96]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the NYSE Arca Options Fee Schedule Regarding the Criteria To Qualify for a Posting Credit on Certain Customer Volume

November 13, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b-4 thereunder,[3] notice is hereby given that, on November 2, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (''Fee Schedule'') regarding the criteria to qualify for a posting credit on certain Customer volume. The Exchange proposes to implement the fee change effective November 2, 2020. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Fee Schedule to modify the criteria to qualify for a posting credit on Customer volume in Penny Issues. The Exchange proposes to implement the rule change on November 2, 2020.

The Exchange currently provides several incentives for OTP Holders and OTP Firms (collectively, ''OTPs'') designed to encourage OTPs to direct additional order flow to the Exchange to achieve more favorable pricing and higher credits. Among these incentives are enhanced posted liquidity credits based on achieving certain percentages of Total Industry Customer equity and ETF option average daily volume (''TCADV'').[4]

Pursuant to the Customer Penny Posting Credit Tiers (the ''Penny Credit Tiers''), Customer and Professional Customer orders that post liquidity and are executed on the Exchange earn a base credit of ($0.25) per contract, and may be eligible for increased credits based on the participant's activity. Currently, there are seven Penny Credit Tiers, with increasing minimum volume thresholds (as well as increasing credits) associated with each tier, ranging from per contract credits of ($0.27) to ($0.50) for OTP Holders that achieve Tiers 1–7, respectively.

Currently, there are two alternative bases for an OTP Holder to qualify for Tier 2, one of which requires the OTP to execute at least 0.25% of TCADV from Customer posted interest in all issues to earn the associated ($0.43) per contract credit applied to electronic executions of Customer posted interest in Penny Issues.[5] The Exchange proposes to increase the minimum volume threshold from 0.25% to 0.30% of TCADV from Customer posted interest in all issues for the same ($0.43) per contract credit.[6] The Exchange believes this proposed change would still encourage OTP Holders to achieve Tier 2 albeit with increased Customer posted interest, which brings increased liquidity and order flow for the benefit of all market participants.

The Exchange cannot predict with certainty whether any OTP Holders would qualify for Tier 2 under the modified criteria; however, the Exchange believes that OTP Holders would continue to be encouraged to increase Customer posted volume to qualify for this Tier.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and

[4] TCADV includes OCC calculated Customer volume of all types, including Complex Order Transactions and QCC transactions, in equity and ETF options. *See* Endnote 8 to the Fee Schedule.

[5] The alternative Tier 2 volume threshold requires an OTP Holder to achieve an ''[i]ncrease of at least 0.15% of TCADV in posted interest in all issues, all account types other than Market Maker, over the OTP Holder's or OTP Firm's March 2020 level of posted interest in all issues, all account types other than Market Maker.'' *See* Fee Schedule, NYSE Arca OPTIONS: TRADE–RELATED CHARGES FOR STANDARD OPTIONS, CUSTOMER PENNY POSTING CREDIT.

[6] *See* proposed Fee Schedule, NYSE Arca OPTIONS: TRADE–RELATED CHARGES FOR STANDARD OPTIONS, CUSTOMER PENNY POSTING CREDIT.

[7] 15 U.S.C. 78f(b).

furthers the objectives of Sections 6(b)(4) and (5) of the Act,[8] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [9]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[10] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had slightly more than 10% market share of executed volume of multiply-listed equity & ETF options trades.[11]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow, including with options exchanges that offer similar posting credits on Electronic Customer executions.[12]

The Exchange believes that the proposed modification to the criteria to qualify for Tier 2 of the Penny Credit Tiers is reasonably designed to continue to incent OTP Holders to increase the amount and type of Customer interest sent to the Exchange, especially posted interest. The Exchange notes that OTP Holders are still eligible to qualify for Penny Credit Tier 2 under the existing alternative (*see supra* note 5) based on an increase over a specified benchmark in posted interest in all issues, all account types other than Market Maker. By continuing to provide such alternative methods to qualify for a Penny Credit Tier, the Exchange believes the opportunities to qualify for credits is increased, which benefits all participants through increased volume to the Exchange.

To the extent that the proposed change attracts to the Exchange more Customer posted interest in both Penny and non-Penny issues, this increased order flow would continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system.

The Exchange cannot predict with certainty whether any OTP Holders would qualify for Tier 2 under the modified criteria; however, the Exchange believes that OTP Holders would continue to be encouraged to increase Customer posted volume to qualify for this Tier.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange and OTP Holders can opt to avail themselves of the modified criteria to qualify for Tier 2 or not. Moreover, the proposal is designed to incent OTP Holders to aggregate all Customer posting interest at the Exchange as a primary execution venue. To the extent that the proposed change attracts more Customer posting interest to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, therefore, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes it is not unfairly discriminatory to modify the criteria to qualify for Tier 2 because the proposed modification would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange and OTP Holders are not obligated to try to achieve Penny Credit Tier 2, as modified, nor are they obligated to execute posted interest. Rather, the proposal is designed to encourage OTP Holders to utilize the Exchange as a primary trading venue for Customer posted interest (if they have not done so previously) or increase volume sent to the Exchange. To the extent that the proposed change attracts to the Exchange more Customer interest, including posted interest, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, therefore, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional liquidity to a public

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[10] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: *https://www.theocc.com/market-data/volume/default.jsp.*

[11] Based on OCC data, *see id.,* the Exchange's market share in equity-based options was 9.59% for the month of August 2019 and 10.20% for the month of August 2020.

[12] *See e.g.,* MIAX Pearl Fee Schedule, available here: *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_PEARL_Fee_Schedule_08252020.pdf* (regarding Customer Posting Tiers).

exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [13]

Intramarket Competition. The proposed change is designed to attract additional order flow (particularly Customer posted interest) to the Exchange. The Exchange believes that the proposed modification to Penny Credit Tier 2 would continue to incent OTP Holders to direct their Customer order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange and increased Customer order flow would increase opportunities for execution of other trading interest. The proposed modification would be available to all similarly-situated market participants that execute Customer posted interest, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[14] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had slightly more than 10% market share of executed volume of multiply-listed equity & ETF options trades.[15]

The Exchange believes that the proposed modification to the criteria to qualify for Tier 2 reflects this competitive environment because it modifies the Exchange's fees in a manner designed to incent OTP Holders to continue to direct trading interest (particularly Customer posted interest) to the Exchange, to provide liquidity and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar Customer posting credits, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–96 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2020–96. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–96, and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25500 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[13] *See* Reg NMS Adopting Release, *supra* note 9, at 37499.

[14] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/market-data/volume/default.jsp.*

[15] Based on OCC data, *see id.,* the Exchange's market share in equity-based options was 9.59% for the month of August 2019 and 10.20% for the month of August 2020.

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90422; File No. SR–CboeEDGX–2020–055]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Automate the Exchange's Process for Initiating the Re-Opening of a Security Listed on the New York Stock Exchange LLC Following the Resumption of Trading After a Halt, Suspension, or Pause During the Early Trading Session, Pre-Opening Session, or Post-Closing Session

November 13, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on November 5, 2020, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') 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

Cboe EDGX Exchange, Inc. (''EDGX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to automate the Exchange's current process for initiating the re-opening of a security listed on the New York Stock Exchange LLC following the resumption of trading after a halt, suspension, or pause during the Early Trading Session, Pre-Opening Session, or Post-Closing Session. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to automate the Exchange's current process for initiating the re-opening of securities listed on the New York Stock Exchange LLC (''NYSE'') following the resumption of trading after a halt, suspension, or pause during the Early Trading Session,[3] Pre-Opening Session,[4] or Post-Closing Session.[5] EDGX Rule 11.7 describes the Exchange's opening process for securities listed on other national securities exchanges, including the process for re-opening such securities following the resumption of trading after a halt, suspension, or pause. Although the Exchange generally employs an automated process for re-opening securities listed on other exchanges, there are situations where manual intervention is currently needed to initiate the Exchange's re-opening process. Specifically, manual intervention is currently needed for the Exchange to initiate its re-opening process in NYSE-listed securities that resume trading after a halt, suspension, or pause when such resumption of trading occurs outside of regular trading hours at times when the Exchange is open for either pre- or post-market trading but NYSE does not trade its listed securities. The proposed rule change would implement an automated process for initiating the re-opening of trading on the Exchange in these circumstances.

Generally, the Exchange's re-opening process is designed to provide an execution at the midpoint of the national best bid and offer (''NBBO'') following the initiation of trading on the applicable listing exchange. Specifically, as described in EDGX Rule 11.7(e)(1), the Exchange's re-opening process occurs at the midpoint of the: (i) First NBBO subsequent to the first reported trade and first two-sided quotation on the listing exchange following the resumption of trading after a halt, suspension, or pause; or (ii) then prevailing NBBO when the first two-sided quotation published by the listing exchange following the resumption of trading after a halt, suspension, or pause if no first trade is reported by the listing exchange within one second of publication of the first two-sided quotation by the listing exchange. In either case, the Exchange must wait for the listing exchange to commence trading before initiating its re-opening procedures.

NYSE operates two trading sessions each day: (1) The ''core trading session'' between 9:30 a.m. ET to 4:00 p.m. ET, during which all securities are available for trading;[6] and (2) the ''early trading session'' between 7:00 a.m. ET and the commencement of the core trading session, during which only securities that trade via unlisted trading privileges are available for trading.[7] NYSE does not trade its listed securities during its early trading session, *i.e.,* prior to the beginning of regular trading hours, nor does it trade any securities after the end of regular trading hours. As a result, since the Exchange's normal process for re-opening securities listed on other exchanges after a halt, suspension, or pause requires trading to commence on the listing exchange, the Exchange cannot use this process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or Post-Closing Session.

At the same time, EDGX Rule 11.7(e)(2) provides that where neither of the conditions required for the initiation of the Exchange's automated re-opening process have occurred, trading in the security may be resumed on the Exchange at its discretion. The Exchange therefore periodically invokes it authority pursuant to this rule to manually initiate the resumption of trading in NYSE-listed securities outside of regular trading hours.[8] However, initiating trading on the Exchange in this manner requires manual intervention by Exchange staff. The Exchange believes that it would be in the interest of market participants and investors to instead automate its process for initiating trading in this

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Early Trading Session'' means the time between 7:00 a.m. and 8:00 a.m. Eastern Time. *See* EDGX Rule 1.5(ii).

[4] The term ''Pre-Opening Session'' means the time between 8:00 a.m. and 9:30 a.m. Eastern Time. *See* EDGX Rule 1.5(s).

[5] The term ''Post-Closing Session'' means the time between 4:00 p.m. and 8:00 p.m. Eastern Time. *See* EDGX Rule 1.5(r).

[6] *See* NYSE Rule 7.34(a)(2). NYSE's core trading session for its listed securities begins with its opening auction and ends with its closing auction if one is conducted. *Id.*

[7] *See* NYSE Rule 7.34(a)(1).

[8] The Exchange estimates that it currently invokes its authority under this rule to manually initiate a re-opening in NYSE-listed securities a handful of times each month.

situation and avoid the need for manual intervention.

Current Process for NYSE-Listed Securities Re-Opened in Pre- and Post-Market

As discussed, the Exchange currently employs a manual process to initiate the resumption of trading in NYSE-listed securities outside of regular trading hours. This manual process requires personnel from the Exchange's Trade Desk to become aware of, and react to, NYSE's determination to lift a trading halt in one of their listed securities.[9] Typically, this occurs in one of two ways. First, the Trade Desk performs proactive monitoring of halt notifications from NYSE and subsequent resumptions during the Post-Closing Trading Session.[10] If a security is halted by NYSE during regular trading, Trade Desk personnel will monitor internal tools beginning at 4:00 p.m. ET to identify whether NYSE has lifted the halt. Second, even with the proactive monitoring performed by the Trade Desk, there may be instances where the Exchange has not immediately initiated the manual re-opening of a security that has resumed trading. In such circumstances, Exchange members may reach out to the Trade Desk when they notice that their orders are not reflected in the market. In either case, Trade Desk personnel would check internal tools to confirm that the security is no longer halted, and would routinely invoke the authority described in the paragraph above to initiate the re-opening process on the Exchange after identifying that there are quotes available in the security on other exchanges. The Exchange believes that this manual process is inefficient, and members have also reached out to the Trade Desk with requests that the Exchange replace this process with a more efficient automated process. As a result, the Exchange is proposing to automate its process for initiating trading in this situation to avoid the need for manual intervention by Exchange staff.

Proposed Automated Process for Initiating the Exchange's Re-Opening

As proposed, the Exchange would replace the manual process described above with automated procedures that would automatically resume trading after one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause.[11] This change would allow the Exchange to avoid the need for Trade Desk staff to monitor for resumption messages, and would allow members' orders to be automatically reflected in the market, while continuing to ensure that the Exchange's re-opening is tied to the existence of a market in the security on a national securities exchange(s).[12] With this change, the Exchange would continue to re-open trading in NYSE-listed securities in the same manner that it is able to under EDGX Rule 11.7(e)(2) today, but would not have to rely on manual procedures for initiating the resumption of trading. Specifically, rather than conducting the standard midpoint re-opening described in EDGX Rule 11.7(e)(1) when the listing exchange has not established a market in the security, the Exchange would continue to follow the process described in EDGX Rule 11.7(e)(2), without the need for manual intervention. Thus, as is the case following the manual initiation of re-opening of trading in a security on the Exchange, orders would be processed using the ''contingent open'' procedures described in EDGX Rule 11.7(d), which provides that orders are to be handled in time sequence and placed on the EDGX Book, routed, cancelled, or executed in accordance with the terms of the order.[13]

In the event that there is no available NBBO in the security, the proposed automated procedures would not resume trading on the Exchange, but the Exchange would retain the ability to manually resume trading at its discretion pursuant to current EDGX Rule 11.7(e)(2). To increase transparency around when the Exchange could invoke this discretion, the Exchange proposes to amend EDGX Rule 11.7(e)(2) to specifically state that the discretion provided pursuant to this rule applies when a security has not otherwise been re-opened for trading on the Exchange pursuant to Proposed EDGX Rule 11.7(e)(3). This change would not substantively modify the scope of the discretion provided pursuant to EDGX Rule 11.7(e)(2). However, the Exchange believes that modifying the rule in this manner would serve to increase transparency by specifically identifying the times when this discretion is not relevant due to the fact that the Exchange has successfully re-opened the security using its automated procedures.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[14] in general, and Section 6(b)(5) of the Act,[15] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. Today, Trade Desk staff must manually intervene to initiate the re-opening on the Exchange of NYSE-listed securities following the resumption of trading after a halt, suspension, or pause, if the security resumes trading during the Early Trading Session, Pre-Opening Session, or Post-Closing Session. Although NYSE may trade securities pursuant to unlisted trading privileges prior to regular trading hours, it does not offer pre- or post-market trading for its listed securities. Since the Exchange's current rules require trading to have commenced on the primary listing market in order to initiate the Exchange's automated process for re-opening securities following a halt, suspension, or pause, the Exchange is forced to periodically invoke manual procedures to resume trading these securities pursuant to unlisted trading privileges. The Exchange believes, however, that an automated process would be more consistent and reliable for market participants and investors as such a process would not rely on manual intervention by Trade Desk staff

[9] Section 203.07 of NYSE's Listed Company Manual describes its trading halt procedures, and provides NYSE with discretion to declare a material news halts in its listed securities, as well as to lift such a halt when it determines that trading should resume. As a matter of practice, NYSE may exercise its discretion to lift a trading halt in its listed securities outside of its own hours for trading such securities. In that event, NYSE would disseminate a resume message through the SIP, which would permit trading to resume on other national securities exchanges, including the Exchange.

[10] Although it is possible for a resumption to take place in the Early Trading and Pre-Opening Sessions, Trade Desk personnel do not monitor for resumptions in those trading sessions as this scenario normally occurs in the Post-Closing Trading Session.

[11] The Exchange utilizes a combination of direct feeds and the applicable securities information processor (''SIP'') feeds to determine the NBBO in a security. *See* EDGX Rule 13.4. In addition, such NBBO information, as well as applicable halt and resume messages, are disseminated to market participants through the SIP feeds during the pre- and post-market trading hours of all U.S. equities exchanges.

[12] Pursuant to Regulation NMS, the NBBO in a given security is established by the best bid and best offer in such security calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. *See* 17 CFR 242.600(b)(43). As such, an NBBO may be established when one or more national securities exchanges are disseminating quotations in an equity security.

[13] *See* EDGX Rule 11.7(e)(2),(d).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

before the Exchange can resume trading. In addition to generally increasing efficiency of the re-opening process, the Exchange believes that the proposed automated procedures would reduce the need for members to contact the Trade Desk with questions about the status of their orders. Further, such a process would be responsive to member requests to improve on the inefficient manual process currently employed.

The proposed rule change would promote the public interest and the protection of investors by eliminating the need for manual intervention and replacing it with a more consistent procedure that would be applied by its trading systems on an automated basis. The proposed change would not impact the process by which the security would be re-opened, which would continue to follow the ''contingent open'' procedures used today. However, instead of relying on Trade Desk staff to manually re-open trading in the security, trading would resume on the Exchange once one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause. This condition is designed to ensure that a market has been established in the security prior to resuming trading on the Exchange, and mirrors the steps that Trade Desk personnel would conduct today to verify that there is a market in the security on one or more other exchanges before manually initiating a re-opening. Specifically, trading on the Exchange would not resume until one second after an NBBO has been established in the security following the resumption of quoting on at least one other national securities exchange. The Exchange believes that resuming trading once this condition has been satisfied would ensure that trading can be resumed in an automated and efficient fashion, while also ensuring that the re-opening of trading on the Exchange continues to be tied to the existence of an established market in the security on one or more other exchanges in the absence of trading on the primary listing market during the pre- and post-market. In addition, the Exchange would continue to have the authority to manually initiate the re-open of trading pursuant to EDGX Rule 11.7(e)(2), which would allow the Exchange to re-open trading in the event that trading is not re-opened pursuant to its automated procedures. The proposed amendments to EDGX Rule 11.7(e)(2) would increase the transparency of that rule by specifically noting that this discretion would be used when the Exchange is not otherwise able to re-open trading in an automated fashion under its rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to facilitate a more efficient re-opening process in situations where the Exchange's current rules would require unnecessary and inefficient manual intervention, and is not designed to address any competitive issues. The Exchange therefore does not believe that the proposed rule change would have any significant impact on competition. Rather than impact the competitive environment, the proposed rule change would benefit members and investors by eliminating the need for manual intervention when initiating the Exchange's re-opening process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or Post-Closing Session.

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 on 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 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*. Please include File Number SR–CboeEDGX–2020–055 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-CboeEDGX–2020–055. 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–CboeEDGX–2020–055 and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25497 Filed 11–18–20; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).a.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90431/November 13, 2020]

Securities Exchange Act of 1934; In the Matter of: NYSE Area, Inc., 11 Wall St., New York, NY 10005, File No. SR–NYSEArca–2019–01; Order Setting Aside the Order by Delegated Authority Disapproving SR–NYSEArca–2019–01

On January 28, 2019, NYSE Arca, Inc. (''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Bitwise Bitcoin ETF Trust under NYSE Arca Rule 8.201–E. The proposed rule change was published for comment in the **Federal Register** on February 15, 2019.[3] On March 29, 2019, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Division of Trading and Markets (''Division''), for the Commission pursuant to delegated authority, designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] On May 7, 2019, NYSE Arca filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed, and on May 14, 2019, the Division, for the Commission pursuant to delegated authority, published the proposed rule change, as modified by Amendment No. 1, for notice and comment and instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] On August 12, 2019, the Division, for the Commission pursuant to delegated authority, extended the period for consideration of the proposed rule change, as modified by Amendment No. 1.[8] On October 9, 2019, the Division, for the Commission pursuant to delegated authority,[9] disapproved the proposed rule change, as modified by Amendment No. 1.[10]

On October 15, 2019, the Secretary of the Commission notified NYSE Arca that, pursuant to Commission Rule of Practice 431,[11] the Commission would review the Division's action pursuant to delegated authority and that the Division's action pursuant to delegated authority was stayed until the Commission orders otherwise.[12] On November 12, 2019, the Commission issued a scheduling order allowing the filing of additional statements.[13]

On January 13, 2020, NYSE Arca withdrew the proposed rule change (SR–NYSEArca–2019–01).[14]

Under Commission Rule of Practice 431(a), the Commission may ''affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to'' delegated authority.[15] We find that, in light of the NYSE Arca's withdrawal of the proposed rule change, it is appropriate to set aside the Delegated Order.

Accordingly, *it is ordered* that the October 9, 2019, order disapproving by delegated authority NYSE Arca's proposed rule change number SR–NYSEArca–2019–01, be, and it hereby is, set aside.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25504 Filed 11–18–20; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85093 (Feb. 11, 2019), 84 FR 4589.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 85461, 84 FR 13339 (Apr. 4, 2019).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 85854, 84 FR 23125 (May 21, 2019).

[8] *See* Securities Exchange Act Release No. 86629, 84 FR 42036 (Aug. 16, 2019).

[9] 17 CFR 200.30–3(a)(12).

[10] *See* Securities Exchange Act Release No. 87267, 84 FR 55382 (Oct. 16, 2019) (''Delegated Order'').

[11] 17 CFR 201.431.

[12] *See* Letter from Secretary, Commission, to Michael Cavalier, Counsel, and David De Gregorio Senior Counsel, Intercontinental Exchange/NYSE (Oct. 15, 2019), available at *https://www.sec.gov/rules/sro/nysearca/2019/34/87267-letter.pdf.*

[13] *See* Securities Exchange Act Release No. 87503, 84 FR 63699 (Nov. 18, 2019).

[14] *See* letter from David De Gregorio, Senior Counsel, NYSE Arca, to Secretary, Commission, dated Jan. 13, 2020, available at *https://www.sec.gov/rules/sro/nysearca/2019/34/87267-nysearca-withdrawal.pdf.*

[15] 17 CFR 201.431(a).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90415; File No. SR–DTC–2020–013]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Reorganizations Service Guide

November 13, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 12, 2020, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change [5] is to amend the Reorganizations Guide to (1) establish November 16, 2020 as the date for the retirement of the Reorganization Inquiry for Participants (''RIPS'') [6] function for mandatory corporate action events,[7] and (2) make clarifying and technical changes, as more fully described below.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4).

[5] Each term not otherwise defined herein has its respective meaning as set forth in the Rules, By-Laws and Organization Certificate of DTC (the ''Rules'') and the Reorganizations Service Guide (''Reorganizations Guide''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[6] The RIPS function on the Participant Terminal System (''PTS'') is the functional equivalent of the Reorganizations and Redemptions function on the Participant Browser Service System (''PBS''). The PBS Reorganizations and Redemptions function will be retired concurrently with the RIPS function for mandatory reorganizations events. PTS and PBS are user interfaces for DTC's settlement and asset services functions. PTS is mainframe-based and PBS is web-based with a mainframe back-end. Participants may use either PTS or PBS, as they are functionally equivalent. References to a particular PTS function in this rule filing include the corresponding PBS function.

[7] RIPS will continue to be available for voluntary reorganizations events. *See* Important Notice 13116–20 (August 3, 2020), *available at https://www.dtcc.com/legal/important-notices.*

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Reorganizations Guide to (1) establish November 16, 2020 as the date for the retirement of the RIPS function for mandatory corporate action events, and (2) make clarifying and technical changes, as more fully described below.

(i) RIPS (Reorganization Inquiry for Participants) Retirement

On May 21, 2019, DTC filed with the Commission a proposed rule change to, among other things, update its corporate action service by transitioning certain corporate action functions on PTS and PBS for the processing of Reorganizations to the Corporate Action Web (''CA Web'') [8] system.[9] The rule change provided that, at the conclusion of the pilot test phase in Q2 of 2019, Reorganizations activity within the ADJI (Adjustment Inquiries) function, the RIPS function for mandatory reorganizations, and the SDAR Dept. C (Reorg/Redemptions/Dividend Allocations) function would be retired from PTS/PBS and the equivalent functionality would only be available on CA Web.

Subsequent to the May 21, 2019 rule filing, DTC had received feedback from Participants indicating that they needed additional time to test the parallel RIPS functionality on CA Web, the ''Reorganizations Announcements'' function. DTC postponed the retirement of the RIPS function for mandatory corporate actions events from PTS to an unspecified future date in order to provide Participants with the additional time for testing.[10]

DTC understands that the Participants have completed their testing. Thus, pursuant to this proposed rule change, DTC would retire the RIPS function for mandatory corporate actions events from PTS on November 16, 2020. In addition, DTC would amend the Reorganizations Guide to reference the retirement and to remove references to RIPS for mandatory corporate actions events.

(ii) Clarifying and Technical Changes

Pursuant to the proposed rule change, DTC would make other technical and clarifying changes to the Reorganizations Guide, as described below.

1. ''Important Legal Information'' Section

Pursuant to the proposed rule change, DTC would update the copyright date from 2019 to 2020.

2. ''About Reorganization Services'' Section

In the ''Preparing to Use the Services'' subsection, DTC is proposing to remove the chart of PTS/PBS functions that were retired in 2019. These functions have since been replaced by CA Web functionality.

In the ''How Reorganizations Work'' subsection, DTC is proposing to delete ''Participant Terminal System (PTS) functions'' and ''Participant Browser Service (PBS)'' from the list of delivery mechanism that DTC uses to provide Participants with information pertaining to their entitlements. The PTS/PBS functions that had been used for this purpose were retired.

In the ''Associated PTS/PBS and CA Web Functions'' subsection, DTC is proposing to delete the ART, POS, SDAR, ADJI rows from the table, as these functions were retired in 2019.[11] In addition, DTC is proposing to delete the row for LENP, which was replaced by the Legal Notice System (LENS).[12] Further, pursuant to the proposed rule change, DTC would delete the ''X'' in the Mand column for the RIPS row, to reflect the retirement of RIPS for mandatory reorganizations. DTC would also delete the ''X'' in the PXY column for RIPS because Proxy announcements are not viewed in RIPS, but rather are viewed in PTS PXY and announced in PTS PANS.

3. ''Announcements'' Section

In the ''How the Announcement Service Works'' subsection, DTC is proposing to update the final sentence in the subsection to reflect that announcement information is also delivered electronically via ISO 20022 messaging.

In the ''How to View Mandatory and Voluntary Reorganization Announcements'' subsection, DTC is proposing to amend the first sentence and insert a footnote to reflect that, after the RIPS function for mandatory reorganizations announcements is retired on November 16, 2020, the RIPS function would only be available for voluntary reorganizations announcements.

4. ''Processing'' Section

In the ''Mandatory Reorganizations'' subsection, in the ''Various Types of Mandatory Reorganizations'' table, DTC is proposing to edit the description for the Liquidation event by deleting ''securities and/or.'' The reference to securities is incorrect because DTC does not distribute securities under a Liquidation event type. Securities are distributed under a plan of reorganization.

In the ''Reorganization (RRG) Segregated Account'' subsection, for consistency, DTC is proposing to move the sentence ''Contra-CUSIP numbers are used to segregate your position (representing instructions submitted) for voluntary offers and put bond options.'' to the ''About Contra-CUSIPs'' subsection.

In the ''About Contra-CUSIPs'' subsection, DTC is proposing to streamline the description of contra-CUSIPs to enhance readability, and, for accuracy, to update the description to reflect that a contra-CUSIP contains the same first three digits of the issuer number assigned to the subject security. Further, DTC is proposing to simplify the description of a contra-CUSIP by removing text and examples that address the specific numerical construction of a contra-CUSIP. In addition to the three issuer digits, DTC generates the other digits of a contra-CUSIP on the basis of multiple factors, including, but not limited to, security characteristics, event types, and

[8] In PTS/PBS, corporate actions are announced using DTC proprietary codes to signify event types. CA Web replaces DTC's proprietary codes with market standard language. For example, a cash dividend payment that PTS/PBS identifies as a ''08'' function code is identified in CA Web as a ''Cash Dividend'' event. Additionally, CA Web incorporates the entire lifecycle of an event into one platform with a unique corporate action identifier that follows the event through its lifecycle. CA Web gives Participants the ability to customize screen displays and offers flexible methods for event search, neither of which is available in the PTS/PBS systems.

[9] *See* Securities Exchange Act Release No. 85986 (May 31, 2019), 84 FR 26466 (June 6, 2019) (SR–DTC–2019–003).

[10] *See* Securities Exchange Act Release No. 86255 (July 1, 2019), 84 FR 32508 (July 8, 2019) (SR–DTC–2019–004).

[11] *See* Securities Exchange Act Release No. 85986 (May 31, 2019), 84 FR 26466 (June 6, 2019) (SR–DTC–2019–003).

[12] *See* Important Notice 6525–10 (March 31, 2010), *supra* note 7.

currency. These other digits are used by DTC for internal tracking and accounting purposes and are not intended to provide information to Participants about the offer or event. The current language of the Reorganizations Guide does not reflect the full scope of the DTC process. In addition, because it is an internal DTC process for internal DTC use, DTC believes that Participants do not need, and may be confused by, information about how DTC generates the specific digits in a contra-CUSIP.

5. ''Instructions/Expirations'' Section

In the second paragraph of the ''Accepting an ATOP-Eligible Offer'' subsection, DTC is proposing to insert ''ISO 20022'' in the list of interfaces through which a Participant can view a notice of a tender offer.

In the ''Submitting a Protect for an ATOP-Eligible Offer'' subsection, DTC is proposing to insert additional language into the Warning! paragraph to clarify that DTC will only accept cover of protect instructions outside of PTS PTOP or PBS Voluntary Tenders and Exchanges when the window for submitting instructions through PTS PTOP or PBS Voluntary Tenders and Exchanges has closed, and only if the Participant contacted the agent before the offer had actually expired. If the offer expired prior to the Participant contacting the agent, any agreements to handle the protect will be required to be completed outside DTC. Further, DTC is proposing to clarify that if the Participant contacts the agent before the actual expiration of the offer and the agent agrees to accept an email submission directly, the agent will notify DTC and the Participant should email a Protect Submission Form to DTC. Once the communication from both the agent and Participant has been received by DTC, with each having provided the appropriate indemnification language, DTC will then input the protect submission on behalf of the Participant.

In the ''Submitting a Cover of Protect via PTS PTOP or PBS Voluntary Tenders and Exchanges for an ATOP-Eligible Offer'' subsection, DTC is proposing to insert additional language into the Warning! paragraph to clarify that DTC will not accept cover of protect instructions outside of PTS PTOP or PBS Voluntary Tenders and Exchanges (i) if the window for submitting instructions through PTS PTOP or PBS Voluntary Tenders and Exchanges is still open, or (ii) if the original protect was not accepted in PTS PTOP or PBS Voluntary Tenders and Exchanges. In the paragraph below the Warning! paragraph, DTC is proposing to insert ''ISO 20022 message'' in the lists of interfaces through which a Participant can view the notice of a tender offer.

In the ''Submitting a Cover of Protect via PTS PTOP or PBS Voluntary Tenders and Exchanges on Behalf of Another Participant'' subsection, DTC is proposing to insert additional language into the Warning! paragraph to clarify that in order for one Participant to cover a protect on behalf of a second Participant, the second Participant must have either (i) submitted its protect via PTS/PBS, or (ii) submitted a protect to the agent via email that was subsequently communicated to DTC and input into PTS PTOP by DTC.

In the ''Procedures for Submitting Instructions Outside of PTS/PBS''/ ''Submitting the Instruction'' subsection, in the fifth Warning! paragraph, DTC is proposing to insert ''CA Web and ISO 20022 messages'' as interfaces through which a Participant can view information about a tender offer.

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires, *inter alia,* that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[13]

DTC believes that the proposed rule change with respect to establishing November 16, 2020 as the date for the retirement of the RIPS function for mandatory corporate actions events is consistent with Section 17(A)(b)(3)(F) of the Act referenced above. By requiring Participants to utilize the more flexible and robust CA Web interface, DTC would be promoting more efficient access to reorganization services and a broader view of a reorganization event for Participants. Therefore, DTC believes that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions relating to mandatory corporate actions events, consistent with Section 17A(b)(3)(F) of the Act, cited above.

DTC believes that the proposed rule change to amend the Reorganizations Guide to make technical and clarifying changes is consistent with Section 17(A)(b)(3)(F) of the Act referenced above because it would enhance the clarity and transparency of the Reorganizations Guide. By enhancing the clarity and transparency of the Reorganizations Guide, the proposed rule change would allow Participants to more efficiently and effectively conduct their business in connection with processing reorganization events and settling related securities transactions. Therefore, DTC believes that the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities transactions related to Reorganizations, consistent with Section 17A(b)(3)(F) of the Act, cited above.

(B) Clearing Agency's Statement on Burden on Competition

DTC believes that the proposed rule change with respect to amending the Reorganizations Guide to establish November 16, 2020 as the date for the retirement of the RIPS function for mandatory corporate actions events would not have any impact on competition. As discussed above, DTC had originally postponed the retirement date to allow Participants additional time to test the parallel functionality on CA Web. As Participants' testing is now complete, the retirement of RIPS for mandatory corporate actions, which applies to all Participants equally, can proceed. Therefore, DTC believes that the proposed rule change with respect to amending the Reorganizations Guide to establish November 16, 2020 as the date for the retirement of the RIPS function for mandatory corporate actions events would not have any impact on competition.[14]

DTC believes that the proposed rule change to amend the Reorganizations Guide to make technical and clarifying changes would not have any impact on competition because it merely would enhance the clarity and transparency of the Reorganizations Guide, and therefore would not affect the rights and obligations of any party.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[15] of the Act and paragraph (f)[16] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] 15 U.S.C. 78q–1(b)(3)(I).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2020–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2020–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2020–013 and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25502 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90423; File No. SR–NASDAQ–2020–074)

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Credits at Equity 7, Section 118

November 13, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 2, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction credits at Equity 7, Section 118, as described further below.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its schedule of credits at Equity 7, Section 118, to add a new credit for executing orders in securities in all three Tapes.

Presently, the Exchange offers its members a credit of $0.00295 per share of displayed orders/quotes (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to the extent such members (i) have shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.70% or more of Consolidated Volume[3] during the month; (ii) execute 0.20% or more of Consolidated Volume during the month through providing midpoint orders and through MELO; and (iii) remove at least 1.10% of Consolidated Volume during the month of Consolidated Volume during the month through one or more of their Nasdaq Market Center MPIDs [sic]. The purpose of this credit is to incent members to engage in substantial volumes of liquidity adding and removal activity on the Exchange during a month and, in particular, to execute a substantial percentage of such volume through the provision of midpoint and Midpoint Extended Life Orders, or ''M–ELOs.''

The Exchange now proposes to add a new, higher credit for members that meet similar criteria, albeit with higher volume requirements. Specifically, the Exchange proposes to provide a new credit of $0.00305 per share of displayed orders/quotes (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to the extent such members (i) have shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.20% or more of Consolidated

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[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Pursuant to Equity 7, Section 118(a), the term ''Consolidated Volume'' means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes is excluded from both total Consolidated Volume and the member's trading activity.

Volume[4] during the month; (ii) execute 0.40% or more of Consolidated Volume during the month through providing midpoint orders and through MELO; and (iii) remove at least 1.10% of Consolidated Volume during the month of Consolidated Volume during the month through one or more of their Nasdaq Market Center MPIDs [sic].

In incentivizing members to increase the extent of their liquidity addingand removal activity on the Exchange, and the extent of their midpoint and M–ELO execution activity on the Exchange, the Exchange intends to improve the overall quality and attractiveness of the market.

Impact of the Changes

Those participants that act as significant providers and removers of liquidity, and who execute substantial volumes of midpoint and M–ELO orders on the Exchange, will benefit directly from the proposed addition of the new credit. Other participants will also benefit from the new credit insofar as any increase in liquidity adding and removal activity on the Exchange will improve the overall quality of the market, to the benefit of all members.

The Exchange notes that its proposals are not otherwise targeted at or expected to be limited in their applicability to a specific segment of market participants nor will they apply differently to different types of market participants.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and further the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

The Proposal is Reasonable

The Exchange's proposed change to its schedule of credits is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has 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'. . . .''[7]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, 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.''[8]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity 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 thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange has designed its proposed new credit to provide increased overall incentives to members to increase their liquidity adding and removal activity on the Exchange, and their execution activity in midpoint and M–ELO orders. An increase in liquidity adding and removal activity on the Exchange will, in turn, improve the quality of the Nasdaq market and increase its attractiveness to existing and prospective participants.

The Exchange notes that those market participants that are dissatisfied with the new credit are free to shift their order flow to competing venues that offer them lower charges or higher credits.

The Proposal is an Equitable Allocation of Credits

The Exchange believes its proposal will allocate its credits fairly among its market participants. It is equitable for the Exchange to establish the proposed new credit as a means of incentivizing members to provide and remove meaningful amounts of liquidity to the Exchange, including in midpoint and M–ELO orders. To the extent that the Exchange succeeds in increasing overall activity on the Exchange, including in midpoint and M–ELO orders, then the Exchange would experience improvements in its market quality, which would benefit all market participants.

Any participant that is dissatisfied with the proposed new credit is free to shift their order flow to competing venues that provide more generous pricing or less stringent qualifying criteria.

The Proposed Credit is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its volume-based tiered pricing model is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries—from co-branded credit cards to grocery stores to cellular telephone data plans—that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its

[4] Pursuant to Equity 7, Section 118(a), the term ''Consolidated Volume'' means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes is excluded from both total Consolidated Volume and the member's trading activity.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4) and (5).

[7] *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)).

[8] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

Moreover, the Exchange believes that its new proposed credit is not unfairly discriminatory because it stands to improve the overall market quality of the Exchange, to the benefit of all market participants, by incentivizing members to provide and remove meaningful amounts of liquidity.

Finally, any participant that is dissatisfied with the proposed new credit is free to shift their order flow to competing venues that provide more generous pricing or less stringent qualifying criteria.

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.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage. To the contrary, the proposed change will provide an opportunity for members to receive a higher credit based upon their market-improving behavior. Any member may elect to provide the levels of market activity required in order to receive the new credit. Furthermore, all members of the Exchange will benefit from any increase in market activity that the proposals effectuates.

Moreover, members are free to trade on other venues to the extent they believe that the proposed credit is too low or the qualification criteria are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. The Exchange notes that the tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

Intermarket Competition

The Exchange believes that its proposal will not burden competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the multitude of other live exchanges and from off-exchange venues. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and credits to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee and credit changes in this market may impose any burden on competition is extremely limited.

The proposed new credit is reflective of this competition because, even as one of the largest U.S. equities exchanges by volume, the Exchange has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprises upwards of 40% of industry volume.

The Exchange's proposal is pro-competitive in that the Exchange intends for it to increase liquidity adding and removal activity on the Exchange and thereby render the Exchange a more attractive and vibrant venue to market participants.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[9]

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–074 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–074. 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–NASDAQ–2020–074, and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25501 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90427/November 13, 2020]

Securities Exchange Act of 1934

In the Matter of: Cboe Exchange, Inc., 400 South LaSalle Street, Chicago, IL 60605, File No. SR–CBOE–2018–060; Order Setting Aside the Order by Delegated Authority Approving SR–CBOE–2018–060

On August 16, 2018, Cboe Exchange, Inc. (''Exchange'' or ''Cboe'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rule 6.49A (Transfer of Positions). The proposed rule change was published for comment in the **Federal Register** on September 4, 2018.[3] The Commission received no comments during the comment period.[4] On October 16, 2018, the Division of Trading and Markets, for the Commission pursuant to delegated authority,[5] approved the proposed rule change.[6]

On October 23, 2018, Susquehanna International Group, LLP submitted a notice of intention to petition the Delegated Order,[7] and on October 30, 2018, Susquehanna International Group, LLP filed a petition for review of the Delegated Order.[8]

On February 11, 2019, Cboe withdrew the proposed rule change (SR–CBOE–2018–060).[9]

Under Commission Rule of Practice 431(a), the Commission may ''affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to'' delegated authority.[10] We find that, in light of Cboe's withdrawal of the proposed rule change, it is appropriate to set aside the Delegated Order.

Accordingly, *it is ordered* that the October 16, 2018 order approving by delegated authority Cboe's proposed rule change number SR–CBOE–2018–060, be, and it hereby is, set aside.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25505 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83968 (August 28, 2018), 83 FR 44938 (September 4, 2018) (SR–CBOE–2018–060).

[4] Susquehanna International Group, LLP submitted a comment letter on October 19, 2018, three days after approval of the proposed rule change pursuant to delegated authority. *See* Letter from Richard J. McDonald, Regulatory Affairs, Susquehanna International Group, LLP, to Brent J. Fields, Secretary, Commission, dated October 19, 2018.

[5] 17 CFR 200.30–3(a)(12).

[6] *See* Securities Exchange Act Release No. 84437 (October 16, 2018), 83 FR 53336 (October 22, 2018) (SR–CBOE–2018–060) (''Delegated Order'').

[7] *See* Letter from Joseph C. Lombard, Murphy & McGonigle, as Counsel for Susquehanna International Group, LLP, to Brent J. Fields, Secretary, Commission, dated October 23, 2018, *available at https://www.sec.gov/rules/sro/cboe/2018/srcboe2018060-intention-to-petition.pdf.*

[8] *See In the Matter of the Petition of Susquehanna International Group, LLP* (Petition for Review of Order Entered Pursuant to Delegated Authority Approving Amendments to Rule 6.49A by Cboe Exchange, Inc.) (October 30, 2018), *available at https://www.sec.gov/rules/sro/cboe/2018/srcboe2018060-petition.pdf.*

[9] *See* Letter from Laura G. Dickman, Vice President, Associate General Counsel, Cboe Exchange, Inc., to Eduardo A. Aleman, Assistant Secretary, Commission, dated February 11, 2019, *available at https://www.sec.gov/rules/sro/cboe/2019/cboe-2018-060-withdrawal.pdf.*

[10] 17 CFR 201.431(a).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90430/November 13, 2020]

Order Setting Aside the Order by Delegated Authority Disapproving SR–NYSEArca–2018–02; In the Matter of NYSE Arca, Inc., 11 Wall St., New York, NY 10005; File No. SR–NYSEArca–2018–02

On January 4, 2018, NYSE Arca, Inc. (''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares under NYSE Arca Rule 8.200–E, Commentary .02. The proposed rule change was published for comment in the **Federal Register** on January 24, 2018.[3] On March 1, 2018, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Division of Trading and Markets (''Division''), for the Commission pursuant to delegated authority, designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] On April 23, 2018, the Division, for the Commission pursuant to delegated authority, instituted proceedings under Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On July 18, 2018, the Division, for the Commission pursuant to delegated authority, extended the period for consideration of the proposed rule change.[8] On August 22, 2018, the Division, for the Commission pursuant to delegated authority,[9] disapproved the proposed rule change.[10]

On August 23, 2018, the Secretary of the Commission notified NYSE Arca that, pursuant to Commission Rule of Practice 431,[11] the Commission would review the Division's action pursuant to delegated authority and that the Division's action pursuant to delegated authority was stayed until the Commission orders otherwise.[12] On October 4, 2018, the Commission issued a scheduling order allowing the filing of additional statements.[13]

On June 17, 2020, NYSE Arca withdrew the proposed rule change (SR–NYSEArca–2018–02).[14]

[3] *See* Securities Exchange Act Release No. 82532 (Jan. 18, 2018), 83 FR 3380.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 82795, 83 FR 9768 (Mar. 7, 2018).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 83094, 83 FR 18603 (Apr. 27, 2018).

[8] *See* Securities Exchange Act Release No. 83661, 83 FR 35040 (July 24, 2018).

[9] 17 CFR 200.30–3(a)(12).

[10] *See* Securities Exchange Act Release No. 83912, 83 FR 43912 (Aug. 28, 2018) (''Delegated Order'').

[11] 17 CFR 201.431.

[12] *See* Letter from Secretary, Commission, to Eugene Schlanger, Counsel, NYSE Group, Inc., dated Aug. 23, 2018, available at *https://www.sec.gov/rules/sro/nysearca/2018/34-83912-letter-from-secretary.pdf.*

[13] *See* Securities Exchange Act Release No. 84370, 83 FR 51531 (Oct. 11, 2018).

[14] *See* letter from David De Gregorio, Senior Counsel, NYSE Arca, to Secretary, Commission,

Continued

Under Commission Rule of Practice 431(a), the Commission may ''affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to'' delegated authority.[15] We find that, in light of the NYSE Arca's withdrawal of the proposed rule change, it is appropriate to set aside the Delegated Order.

Accordingly, it is ordered that the August 22, 2018, order disapproving by delegated authority NYSE Arca's proposed rule change number SR–NYSEArca–2018–02, be, and it hereby is, set aside.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25506 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 201.431(a).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90421; File No. SR–CboeBYX–2020–032]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Automate the Exchange's Process for Initiating the Re-Opening of a Security Listed on the New York Stock Exchange LLC Following the Resumption of Trading After a Halt, Suspension, or Pause During the Early Trading Session, Pre-Opening Session, or After Hours Trading Session

November 13, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 5, 2020, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') 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

Cboe BYX Exchange, Inc. (''BYX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to automate the Exchange's current process for initiating the re-opening of a security listed on the New York Stock Exchange LLC following the resumption of trading after a halt, suspension, or pause during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session. 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/byx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to automate the Exchange's current process for initiating the re-opening of securities listed on the New York Stock Exchange LLC (''NYSE'') following the resumption of trading after a halt, suspension, or pause during the Early Trading Session,[3] Pre-Opening Session,[4] or After Hours Trading Session.[5] BYX Rule 11.23 describes the Exchange's opening process for securities listed on other national securities exchanges, including the process for re-opening such securities following the resumption of trading after a halt, suspension, or pause. Although the Exchange generally employs an automated process for re-opening securities listed on other exchanges, there are situations where manual intervention is currently needed to initiate the Exchange's re-opening process. Specifically, manual intervention is currently needed for the Exchange to initiate its re-opening process in NYSE-listed securities that resume trading after a halt, suspension, or pause when such resumption of trading occurs outside of regular trading hours at times when the Exchange is open for either pre- or post-market trading but NYSE does not trade its listed securities. The proposed rule change would implement an automated process for initiating the re-opening of trading on the Exchange in these circumstances.

Generally, the Exchange's re-opening process is designed to provide an execution at the midpoint of the national best bid and offer (''NBBO'') following the initiation of trading on the applicable listing exchange. Specifically, as described in BYX Rule 11.23(e)(1), the Exchange's re-opening process occurs at the midpoint of the: (i) First NBBO subsequent to the first reported trade and first two-sided quotation on the listing exchange following the resumption of trading after a halt, suspension, or pause; or (ii) NBBO when the first two-sided quotation is published by the listing exchange following the resumption of trading after a halt, suspension, or pause if no first trade is reported by the listing exchange within one second of publication of the first two-sided quotation by the listing exchange. In either case, the Exchange must wait for the listing exchange to commence trading before initiating its re-opening procedures.

NYSE operates two trading sessions each day: (1) The ''core trading session'' between 9:30 a.m. ET to 4:00 p.m. ET, during which all securities are available for trading;[6] and (2) the ''early trading session'' between 7:00 a.m. ET and the commencement of the core trading session, during which only securities that trade via unlisted trading privileges are available for trading.[7] NYSE does not trade its listed securities during its early trading session, *i.e.,* prior to the beginning of regular trading hours, nor does it trade any securities after the end of regular trading hours. As a result, since the Exchange's normal process for re-opening securities listed on other exchanges after a halt, suspension, or pause requires trading to commence on the listing exchange, the Exchange

dated June 17, 2020, available at *https://www.sec.gov/comments/sr-nysearca-2018-02/srnysearca201802-7415693-219417.pdf.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Early Trading Session'' means the time between 7:00 a.m. and 8:00 a.m. Eastern Time. *See* BYX Rule 1.5(ee).

[4] The term ''Pre-Opening Session'' means the time between 8:00 a.m. and 9:30 a.m. Eastern Time. *See* BYX Rule 1.5(r).

[5] The term ''After Hours Trading Session'' means the time between 4:00 p.m. and 8:00 p.m. Eastern Time. *See* BYX Rule 1.5(c).

[6] *See* NYSE Rule 7.34(a)(2). NYSE's core trading session for its listed securities begins with its opening auction and ends with its closing auction if one is conducted. *Id.*

[7] *See* NYSE Rule 7.34(a)(1).

cannot use this process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session.

At the same time, BYX Rule 11.23(e)(2) provides that where neither of the conditions required for the initiation of the Exchange's automated re-opening process have occurred, trading in the security may be resumed on the Exchange at its discretion. The Exchange therefore periodically invokes it authority pursuant to this rule to manually initiate the resumption of trading in NYSE-listed securities outside of regular trading hours.[8] However, initiating trading on the Exchange in this manner requires manual intervention by Exchange staff. The Exchange believes that it would be in the interest of market participants and investors to instead automate its process for initiating trading in this situation and avoid the need for manual intervention.

Current Process for NYSE-Listed Securities Re-Opened in Pre- and Post-Market

As discussed, the Exchange currently employs a manual process to initiate the resumption of trading in NYSE-listed securities outside of regular trading hours. This manual process requires personnel from the Exchange's Trade Desk to become aware of, and react to, NYSE's determination to lift a trading halt in one of their listed securities.[9] Typically, this occurs in one of two ways. First, the Trade Desk performs proactive monitoring of halt notifications from NYSE and subsequent resumptions during the After Hours Trading Session.[10] If a security is halted by NYSE during regular trading, Trade Desk personnel will monitor internal tools beginning at 4:00 p.m. ET to identify whether NYSE has lifted the halt. Second, even with the proactive monitoring performed by the Trade Desk, there may be instances where the Exchange has not immediately initiated the manual re-opening of a security that has resumed trading. In such circumstances, Exchange members may reach out to the Trade Desk when they notice that their orders are not reflected in the market. In either case, Trade Desk personnel would check internal tools to confirm that the security is no longer halted, and would routinely invoke the authority described in the paragraph above to initiate the re-opening process on the Exchange after identifying that there are quotes available in the security on other exchanges. The Exchange believes that this manual process is inefficient, and members have also reached out to the Trade Desk with requests that the Exchange replace this process with a more efficient automated process. As a result, the Exchange is proposing to automate its process for initiating trading in this situation to avoid the need for manual intervention by Exchange staff.

Proposed Automated Process for Initiating the Exchange's Re-Opening

As proposed, the Exchange would replace the manual process described above with automated procedures that would automatically resume trading after one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause.[11] This change would allow the Exchange to avoid the need for Trade Desk staff to monitor for resumption messages, and would allow members' orders to be automatically reflected in the market, while continuing to ensure that the Exchange's re-opening is tied to the existence of a market in the security on a national securities exchange(s).[12] With this change, the Exchange would continue to re-open trading in NYSE-listed securities in the same manner that it is able to under BYX Rule 11.23(e)(2) today, but would not have to rely on manual procedures for initiating the resumption of trading. Specifically, rather than conducting the standard midpoint re-opening described in BYX Rule 11.23(e)(1) when the listing exchange has not established a market in the security, the Exchange would continue to follow the process described in BYX Rule 11.23(e)(2), without the need for manual intervention. Thus, as is the case following the manual initiation of the re-opening of trading in a security on the Exchange, orders would be processed using the ''contingent open'' procedures described in BYX Rule 11.23(d), which provides that orders are to be handled in time sequence and placed on the BYX Book, routed, cancelled, or executed in accordance with the terms of the order.[13]

In the event that there is no available NBBO in the security, the proposed automated procedures would not resume trading on the Exchange, but the Exchange would retain the ability to manually resume trading at its discretion pursuant to current BYX Rule 11.23(e)(2). To increase transparency around when the Exchange could invoke this discretion, the Exchange proposes to amend BYX Rule 11.23(e)(2) to specifically state that the discretion provided pursuant to this rule applies when a security has not otherwise been re-opened for trading on the Exchange pursuant to Proposed BYX Rule 11.23(e)(3). This change would not substantively modify the scope of the discretion provided pursuant to BYX Rule 11.23(e)(2). However, the Exchange believes that modifying the rule in this manner would serve to increase transparency by specifically identifying the times when this discretion is not relevant due to the fact that the Exchange has successfully re-opened the security using its automated procedures.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[14] in general, and Section 6(b)(5) of the Act,[15] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. Today, Trade Desk staff must manually intervene to initiate the re-opening on the Exchange of NYSE-listed

[8] The Exchange estimates that it currently invokes its authority under this rule to manually initiate a re-opening in NYSE-listed securities a handful of times each month.

[9] Section 203.07 of NYSE's Listed Company Manual describes its trading halt procedures, and provides NYSE with discretion to declare a material news halts in its listed securities, as well as to lift such a halt when it determines that trading should resume. As a matter of practice, NYSE may exercise its discretion to lift a trading halt in its listed securities outside of its own hours for trading such securities. In that event, NYSE would disseminate a resume message through the SIP, which would permit trading to resume on other national securities exchanges, including the Exchange.

[10] Although it is possible for a resumption to take place in the Early Trading and Pre-Opening Sessions, Trade Desk personnel do not monitor for resumptions in those trading sessions as this scenario normally occurs in the After Hours Trading Session.

[11] The Exchange utilizes a combination of direct feeds and the applicable securities information processor (''SIP'') feeds to determine the NBBO in a security. *See* BYX Rule 11.26. In addition, such NBBO information, as well as applicable halt and resume messages, are disseminated to market participants through the SIP feeds during the pre- and post-market trading hours of all U.S. equities exchanges.

[12] Pursuant to Regulation NMS, the NBBO in a given security is established by the best bid and best offer in such security calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. *See* 17 CFR 242.600(b)(43). As such, an NBBO may be established when one or more national securities exchanges are disseminating quotations in an equity security.

[13] *See* BYX Rule 11.23(e)(2),(d).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

securities following the resumption of trading after a halt, suspension, or pause, if the security resumes trading during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session. Although NYSE may trade securities pursuant to unlisted trading privileges prior to regular trading hours, it does not offer pre- or post-market trading for its listed securities. Since the Exchange's current rules require trading to have commenced on the primary listing market in order to initiate the Exchange's automated process for re-opening securities following a halt, suspension, or pause, the Exchange is forced to periodically invoke manual procedures to resume trading these securities pursuant to unlisted trading privileges. The Exchange believes, however, that an automated process would be more consistent and reliable for market participants and investors as such a process would not rely on manual intervention by Trade Desk staff before the Exchange can resume trading. In addition to generally increasing efficiency of the re-opening process, the Exchange believes that the proposed automated procedures would reduce the need for members to contact the Trade Desk with questions about the status of their orders. Further, such a process would be responsive to member requests to improve on the inefficient manual process currently employed.

The proposed rule change would promote the public interest and the protection of investors by eliminating the need for manual intervention and replacing it with a more consistent procedure that would be applied by its trading systems on an automated basis. The proposed change would not impact the process by which the security would be re-opened, which would continue to follow the ''contingent open'' procedures used today. However, instead of relying on Trade Desk staff to manually re-open trading in the security, trading would resume on the Exchange once one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause. This condition is designed to ensure that a market has been established in the security prior to resuming trading on the Exchange, and mirrors the steps that Trade Desk personnel would conduct today to verify that there is a market in the security on one or more other exchanges before manually initiating a re-opening. Specifically, trading on the Exchange would not resume until one second after an NBBO has been established in the security following the resumption of quoting on at least one other national securities exchange. The Exchange believes that resuming trading once this condition has been satisfied would ensure that trading can be resumed in an automated and efficient fashion, while also ensuring that the re-opening of trading on the Exchange continues to be tied to the existence of an established market in the security on one or more other exchanges in the absence of trading on the primary listing market during the pre- and post-market. In addition, the Exchange would continue to have the authority to manually initiate the re-open of trading pursuant to BYX Rule 11.23(e)(2), which would allow the Exchange to re-open trading in the event that trading is not re-opened pursuant to its automated procedures. The proposed amendments to BYX Rule 11.23(e)(2) would increase the transparency of that rule by specifically noting that this discretion would be used when the Exchange is not otherwise able to re-open trading in an automated fashion under its rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to facilitate a more efficient re-opening process in situations where the Exchange's current rules would require unnecessary and inefficient manual intervention, and is not designed to address any competitive issues. The Exchange therefore does not believe that the proposed rule change would have any significant impact on competition. Rather than impact the competitive environment, the proposed rule change would benefit members and investors by eliminating the need for manual intervention when initiating the Exchange's re-opening process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session.

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 on 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 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.* Please include File Number SR–CboeBYX–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–CboeBYX–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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBYX–2020–032 and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25495 Filed 11–18–20; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90428/November 13, 2020]

Securities Exchange Act of 1934; In the Matter of: Cboe BZX Exchange, Inc., 400 South LaSalle Street, Chicago, IL 60605, File No. SR–CboeBZX–2018–044; Order Setting Aside the Order by Delegated Authority Disapproving SR–CboeBZX–2018–044

On June 21, 2018, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend BZX Rule 14.11(c) to permit either the portfolio holdings of a series of Index Fund Shares or the index underlying a series of Index Fund Shares to satisfy the listing standards under BZX Rules 14.11(c)(3), (4), and (5). The proposed rule change was published for comment in the **Federal Register** on July 11, 2018.[3] On August 23, 2018, the Division of Trading and Markets (''Division''), for the Commission pursuant to delegated authority, extended the time period for Commission action on the proposed rule change.[4] On September 28, 2018, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change as originally filed.[5] On October 5, 2018, the Division, for the Commission pursuant to delegated authority, published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] On December 21, 2018, pursuant to Section 19(b)(2) of the Exchange Act,[8] the Division, for the Commission pursuant to delegated authority, designated a longer period within which to issue an order approving or disapproving the proposed rule change, as modified by Amendment No. 1.[9] On March 8, 2019, the Division, for the Commission pursuant to delegated authority,[10] disapproved the proposed rule change, as modified by Amendment No. 1.[11]

On March 18, 2019, the Acting Secretary of the Commission notified BZX that, pursuant to Commission Rule of Practice 431,[12] the Commission would review the Division's action pursuant to delegated authority and that the Division's action pursuant to delegated authority was stayed until the Commission orders otherwise.[13] On April 17, 2019, the Commission issued a scheduling order allowing the filing of additional statements.[14]

On June 23, 2020, BZX withdrew the proposed rule change (SR–CboeBZX–2018–044).[15]

Under Commission Rule of Practice 431(a), the Commission may ''affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to'' delegated authority.[16] We find that, in light of BZX's withdrawal of the proposed rule change, it is appropriate to set aside the Delegated Order.

Accordingly, *it is ordered* that the March 8, 2019 order disapproving by delegated authority BZX's proposed rule change number SR–CboeBZX–2018–044, be, and it hereby is, set aside.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25507 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83594 (July 5, 2018), 83 FR 32158.

[4] *See* Securities Exchange Act Release No. 83919, 83 FR 44083 (August 29, 2018).

[5] Amendment No. 1 is available at *https://www.sec.gov/comments/sr-cboebzx-2018/044/srcboebzx2018044/4468884/175849.pdf.*

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 84378, 83 FR 51745 (October 12, 2018).

[8] 15 U.S.C. 78s(b)(2).

[9] *See* Securities Exchange Act Release No. 84948, 83 FR 67785 (December 31, 2018).

[10] 17 CFR 200.30–3(a)(12).

[11] *See* Securities Exchange Act Release No. 85278, 84 FR 9395 (March 14, 2019) (''Delegated Order'').

[12] 17 CFR 201.431.

[13] *See* letter from Vanessa A. Countryman, Acting Secretary, Commission, to Kyle Murray, Assistant General Counsel, BZX, dated March 18, 2019, available at *https://www.sec.gov/rules/sro/cboebzx/2019/cboebzx-2018-044-acknowledgement-letter-031819.pdf.*

[14] *See* Securities Exchange Act Release No. 85682, 84 FR 18098 (April 29, 2019).

[15] *See* letter from Kyle Murray, Vice President and Associate General Counsel, BZX, to Vanessa Countryman, Secretary, Commission, dated June 23, 2020, available at *https://www.sec.gov/comments/sr-cboebzx-2018-044/srcboebzx2018044-7340745-218668.pdf.*

[16] 17 CFR 201.431(a).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90419; File No. SR–CboeEDGA–2020–029]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Automate the Exchange's Process for Initiating the Re-Opening of a Security Listed on the New York Stock Exchange LLC Following the Resumption of Trading After a Halt, Suspension, or Pause During the Early Trading Session, Pre-Opening Session, or Post-Closing Session

November 13, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 5, 2020, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') 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

Cboe EDGA Exchange, Inc. (''EDGA'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to automate the Exchange's current process for initiating the re-opening of a security listed on the New York Stock Exchange LLC following the resumption of trading after a halt, suspension, or pause during the Early Trading Session, Pre-Opening Session, or Post-Closing Session. 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to automate the Exchange's current process for initiating the re-opening of securities listed on the New York Stock Exchange LLC (''NYSE'') following the resumption of trading after a halt, suspension, or pause during the Early Trading Session,[3] Pre-Opening Session,[4] or Post-Closing Session.[5] EDGA Rule 11.7 describes the Exchange's opening process for securities listed on other national securities exchanges, including the process for re-opening such securities following the resumption of trading after a halt, suspension, or pause. Although the Exchange generally employs an automated process for re-opening securities listed on other exchanges, there are situations where manual intervention is currently needed to initiate the Exchange's re-opening process. Specifically, manual intervention is currently needed for the Exchange to initiate its re-opening process in NYSE-listed securities that resume trading after a halt, suspension, or pause when such resumption of trading occurs outside of regular trading hours at times when the Exchange is open for either pre- or post-market trading but NYSE does not trade its listed securities. The proposed rule change would implement an automated process for initiating the re-opening of trading on the Exchange in these circumstances.

Generally, the Exchange's re-opening process is designed to provide an execution at the midpoint of the national best bid and offer (''NBBO'') following the initiation of trading on the applicable listing exchange. Specifically, as described in EDGA Rule 11.7(e)(1), the Exchange's re-opening process occurs at the midpoint of the: (i) First NBBO subsequent to the first reported trade and first two-sided quotation on the listing exchange following the resumption of trading after a halt, suspension, or pause; or (ii) then prevailing NBBO when the first two-sided quotation published by the listing exchange following the resumption of trading after a halt, suspension, or pause if no first trade is reported by the listing exchange within one second of publication of the first two-sided quotation by the listing exchange. In either case, the Exchange must wait for the listing exchange to commence trading before initiating its re-opening procedures.

NYSE operates two trading sessions each day: (1) The ''core trading session'' between 9:30 a.m. ET to 4:00 p.m. ET, during which all securities are available for trading;[6] and (2) the ''early trading session'' between 7:00 a.m. ET and the commencement of the core trading session, during which only securities that trade via unlisted trading privileges are available for trading.[7] NYSE does not trade its listed securities during its early trading session, *i.e.,* prior to the beginning of regular trading hours, nor does it trade any securities after the end of regular trading hours. As a result, since the Exchange's normal process for re-opening securities listed on other exchanges after a halt, suspension, or pause requires trading to commence on the listing exchange, the Exchange cannot use this process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or Post-Closing Session.

At the same time, EDGA Rule 11.7(e)(2) provides that where neither of the conditions required for the initiation of the Exchange's automated re-opening process have occurred, trading in the security may be resumed on the Exchange at its discretion. The Exchange therefore periodically invokes it authority pursuant to this rule to manually initiate the resumption of trading in NYSE-listed securities outside of regular trading hours.[8] However, initiating trading on the Exchange in this manner requires manual intervention by Exchange staff. The Exchange believes that it would be in the interest of market participants and investors to instead automate its process for initiating trading in this situation and avoid the need for manual intervention.

Current Process for NYSE-Listed Securities Re-Opened in Pre- and Post-Market

As discussed, the Exchange currently employs a manual process to initiate the resumption of trading in NYSE-listed securities outside of regular trading hours. This manual process requires personnel from the Exchange's Trade Desk to become aware of, and react to, NYSE's determination to lift a trading halt in one of their listed securities.[9] Typically, this occurs in one of two ways. First, the Trade Desk performs proactive monitoring of halt notifications from NYSE and subsequent resumptions during the Post-Closing Trading Session.[10] If a security is halted by NYSE during regular trading, Trade Desk personnel will monitor internal tools beginning at 4:00 p.m. ET to identify whether NYSE has lifted the halt. Second, even with the proactive monitoring performed by the Trade Desk, there may be instances where the Exchange has not immediately initiated the manual re-opening of a security that has resumed trading. In such circumstances, Exchange members may reach out to the Trade Desk when they notice that their orders are not reflected in the market. In either case, Trade Desk personnel would check internal tools to confirm that the security is no longer halted, and would routinely invoke the authority described in the paragraph

[3] The term ''Early Trading Session'' means the time between 7:00 a.m. and 8:00 a.m. Eastern Time. *See* EDGA Rule 1.5(ii).

[4] The term ''Pre-Opening Session'' means the time between 8:00 a.m. and 9:30 a.m. Eastern Time. *See* EDGA Rule 1.5(s).

[5] The term ''Post-Closing Session'' means the time between 4:00 p.m. and 8:00 p.m. Eastern Time. *See* EDGA Rule 1.5(r).

[6] *See* NYSE Rule 7.34(a)(2). NYSE's core trading session for its listed securities begins with its opening auction and ends with its closing auction if one is conducted. *Id.*

[7] *See* NYSE Rule 7.34(a)(1).

[8] The Exchange estimates that it currently invokes its authority under this rule to manually initiate a re-opening in NYSE-listed securities a handful of times each month.

[9] Section 203.07 of NYSE's Listed Company Manual describes its trading halt procedures, and provides NYSE with discretion to declare a material news halts in its listed securities, as well as to lift such a halt when it determines that trading should resume. As a matter of practice, NYSE may exercise its discretion to lift a trading halt in its listed securities outside of its own hours for trading such securities. In that event, NYSE would disseminate a resume message through the SIP, which would permit trading to resume on other national securities exchanges, including the Exchange.

[10] Although it is possible for a resumption to take place in the Early Trading and Pre-Opening Sessions, Trade Desk personnel do not monitor for resumptions in those trading sessions as this scenario normally occurs in the Post-Closing Trading Session.

above to initiate the re-opening process on the Exchange after identifying that there are quotes available in the security on other exchanges. The Exchange believes that this manual process is inefficient, and members have also reached out to the Trade Desk with requests that the Exchange replace this process with a more efficient automated process. As a result, the Exchange is proposing to automate its process for initiating trading in this situation to avoid the need for manual intervention by Exchange staff.

Proposed Automated Process for Initiating the Exchange's Re-Opening

As proposed, the Exchange would replace the manual process described above with automated procedures that would automatically resume trading after one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause.[11] This change would allow the Exchange to avoid the need for Trade Desk staff to monitor for resumption messages, and would allow members' orders to be automatically reflected in the market, while continuing to ensure that the Exchange's re-opening is tied to the existence of a market in the security on a national securities exchange(s).[12] With this change, the Exchange would continue to re-open trading in NYSE-listed securities in the same manner that it is able to under EDGA Rule 11.7(e)(2) today, but would not have to rely on manual procedures for initiating the resumption of trading. Specifically, rather than conducting the standard midpoint re-opening described in EDGA Rule 11.7(e)(1) when the listing exchange has not established a market in the security, the Exchange would continue to follow the process described in EDGA Rule 11.7(e)(2), without the need for manual intervention. Thus, as is the case following the manual initiation of the re-opening of trading in a security on the Exchange, orders would be processed using the ''contingent open'' procedures described in EDGA Rule 11.7(d), which provides that orders are to be handled in time sequence and placed on the EDGA Book, routed, cancelled, or executed in accordance with the terms of the order.[13]

In the event that there is no available NBBO in the security, the proposed automated procedures would not resume trading on the Exchange, but the Exchange would retain the ability to manually resume trading at its discretion pursuant to current EDGA Rule 11.7(e)(2). To increase transparency around when the Exchange could invoke this discretion, the Exchange proposes to amend EDGA Rule 11.7(e)(2) to specifically state that the discretion provided pursuant to this rule applies when a security has not otherwise been re-opened for trading on the Exchange pursuant to Proposed EDGA Rule 11.7(e)(3). This change would not substantively modify the scope of the discretion provided pursuant to EDGA Rule 11.7(e)(2). However, the Exchange believes that modifying the rule in this manner would serve to increase transparency by specifically identifying the times when this discretion is not relevant due to the fact that the Exchange has successfully re-opened the security using its automated procedures.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[14] in general, and Section 6(b)(5) of the Act,[15] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. Today, Trade Desk staff must manually intervene to initiate the re-opening on the Exchange of NYSE-listed securities following the resumption of trading after a halt, suspension, or pause, if the security resumes trading during the Early Trading Session, Pre-Opening Session, or Post-Closing Session. Although NYSE may trade securities pursuant to unlisted trading privileges prior to regular trading hours, it does not offer pre- or post-market trading for its listed securities. Since the Exchange's current rules require trading to have commenced on the primary listing market in order to initiate the Exchange's automated process for re-opening securities following a halt, suspension, or pause, the Exchange is forced to periodically invoke manual procedures to resume trading these securities pursuant to unlisted trading privileges. The Exchange believes, however, that an automated process would be more consistent and reliable for market participants and investors as such a process would not rely on manual intervention by Trade Desk staff before the Exchange can resume trading. In addition to generally increasing efficiency of the re-opening process, the Exchange believes that the proposed automated procedures would reduce the need for members to contact the Trade Desk with questions about the status of their orders. Further, such a process would be responsive to member requests to improve on the inefficient manual process currently employed.

The proposed rule change would promote the public interest and the protection of investors by eliminating the need for manual intervention and replacing it with a more consistent procedure that would be applied by its trading systems on an automated basis. The proposed change would not impact the process by which the security would be re-opened, which would continue to follow the ''contingent open'' procedures used today. However, instead of relying on Trade Desk staff to manually re-open trading in the security, trading would resume on the Exchange once one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause. This condition is designed to ensure that a market has been established in the security prior to resuming trading on the Exchange, and mirrors the steps that Trade Desk personnel would conduct today to verify that there is a market in the security on one or more other exchanges before manually initiating a re-opening. Specifically, trading on the Exchange would not resume until one second after an NBBO has been established in the security following the resumption of quoting on at least one other national securities exchange. The Exchange believes that resuming trading once this condition has been satisfied would ensure that trading can be resumed in an automated and efficient fashion, while also ensuring that the re-opening of trading on the Exchange continues to be tied to the existence of an established market in the security on one or more other exchanges in the absence of trading on the primary listing market

[11] The Exchange utilizes a combination of direct feeds and the applicable securities information processor (''SIP'') feeds to determine the NBBO in a security. *See* EDGA Rule 13.4. In addition, such NBBO information, as well as applicable halt and resume messages, are disseminated to market participants through the SIP feeds during the pre- and post-market trading hours of all U.S. equities exchanges.

[12] Pursuant to Regulation NMS, the NBBO in a given security is established by the best bid and best offer in such security calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. *See* 17 CFR 242.600(b)(43). As such, an NBBO may be established when one or more national securities exchanges are disseminating quotations in an equity security.

[13] *See* EDGA Rule 11.7(e)(2), (d).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

during the pre- and post-market. In addition, the Exchange would continue to have the authority to manually initiate the re-open of trading pursuant to EDGA Rule 11.7(e)(2), which would allow the Exchange to re-open trading in the event that trading is not re-opened pursuant to its automated procedures. The proposed amendments to EDGA Rule 11.7(e)(2) would increase the transparency of that rule by specifically noting that this discretion would be used when the Exchange is not otherwise able to re-open trading in an automated fashion under its rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to facilitate a more efficient re-opening process in situations where the Exchange's current rules would require unnecessary and inefficient manual intervention, and is not designed to address any competitive issues. The Exchange therefore does not believe that the proposed rule change would have any significant impact on competition. Rather than impact the competitive environment, the proposed rule change would benefit members and investors by eliminating the need for manual intervention when initiating the Exchange's re-opening process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or Post-Closing Session.

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 on 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 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. Please include File Number SR–CboeEDGA–2020–029 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2020–029. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CboeEDGA–2–2020–029 and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25494 Filed 11–18–20; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90420; File No. SR–CboeBZX–2020–083]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Automate the Exchange's Process for Initiating the Re-Opening of a Security Listed on the New York Stock Exchange LLC Following the Resumption of Trading After a Halt, Suspension, or Pause During the Early Trading Session, Pre-Opening Session, or After Hours Trading Session

November 13, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 5, 2020, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') 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

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to automate the Exchange's current process for initiating the re-opening of a security listed on the New York Stock Exchange LLC following the resumption of trading after a halt, suspension, or pause during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session. 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/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to automate the Exchange's current process for initiating the re-opening of securities listed on the New York Stock Exchange LLC (''NYSE'') following the resumption of trading after a halt, suspension, or pause during the Early Trading Session,[3] Pre-Opening Session,[4] or After Hours Trading Session.[5] BZX Rule 11.24 describes the Exchange's opening process for securities listed on other national securities exchanges, including the process for re-opening such securities following the resumption of trading after a halt, suspension, or pause. Although the Exchange generally employs an automated process for re-opening securities listed on other exchanges, there are situations where manual intervention is currently needed to initiate the Exchange's re-opening process. Specifically, manual intervention is currently needed for the Exchange to initiate its re-opening process in NYSE-listed securities that resume trading after a halt, suspension, or pause when such resumption of trading occurs outside of regular trading hours at times when the Exchange is open for either pre- or post-market trading but NYSE does not trade its listed securities. The proposed rule change would implement an automated process for initiating the re-opening of trading on the Exchange in these circumstances.

Generally, the Exchange's re-opening process is designed to provide an execution at the midpoint of the national best bid and offer (''NBBO'') following the initiation of trading on the applicable listing exchange. Specifically, as described in BZX Rule 11.24(e)(1), the Exchange's re-opening process occurs at the midpoint of the: (i) First NBBO subsequent to the first reported trade and first two-sided quotation on the listing exchange following the resumption of trading after a halt, suspension, or pause; or (ii) NBBO when the first two-sided quotation is published by the listing exchange following the resumption of trading after a halt, suspension, or pause if no first trade is reported by the listing exchange within one second of publication of the first two-sided quotation by the listing exchange. In either case, the Exchange must wait for the listing exchange to commence trading before initiating its re-opening procedures.

NYSE operates two trading sessions each day: (1) The ''core trading session'' between 9:30 a.m. ET to 4:00 p.m. ET, during which all securities are available for trading;[6] and (2) the ''early trading session'' between 7:00 a.m. ET and the commencement of the core trading session, during which only securities that trade via unlisted trading privileges are available for trading.[7] NYSE does not trade its listed securities during its early trading session, *i.e.,* prior to the beginning of regular trading hours, nor does it trade any securities after the end of regular trading hours. As a result, since the Exchange's normal process for re-opening securities listed on other exchanges after a halt, suspension, or pause requires trading to commence on the listing exchange, the Exchange cannot use this process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session.

At the same time, BZX Rule 11.24(e)(2) provides that where neither of the conditions required for the initiation of the Exchange's automated re-opening process have occurred, trading in the security may be resumed on the Exchange at its discretion. The Exchange therefore periodically invokes it authority pursuant to this rule to manually initiate the resumption of trading in NYSE-listed securities outside of regular trading hours.[8] However, initiating trading on the Exchange in this manner requires manual intervention by Exchange staff. The Exchange believes that it would be in the interest of market participants and investors to instead automate its process for initiating trading in this situation and avoid the need for manual intervention.

Current Process for NYSE-Listed Securities Re-Opened in Pre- and Post-Market

As discussed, the Exchange currently employs a manual process to initiate the resumption of trading in NYSE-listed securities outside of regular trading hours. This manual process requires personnel from the Exchange's Trade Desk to become aware of, and react to, NYSE's determination to lift a trading halt in one of their listed securities.[9] Typically, this occurs in one of two ways. First, the Trade Desk performs proactive monitoring of halt notifications from NYSE and subsequent resumptions during the After Hours Trading Session.[10] If a security is halted by NYSE during regular trading, Trade Desk personnel will monitor internal tools beginning at 4:00 p.m. ET to identify whether NYSE has lifted the halt. Second, even with the proactive monitoring performed by the Trade Desk, there may be instances where the Exchange has not immediately initiated the manual re-opening of a security that has resumed trading. In such circumstances, Exchange members may reach out to the Trade Desk when they notice that their orders are not reflected in the market. In either case, Trade Desk personnel would check internal tools to confirm that the security is no longer halted, and would routinely invoke the authority described in the paragraph above to initiate the re-opening process on the Exchange after identifying that there are quotes available in the security

[3] The term ''Early Trading Session'' means the time between 7:00 a.m. and 8:00 a.m. Eastern Time. *See* BZX Rule 1.5(ee).

[4] The term ''Pre-Opening Session'' means the time between 8:00 a.m. and 9:30 a.m. Eastern Time. *See* BZX Rule 1.5(r).

[5] The term ''After Hours Trading Session'' means the time between 4:00 p.m. and 8:00 p.m. Eastern Time. *See* BZX Rule 1.5(c).

[6] *See* NYSE Rule 7.34(a)(2). NYSE's core trading session for its listed securities begins with its opening auction and ends with its closing auction if one is conducted. *Id.*

[7] *See* NYSE Rule 7.34(a)(1).

[8] The Exchange estimates that it currently invokes its authority under this rule to manually initiate a re-opening in NYSE-listed securities a handful of times each month.

[9] Section 203.07 of NYSE's Listed Company Manual describes its trading halt procedures, and provides NYSE with discretion to declare a material news halts in its listed securities, as well as to lift such a halt when it determines that trading should resume. As a matter of practice, NYSE may exercise its discretion to lift a trading halt in its listed securities outside of its own hours for trading such securities. In that event, NYSE would disseminate a resume message through the SIP, which would permit trading to resume on other national securities exchanges, including the Exchange.

[10] Although it is possible for a resumption to take place in the Early Trading and Pre-Opening Sessions, Trade Desk personnel do not monitor for resumptions in those trading sessions as this scenario normally occurs in the After Hours Trading Session.

on other exchanges. The Exchange believes that this manual process is inefficient, and members have also reached out to the Trade Desk with requests that the Exchange replace this process with a more efficient automated process. As a result, the Exchange is proposing to automate its process for initiating trading in this situation to avoid the need for manual intervention by Exchange staff.

Proposed Automated Process for Initiating the Exchange's Re-Opening

As proposed, the Exchange would replace the manual process described above with automated procedures that would automatically resume trading after one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause.[11] This change would allow the Exchange to avoid the need for Trade Desk staff to monitor for resumption messages, and would allow members' orders to be automatically reflected in the market, while continuing to ensure that the Exchange's re-opening is tied to the existence of a market in the security on a national securities exchange(s).[12] With this change, the Exchange would continue to re-open trading in NYSE-listed securities in the same manner that it is able to under BZX Rule 11.24(e)(2) today, but would not have to rely on manual procedures for initiating the resumption of trading. Specifically, rather than conducting the standard midpoint re-opening described in BZX Rule 11.24(e)(1) when the listing exchange has not established a market in the security, the Exchange would continue to follow the process described in BZX Rule 11.24(e)(2), without the need for manual intervention. Thus, as is the case following the manual initiation of the re-opening of trading in a security on the Exchange, orders would be processed using the ''contingent open'' procedures described in BZX Rule 11.24(d), which provides that orders are to be handled in time sequence and placed on the BZX Book, routed, cancelled, or executed in accordance with the terms of the order.[13]

In the event that there is no available NBBO in the security, the proposed automated procedures would not resume trading on the Exchange, but the Exchange would retain the ability to manually resume trading at its discretion pursuant to current BZX Rule 11.24(e)(2). To increase transparency around when the Exchange could invoke this discretion, the Exchange proposes to amend BZX Rule 11.24(e)(2) to specifically state that the discretion provided pursuant to this rule applies when a security has not otherwise been re-opened for trading on the Exchange pursuant to Proposed BZX Rule 11.24(e)(3). This change would not substantively modify the scope of the discretion provided pursuant to BZX Rule 11.24(e)(2). However, the Exchange believes that modifying the rule in this manner would serve to increase transparency by specifically identifying the times when this discretion is not relevant due to the fact that the Exchange has successfully re-opened the security using its automated procedures.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[14] in general, and Section 6(b)(5) of the Act,[15] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. Today, Trade Desk staff must manually intervene to initiate the re-opening on the Exchange of NYSE-listed securities following the resumption of trading after a halt, suspension, or pause, if the security resumes trading during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session. Although NYSE may trade securities pursuant to unlisted trading privileges prior to regular trading hours, it does not offer pre- or post-market trading for its listed securities. Since the Exchange's current rules require trading to have commenced on the primary listing market in order to initiate the Exchange's automated process for re-opening securities following a halt, suspension, or pause, the Exchange is forced to periodically invoke manual procedures to resume trading these securities pursuant to unlisted trading privileges. The Exchange believes, however, that an automated process would be more consistent and reliable for market participants and investors as such a process would not rely on manual intervention by Trade Desk staff before the Exchange can resume trading. In addition to generally increasing efficiency of the re-opening process, the Exchange believes that the proposed automated procedures would reduce the need for members to contact the Trade Desk with questions about the status of their orders. Further, such a process would be responsive to member requests to improve on the inefficient manual process currently employed.

The proposed rule change would promote the public interest and the protection of investors by eliminating the need for manual intervention and replacing it with a more consistent procedure that would be applied by its trading systems on an automated basis. The proposed change would not impact the process by which the security would be re-opened, which would continue to follow the ''contingent open'' procedures used today. However, instead of relying on Trade Desk staff to manually re-open trading in the security, trading would resume on the Exchange once one second has passed following the Exchange's receipt of the first NBBO following the resumption of trading after the halt, suspension, or pause. This condition is designed to ensure that a market has been established in the security prior to resuming trading on the Exchange, and mirrors the steps that Trade Desk personnel would conduct today to verify that there is a market in the security on one or more other exchanges before manually initiating a re-opening. Specifically, trading on the Exchange would not resume until one second after an NBBO has been established in the security following the resumption of quoting on at least one other national securities exchange. The Exchange believes that resuming trading once this condition has been satisfied would ensure that trading can be resumed in an automated and efficient fashion, while also ensuring that the re-opening of trading on the Exchange continues to be tied to the existence of an established market in the security on one or more other exchanges in the absence of trading on the primary listing market during the pre- and post-market. In addition, the Exchange would continue

[11] The Exchange utilizes a combination of direct feeds and the applicable securities information processor (''SIP'') feeds to determine the NBBO in a security. *See* BZX Rule 11.26. In addition, such NBBO information, as well as applicable halt and resume messages, are disseminated to market participants through the SIP feeds during the pre- and post-market trading hours of all U.S. equities exchanges.

[12] Pursuant to Regulation NMS, the NBBO in a given security is established by the best bid and best offer in such security calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. *See* 17 CFR 242.600(b)(43). As such, an NBBO may be established when one or more national securities exchanges are disseminating quotations in an equity security.

[13] *See* BZX Rule 11.24(e)(2),(d).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

to have the authority to manually initiate the re-open of trading pursuant to BZX Rule 11.24(e)(2), which would allow the Exchange to re-open trading in the event that trading is not re-opened pursuant to its automated procedures. The proposed amendments to BZX Rule 11.24(e)(2) would increase the transparency of that rule by specifically noting that this discretion would be used when the Exchange is not otherwise able to re-open trading in an automated fashion under its rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to facilitate a more efficient re-opening process in situations where the Exchange's current rules would require unnecessary and inefficient manual intervention, and is not designed to address any competitive issues. The Exchange therefore does not believe that the proposed rule change would have any significant impact on competition. Rather than impact the competitive environment, the proposed rule change would benefit members and investors by eliminating the need for manual intervention when initiating the Exchange's re-opening process for NYSE-listed securities that resume trading during the Early Trading Session, Pre-Opening Session, or After Hours Trading Session.

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 on 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 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.* Please include File Number SR-CboeBZX–2020–083 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–2020–083. 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–2020–083 and should be submitted on or before December 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25496 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90429/November 13, 2020]

Order Setting Aside the Order by Delegated Authority Approving SR–IEX–2018–06; In the Matter of Investors Exchange LLC, 3 World Trade Center 58th Floor, New York, NY 10007, File No. SR–IEX–2018–06

On March 15, 2018, Investors Exchange LLC (the ''Exchange'' or ''IEX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a new optional listing category on the Exchange, referred to as the ''LTSE Listings on IEX'' or ''LTSE Listings.'' The proposed rule change was published for comment in the **Federal Register** on April 2, 2018.[3] On May 11, 2018, the Division of Trading and Markets, for the Commission pursuant to delegated authority, extended the time period for Commission action on the proposed rule change.[4] On June 27, 2018, the Exchange filed Amendment No. 1 to the proposed rule change.[5] On June 29, 2018, the Division of Trading and Markets, for the Commission pursuant to delegated authority,[6] approved the proposed rule change, as modified by Amendment No. 1.[7]

On June 29, 2018, the Secretary of the Commission notified the Exchange that pursuant to Rule 431 of the Commission's Rules of Practice,[8] the Commission would review the Delegated Order and that the Delegated Order was stayed until the Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 82948 (March 27, 2018), 83 FR 14074 (SR–IEX–2018–06).

[4] *See* Securities Exchange Act Release No. 83217, 83 FR 22998 (May 17, 2018).

[5] *See* letter from Claudia Crowley, Chief Regulatory Officer, Investors Exchange LLC, dated June 27, 2018, *available at https://www.sec.gov/comments/sr-iex-2018/06/iex201806/3956434-167066.pdf.*

[6] 17 CFR 200.30–3(a)(12).

[7] *See* Securities Exchange Act Release No. 83558 (June 29, 2018), 83 FR 31614 (July 6, 2018) (''Delegated Order'').

[8] 17 CFR 201.431.

ordered otherwise.[9] On July 20, 2018, the Commission issued a scheduling order allowing the filing of additional statements.[10]

On August 15, 2018, IEX withdrew the proposed rule change (SR–IEX–2018–06).[11]

Under Commission Rule of Practice 431(a), the Commission may ''affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to'' delegated authority.[12] We find that, in light of the IEX's withdrawal of the proposed rule change, it is appropriate to set aside the Delegated Order.

Accordingly, *It is ordered* that the June 29, 2018 order approving by delegated authority IEX's proposed rule change number SR–IEX–2018–06, be, and it hereby is, set aside.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25508 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[9] *See* Letter from Secretary of the Commission to Sophia Lee, Associate General Counsel, Investors Exchange LLC, dated June 29, 2018, *available athttps://www.sec.gov/rules/sro/iex/2018/34/83558-letter-from-secretary.pdf.*

[10] *See* Exchange Act Release No. 83678, 83 FR 35300 (July 25, 2018).

[11] *See* letter from Claudia Crowley, Chief Regulatory Officer, IEX, to Brent J. Fields, Secretary, Commission, dated August 15, 2018.

[12] 17 CFR 201.431(a).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34095; 812–15155]

Northern Funds and Northern Trust Investments, Inc.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under Section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from Section 15(c) of the Act.

APPLICANTS: Northern Funds, a registered open-end investment company that is organized as a Delaware statutory trust (the ''Trust'') and that may offer one or more series of shares (each a ''Series''), and Northern Trust Investments, Inc. (''NTI'' or the ''Adviser''), an Illinois state banking corporation registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''), that serves an investment adviser to the Trust (together with the Trust and the Series, the ''Applicants'').

SUMMARY OF APPLICATION: The requested exemption would permit the Trust's board of trustees (the ''Board'') to approve new sub-advisory agreements and material amendments to existing sub-advisory agreements for the Subadvised Series (as defined below), without complying with the in-person meeting requirement of Section 15(c) of the Act.

FILING DATES: The application was filed on August 24, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on December 8, 2020, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Jose Del Real, by email to *jjd4@ntrs.com;* Joshua B. Deringer, by email to *joshua.deringer@faegredrinker.com.*

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Senior Counsel, at (202) 551–6819, or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number or an Applicant using the ''Company'' name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

I. Requested Exemptive Relief

1. Applicants request an exemption from Section 15(c) of the Act to permit the Board,[1] including the Independent Board Members,[2] to approve an agreement (each a ''Sub-Advisory Agreement'') pursuant to which a sub-adviser manages all or a portion of the assets of one or more of the Series, or a material amendment thereof (a ''Sub-Adviser Change''), without complying with the in-person meeting requirement of Section 15(c).[3] Under the requested relief, the Independent Board Members could instead approve a Sub-Adviser Change at a meeting at which members of the Board participate by any means of communication that allows them to hear each other simultaneously during the meeting.

2. Applicants request that the relief apply to Applicants, as well as to any future series of the Trust and any other existing or future registered open-end management investment company or Series thereof that intends to rely on the requested order in the future and that: (i) Is advised by the Adviser;[4] (ii) uses the multi-manager structure described in the application; and (iii) complies with the terms and conditions of the application (each, a ''Subadvised Series'').[5]

II. Management of the Subadvised Series

3. The Adviser will serve as the investment adviser to each Subadvised Series pursuant to an investment advisory agreement with the Trust (each an ''Investment Management Agreement''). The Adviser, subject to the oversight of the Board, will provide continuous investment management services to each Subadvised Series. Applicants are not seeking an exemption from the Act with respect to the Investment Management Agreements.

4. Applicants state that the Subadvised Series may seek to provide exposure to multiple strategies across various asset classes, thus allowing investors to more easily access such strategies without the additional

[1] The term ''Board'' also includes the board of trustees or directors of a future Subadvised Series (as defined below).

[2] The term ''Independent Board Members'' means the members of the Board who are not parties to the Sub-Advisory Agreement (as defined below), or ''interested persons,'' as defined in Section 2(a)(19) of the Act, of any such party.

[3] Applicants do not request relief that would permit the Board and the Independent Board Members to approve renewals of Sub-Advisory Agreements at non-in-person meetings.

[4] The term ''Adviser'' includes (i) the Adviser or its successors, and (ii) any entity controlling, controlled by or under common control with, the Adviser or its successors. For the purposes of the requested order, ''successor'' is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

[5] The term ''Subadvised Series'' also includes a wholly-owned subsidiary, as defined in the Act, of a Subadvised Series (each a ''Subsidiary'') and the term ''sub-adviser'' includes any sub-adviser to a Subsidiary. All registered open-end investment companies that intend to rely on the requested order are named as Applicants. Any entity that relies on the requested order will do so only in accordance with the terms and conditions contained in the application.

transaction costs and administrative burdens of investing in multiple funds to seek to achieve comparable exposures.

5. To that end, the Adviser may achieve its desired exposures to specific strategies by allocating discrete portions of the Subadvised Series' assets to various sub-advisers. Consistent with the terms of each Investment Management Agreement and subject to the Board's approval,[6] the Adviser would delegate management of all or a portion of the assets of a Subadvised Series to a sub-adviser.[7] Each sub-adviser would be an ''investment adviser'' to the Subadvised Series within the meaning of Section 2(a)(20) of the Act.[8] The Adviser would retain overall responsibility for the management and investment of the assets of each Subadvised Series.

III. Applicable Law

6. Section 15(c) of the Act prohibits a registered investment company having a board from entering into, renewing or performing any contract or agreement whereby a person undertakes regularly to act as an investment adviser (including a sub-adviser) to the investment company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of the investment company's board members who are not parties to such contract or agreement, or interested persons of any such party, cast in person at a meeting called for the purpose of voting on such approval.

7. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief meets this standard for the reasons discussed below.

IV. Arguments in Support of the Requested Relief

8. Applicants assert that boards of registered investment companies, including the Board, typically hold in-person meetings on a quarterly basis. Applicants state that during the three to four month period between board meeting dates, market conditions may change or investment opportunities may arise such that the Adviser may wish to make a Sub-Adviser Change. Applicants also state that at these moments it may be impractical and costly to hold an additional in-person Board meeting, especially given the geographic diversity of Board members and the additional cost of holding in-person meetings.

9. As a result, Applicants believe that the requested relief would allow the Subadvised Series to operate more efficiently. In particular, Applicants assert that without the delay inherent in holding in-person Board meetings (and the attendant difficulty of obtaining the necessary quorum for, and the additional costs of, an unscheduled in-person Board meeting), the Subadvised Series would be able to act more quickly and with less expense to add or replace sub-advisers when the Board and the Adviser believe that a Sub-Adviser Change would benefit the Subadvised Series.

10. Applicants also note that the in-person meeting requirement in Section 15(c) of the Act was designed to prohibit absentee approval of advisory agreements. Applicants state that condition 1 to the requested relief is designed to avoid such absentee approval by requiring that the Board approve a Sub-Adviser Change at a meeting where all participating Board members can hear each other and be heard by each other during the meeting.[9]

11. Applicants, moreover, represent that the Board would conduct any such non-in-person consideration of a Sub-Advisory Agreement in accordance with its typical process for approving Sub-Advisory Agreements. Consistent with Section 15(c) of the Act, the Board would request and evaluate such information as may reasonably be necessary to evaluate the terms of any Sub-Advisory Agreement, and the Adviser and sub-adviser would provide such information.

12. Finally, Applicants note that that if one or more Board members request that a Sub-Adviser Change be considered in-person, then the Board would not be able to rely on the relief and would have to consider the Sub-Adviser Change at an in-person meeting.

V. Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Independent Board Members will approve a Sub-Adviser Change at a non-in-person meeting in which Board members may participate by any means of communication that allows those Board members participating to hear each other simultaneously during the meeting.

2. Management will represent that the materials provided to the Board for the non-in-person meeting include the same information the Board would have received if a Sub-Adviser Change were sought at an in-person Board meeting.

3. The notice of the non-in-person meeting will explain the need for considering the Sub-Adviser Change at a non-in-person meeting. Once notice of the non-in-person meeting to consider a Sub-Adviser Change is sent, Board members will be given the opportunity to object to considering the Sub-Adviser Change at a non-in-person Board meeting. If a Board member requests that the Sub-Adviser Change be considered in-person, the Board will consider the Sub-Adviser Change at an in-person meeting, unless such request is rescinded.

4. A Subadvised Series' ability to rely on the requested relief will be disclosed in the Subadvised Series' registration statement.

5. In the event that the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Dated: November 13, 2020.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25491 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

[6] A Sub-Advisory Agreement may also be subject to approval by a Subadvised Series' shareholders. Applicants currently rely on a multi-manager exemptive order to enter into and materially amend Sub-Advisory Agreements without obtaining shareholder approval. *See* Northern Institutional Funds, *et al.,* Investment Company Act Release Nos. 23596 (Dec. 10, 1998) (notice) and 23637 (Jan. 8, 1999) (order).

[7] A sub-adviser may manage the assets of a Subadvised Series directly or provide the Adviser with model portfolio or investment recommendation(s) that would be utilized in connection with the management of a Subadvised Series.

[8] Each sub-adviser would be registered with the Commission as an investment adviser under the Advisers Act or not subject to such registration.

[9] Applicants state that technology that includes visual capabilities will be used unless unanticipated circumstances arise. Applicants also state that the Board could not rely upon the relief to approve a Sub-Advisory Agreement by written consent or another form of absentee approval by the Board.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34094; File No. 812–15150]

NB Crossroads Private Markets Access Fund LLC and Neuberger Berman Investment Advisers LLC

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice.

Notice of an application for an order pursuant to section 6(c) of the Investment Company Act of 1940 (the ''1940 Act'') for an exemption from sections 18(a)(2), 18(c), and 18(i) of the 1940 Act, pursuant to section 6(c) and 23(c) of the 1940 Act for certain exemptions from rule 23c–3 under the 1940 Act, and for an order pursuant to section 17(d) of the 1940 Act and rule 17d–1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of interests (''Shares'') with varying sales loads and asset-based service and/or distribution fees and to impose early withdrawal charges.

APPLICANTS: NB Crossroads Private Markets Access Fund LLC (''Initial Fund'') and Neuberger Berman Investment Advisers LLC (''Adviser'').

FILING DATES: The application was filed on August 7, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on December 7, 2020, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the 1940 Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Corey Issing, Neuberger Berman Investment Advisers LLC, *corey.issing@nb.com.*

FOR FURTHER INFORMATION CONTACT: Jennifer O. Palmer, Senior Counsel, at (303) 844–1012, or David J. Marcinkus, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained by searching the Commission's website, at *http://www.sec.gov/search/search.htm,* using the application's file number or the applicant's name, or by calling the Commission at (202) 551–8090.

Applicants' Representations

1. The Initial Fund is a newly organized Delaware limited liability company that is registered under the 1940 Act as a closed-end management investment company and classified as a non-diversified investment company. The Initial Fund's investment objective is to seek to provide attractive, long-term capital appreciation by investing primarily in an actively managed portfolio of private equity investments.

2. The Adviser, a Delaware organized limited liability company, is registered as an investment adviser under the 1940 Act. The Adviser serves as investment adviser to the Initial Fund. The Adviser is an indirect, wholly-owned subsidiary of Neuberger Berman Group.

3. The applicants seek an order to permit the Initial Fund to offer investors multiple classes of Shares with varying sales loads and asset-based service and/or distribution fees and to impose early withdrawal charges.

4. Applicants request that the order also apply to any other registered closed-end management investment company that conducts a continuous offering of its shares, existing now or in the future, for which the Adviser, its successors,[1] or any entity controlling, controlled by, or under common control with the Adviser, or its successors, acts as investment adviser, and which provides periodic liquidity with respect to its Shares through tender offers conducted in compliance with either rule 23c–3 under the 1940 Act or rule 13e–4 under the Securities Exchange Act of 1934 (the ''1934 Act'') (each such closed-end management investment company a ''Future Fund'' and, together with the Initial Fund, each a ''Fund,'' and collectively the ''Funds'').[2]

5. The Initial Fund's initial Registration Statement filed on Form N–2 seeks to register two initial classes of Shares, Class A Shares and Institutional Class Shares, each with its own fee and expense structure. If the Initial Fund's initial Registration Statement is declared effective prior to receipt of the requested relief, the Initial Fund will only offer one class of Shares, Institutional Class Shares, until receipt of the requested relief. Shares will be offered on a continuous basis pursuant to a registration statement under the Securities Act of 1933 at their net asset value per share. The Initial Fund, as a closed-end management investment company, does not intend to continuously redeem Shares as does an open-end management investment company. Shares of the Initial Fund will not be listed on any securities exchange and will not trade on an over-the-counter system. Applicants do not expect that any secondary market will ever develop for the Shares.

6. If the requested relief is granted, the Initial Fund intends to offer multiple classes of Shares, such as the Institutional Class Shares (the ''Initial Class Shares'') and Class A Shares (the ''New Class Shares''), or any other classes. Because of the different distribution fees, shareholder services fees, and any other class expenses that may be attributable to the different classes, the net income attributable to, and any dividends payable on, each class of Shares may differ from each other from time to time.

7. Applicants state that, from time to time, the Board of a Fund may create and offer additional classes of Shares, or may vary the characteristics described of the Initial Class and New Class Shares, including without limitation, in the following respects: (1) The amount of fees permitted by a distribution and service plan as to such class; (2) voting rights with respect to a distribution and service plan as to such class; (3) different class designations; (4) the impact of any class expenses directly attributable to a particular class of Shares allocated on a class basis as described in the application; (5) differences in any dividends and net asset values per Share resulting from differences in fees under a distribution and service plan or in class expenses; (6) any early withdrawal charge or other sales load structure; and (7) any exchange or conversion features, as permitted under the 1940 Act.

8. Applicants state that, in order to provide a limited degree of liquidity to

[1] A successor in interest is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] The Initial Fund and any Future Fund relying on the requested relief will do so in compliance with the terms and conditions of the application. Applicants represent that any person presently intending to rely on the requested relief is listed as an applicant.

shareholders, the Initial Fund may from time to time offer to repurchase Shares at their then current NAV pursuant to written tenders by shareholders in accordance with rule 13e–4 under the 1934 Act. Any other investment company that intends to rely on the requested relief will provide periodic liquidity to shareholders in accordance with either rule 23c–3 under the 1940 Act or rule 13e–4 under the 1934 Act.

9. Applicants represent that any asset-based distribution and servicing fee of a Fund will comply with the provisions of Rule 2341 of the Rules of the Financial Industry Regulatory Authority (''FINRA Rule 2341'').[3] Applicants also represent that each Fund will disclose in its prospectus the fees, expenses, and other characteristics of each class of Shares offered for sale by the prospectus, as is required for open-end, multiple class funds under Form N–1A. As if it were an open-end management investment company, each Fund will disclose fund expenses borne by shareholders during the reporting period in shareholder reports[4] and describe in its prospectus any arrangements that result in breakpoints in, or elimination of, sales loads.[5] In addition, applicants will comply with applicable enhanced fee disclosure requirements for fund of funds, including registered funds of hedge and private equity funds.[6]

10. Each Fund and its distributor (the ''Distributor'') will also comply with any requirements that may be adopted by the Commission or FINRA regarding disclosure at the point of sale and in transaction confirmations about the costs and conflicts of interest arising out of the distribution of open-end investment company shares, and regarding prospectus disclosure of sales loads and revenue sharing arrangements as if those requirements apply to the Fund and the Distributor. Each Fund or the Distributor will contractually require that any other distributor of the Fund's Shares comply with such requirements in connection with the distribution of Shares of the Fund.

11. All expenses incurred by a Fund will be allocated among its various classes of Shares based on the net assets of the Fund attributable to each class, except that the net asset value and expenses of each class will reflect the expenses associated with the distribution and service plan of that class (if any), shareholder services fees attributable to a particular class (including transfer agency fees, if any), and any other incremental expenses of that class. Expenses of a Fund allocated to a particular class of the Fund's Shares will be borne on a pro rata basis by each outstanding Share of that class. Applicants state that each Fund will comply with the provisions of rule 18f–3 under the 1940 Act as if it were an open-end management investment company.

12. Applicants state that any privilege or feature offered by a Fund will comply with rule 11a–1, rule 11a–3, and rule 18f–3 as if the Fund were an open-end management investment company.

13. Applicants seek relief to the extent necessary for each Fund to impose an early withdrawal charge on shares submitted for repurchase that have been held less than a specified period. Applicants state that each Fund may grant waivers of the early withdrawal charges on repurchases for certain categories of shareholders or transactions established from time to time. Applicants state that each Fund will apply the early withdrawal charge (and any waivers or scheduled variations of the early withdrawal charge) uniformly to all shareholders in a given class and consistently with the requirements of rule 22d–1 under the 1940 Act as if the Fund were an open-end management investment company.

14. Applicants state that a Fund operating as an interval fund pursuant to rule 23c–3 under the 1940 Act may offer its shareholders an exchange feature under which the shareholders of the Fund may, in connection with the Fund's periodic repurchase offers, exchange their Shares of the Fund for shares of the same class of (i) registered open-end management investment companies or (ii) other registered closed-end investment companies that comply with rule 23c–3 under the 1940 Act and continuously offer their shares at net asset value, that are in the Fund's group of investment companies (collectively, the ''Other Funds''). Shares of a Fund operating pursuant to rule 23c–3 that are exchanged for shares of Other Funds will be included as part of the repurchase offer amount for such Fund as specified in rule 23c–3 under the 1940 Act. Any exchange option will comply with rule 11a–3 under the 1940 Act, as if the Fund were an open-end management investment company subject to rule 11a–3. In complying with rule 11a–3 under the 1940 Act, each Fund will treat an early withdrawal charge as if it were a contingent deferred sales load (a ''CDSL'').[7]

15. Applicants state that, if a Fund charges a repurchase fee, Shares of the Fund will be subject to a repurchase fee at a rate of no greater than two percent of the shareholder's repurchase proceeds if the interval between the date of purchase of the Shares and the valuation date with respect to the repurchase of those Shares is less than one year.[8] Repurchase fees, if charged, will equally apply to all classes of Shares of the Fund, consistent with section 18 of the 1940 Act and rule 18f–3 thereunder. To the extent a Fund determines to waive, impose scheduled variations of, or eliminate a repurchase fee, it will do so consistently with the requirements of rule 22d–1 under the 1940 Act as if the repurchase fee were a CDSL and as if the Fund were a registered open-end management investment company. In addition, the Fund's waiver of, scheduled variation in, or elimination of the repurchase fee will apply uniformly to all shareholders of the Fund regardless of class.

Applicants' Legal Analysis

Multiple Classes of Shares

1. Section 18(a)(2)(A) and (B) makes it unlawful for a registered closed-end management investment company to issue a senior security that is a stock unless (a) immediately after such issuance it will have an asset coverage of at least 200% and (b) provision is made to prohibit the declaration of any distribution upon its common stock, or the purchase of any such common stock, unless in every such case such senior security has at the time of the declaration of any such distribution, or at the time of any such purchase, an asset coverage of at least 200% after deducting the amount of such distribution or purchase price, as the case may be. Applicants state that the creation of multiple classes of Shares of the Funds may violate section 18(a)(2) because the Funds may not meet section 18(a)(2)'s requirements with respect to a

[3] Any references to FINRA Rule 2341 include any successor or replacement rule that may be adopted by FINRA.

[4] Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Investment Company Act Release No. 26372 (Feb. 27, 2004) (adopting release).

[5] Disclosure of Breakpoint Discounts by Mutual Funds, Investment Company Act Release No. 26464 (June 7, 2004) (adopting release).

[6] Fund of Funds Investments, Investment Company Act Release Nos. 26198 (Oct. 1, 2003) (proposing release) and 27399 (June 20, 2006) (adopting release). *See also* rules 12d1–1, *et seq.* under the 1940 Act.

[7] A CDSL, assessed by an open-end fund pursuant to Rule 6c–10 under the 1940 Act, is a distribution-related charge payable to the distributor. Pursuant to the requested order, the early withdrawal charge will likewise be a distribution-related charge payable to the distributor.

[8] Unlike a distribution-related charge, the repurchase fee is payable to the Fund to compensate long-term shareholders for the expenses related to shorter-term investors, in light of the Fund's generally longer-term investment horizons and investment operations.

class of Shares that may be a senior security.

2. Section 18(c) of the 1940 Act provides, in relevant part, that a registered closed-end management investment company may not issue or sell any senior security which is a stock if immediately thereafter the company will have outstanding more than one class of senior security that is a stock. Applicants state that the creation of multiple classes of Shares of a Fund may be prohibited by section 18(c), as a class may have priority over another class as to payment of dividends because shareholders of different classes would pay different fees and expenses.

3. Section 18(i) of the 1940 Act generally provides that each share of stock issued by a registered management investment company will be a voting stock and have equal voting rights with every other outstanding voting stock. Applicants state that permitting multiple classes of Shares of a Fund may violate section 18(i) of the 1940 Act because each class would be entitled to exclusive voting rights with respect to matters solely related to that class.

4. Section 6(c) of the 1940 Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of the 1940 Act, or from any rule or regulation under the 1940 Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants request an exemption under section 6(c) from sections 18(a)(2), 18(c), and 18(i) to permit the Funds to issue multiple classes of Shares.

5. Applicants submit that the proposed allocation of expenses relating to distribution and voting rights is equitable and will not discriminate against any group or class of shareholders. Applicants submit that the proposed arrangements would permit each Fund to facilitate the distribution of its Shares and provide investors with a broader choice of shareholder options. Applicants assert that the proposed closed-end management investment company multiple class structure does not raise the concerns underlying section 18 of the 1940 Act to any greater degree than open-end management investment companies' multiple class structures that are permitted by rule 18f–3 under the 1940 Act. Applicants state that each Fund will comply with the provisions of rule 18f–3 as if it were an open-end management investment company.

Early Withdrawal Charges

1. Section 23(c) of the 1940 Act provides, in relevant part, that no registered closed-end management investment company shall purchase securities of which it is the issuer, except: (a) On a securities exchange or other open market; (b) pursuant to tenders, after reasonable opportunity to submit tenders given to all holders of securities of the class to be purchased; or (c) under other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors.

2. Rule 23c–3 under the 1940 Act permits an interval fund to make repurchase offers of between five and twenty-five percent of its outstanding shares at net asset value at periodic intervals pursuant to a fundamental policy of the interval fund. Rule 23c–3(b)(1) under the 1940 Act permits an interval fund to deduct from repurchase proceeds only a repurchase fee, not to exceed two percent of the proceeds, that is paid to the interval fund and is reasonably intended to compensate the fund for expenses directly related to the repurchase.

3. Section 23(c)(3) of the 1940 Act provides that the Commission may issue an order that would permit a closed-end management investment company to repurchase its shares in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased.

4. Applicants request relief under section 6(c), discussed above, and section 23(c)(3) from rule 23c–3 to the extent necessary for each Fund to impose early withdrawal charges on shares of the Fund submitted for repurchase that have been held for less than a specified period.

5. Applicants state that the early withdrawal charges they intend to impose are functionally similar to CDSLs imposed by open-end management investment companies under rule 6c–10 under the 1940 Act. Rule 6c–10 permits open-end management investment companies to impose CDSLs, subject to certain conditions. Applicants note that rule 6c–10 is grounded in policy considerations supporting the employment of CDSLs where there are adequate safeguards for the investor. Applicants state that these same policy considerations support imposition of early withdrawal charges in the interval fund context, and are a solid basis for the Commission to grant exemptive relief to permit interval funds to impose early withdrawal charges. In addition, applicants state that early withdrawal charges may be necessary for the Fund's Distributor to recover distribution costs from shareholders who exit their investments early. Applicants represent that any early withdrawal charge imposed by a Fund will comply with rule 6c–10 under the 1940 Act as if the rule were applicable to closed-end management investment companies. Each Fund will disclose early withdrawal charges in accordance with the requirements of Form N–1A concerning CDSLs.

Asset-Based Service and/or Distribution Fees

1. Section 17(d) of the 1940 Act and rule 17d–1 thereunder prohibit an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or other joint arrangement in which the investment company participates unless the Commission issues an order permitting the transaction. In reviewing applications submitted under section 17(d) and rule 17d–1, the Commission considers whether the participation of the investment company in a joint enterprise or joint arrangement is consistent with the provisions, policies, and purposes of the 1940 Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants.

2. Rule 17d–3 under the 1940 Act provides an exemption from section 17(d) and rule 17d–1 to permit open-end management investment companies to enter into distribution arrangements pursuant to rule 12b–1 under the 1940 Act. Applicants request an order pursuant to section 17(d) of the 1940 Act and rule 17d–1 thereunder to the extent necessary to permit each Fund to impose asset-based service and/or distribution fees (in a manner similar to rule 12b–1 fees for an open-end management investment company). Applicants have agreed to comply with rules 12b–1 and 17d–3 as if those rules apply to closed-end management investment companies, which they believe will resolve any concerns that might arise in connection with a Fund financing the distribution of its Shares through asset-based service and/or distribution fees.

For the reasons stated above, applicants submit that the exemptions requested under section 6(c) are necessary and appropriate in the public interest and are consistent with the

protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants further submit that the relief requested pursuant to section 23(c)(3) will be consistent with the protection of investors and will insure that applicants do not unfairly discriminate against any holders of the class of securities to be purchased. Finally, applicants state that the Funds' imposition of asset-based service and/or distribution fees is consistent with the provisions, policies, and purposes of the 1940 Act and does not involve participation on a basis different from or less advantageous than that of other participants.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Each Fund relying on the requested order will comply with the provisions of rules 6c–10, 12b–1, 17d–3, 18f–3, 22d–1 and, where applicable, 11a–3 under the 1940 Act, as amended from time to time or replaced, as if those rules applied to closed-end management investment companies, and will comply with FINRA Rule 2341, as amended from time to time, as if that rule applies to all closed-end management investment companies.

For the Commission, by the Division of Investment Management, under delegated authority.

Dated: November 13, 2020.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25492 Filed 11–18–20; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16662 and #16663; California Disaster Number CA–00327]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of California (FEMA–4558–DR), dated 08/22/2020.

Incident: Wildfires.

Incident Period: 08/14/2020 through 09/26/2020.

DATES: Issued on 11/12/2020.

Physical Loan Application Deadline Date: 10/21/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 05/24/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of California, dated 08/22/2020, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Butte, Plumas, Stanislaus

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–25532 Filed 11–18–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16603 and #16604; California Disaster Number CA–00325]

Presidential Declaration Amendment of a Major Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 8.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of California (FEMA–4558–DR), dated 08/22/2020.

Incident: Wildfires.

Incident Period: 08/14/2020 through 09/26/2020.

DATES: Issued on 11/12/2020.

Physical Loan Application Deadline Date: 11/23/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 05/24/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of California, dated 08/22/2020, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Mendocino, Stanislaus

Contiguous Counties (Economic Injury Loans Only):

California: Calaveras, Mariposa, Tuolumne

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–25530 Filed 11–18–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2019–0094]

Deepwater Port License Application: Bluewater Texas Terminal LLC; Correction

AGENCY: Maritime Administration, U.S. Department of Transportation.

ACTION: Notice; correction.

SUMMARY: The Maritime Administration (MARAD) and the U.S. Coast Guard (USCG) published a document in the **Federal Register** of August 7, 2020, concerning Deepwater Port License Application: Bluewater Texas Terminal, LLC; Project Scope Changes; Request for Comments. This document had errors in the ''Summary of the Revised Project Description'' and ''Inshore Components'' captions. This notice also seeks public comment regarding the proposed project scope changes. Please note, MARAD and USCG have determined that this notice is sufficient for satisfying National Environmental Policy Act (NEPA) requirements for public scoping and seeking public comment on an agency action.

FOR FURTHER INFORMATION CONTACT: Mr. Roddy Bachman, U.S. Coast Guard, telephone: 202–372–1451, email: *Roddy.C.Bachman@uscg.mil,* or Ms. Yvette M. Fields, Maritime Administration, telephone: 202–366–0926, email: *Yvette.Fields@dot.gov.* For questions regarding viewing the Docket, call Docket Operations, telephone: 202–366–9317 or 202–366–9826.

SUPPLEMENTARY INFORMATION:

Corrections

1. In the **Federal Register** of August 7, 2020, in FR Doc 2020–17327, on page 48071, in the second column, correct the ''Summary of the Revised Project Description'' caption to read:

Bluewater is proposing to construct, own, and operate a deepwater port terminal in the Gulf of Mexico (GOM) to export domestically produced crude oil. The proposed project involves the design, engineering, construction of a deepwater port, and approximately 56.48 miles of pipeline infrastructure. The Bluewater deepwater port would allow for up to two (2) very large crude carriers (VLCCs) or other crude oil carriers to moor at single point mooring (SPM) buoys and connect with the deepwater port via floating connecting crude oil hoses. During single vessel loading operations, the proposed project is capable of loading rates of up to approximately 80,000 barrels per hour (bph) and during simultaneous vessel loading operations, the proposed project is capable of loading rates of 40,000 bph. The facility is expected to service 16 VLCCs per month.

For the purposes of this application, the proposed Bluewater project is described in three distinguishable segments by locality, to include the onshore components, the inshore components and the offshore components.

Onshore components associated with the proposed Bluewater project are defined as those components on the landward side of the western Redfish Bay Mean High Tide (MHT) line, located in San Patricio and Aransas Counties, Texas. The onshore project components include:

- Approximately 22.20 miles of two (2) new parallel 30-inch-diameter crude oil pipelines extending from a planned Multi-Use Terminal located south of the City of Taft in San Patricio County, Texas. The planned multi-use terminal will consist of multiple inbound and outbound crude oil pipelines. Two of those outbound pipelines compose the proposed pipeline infrastructure that will extend to the inshore pipeline which connects to the proposed Harbor Island operational facility described below.

Inshore components associated with the proposed Bluewater project are defined as those components located between the western Redfish Bay MHT line and the MHT line located at the interface of San Jose Island and the GOM. Inshore project components include:

- Approximately 7.15 miles of two (2) new 30-inch-diameter crude oil pipelines connecting to the onshore facility, an approximately 12-acre operations station and a connection to the offshore pipeline. The onshore pipeline would be located within San Patricio County, Texas and Nueces County, Texas and a proposed operations facility would be located on Harbor Island in Nueces County, Texas. The operations facility located on Harbor Island will cover approximately 12 acres of land and house the necessary infrastructure to support the transport of crude oil through the proposed pipeline infrastructure to the deepwater port for the loading of moored vessels. The facility would consist of pig launchers/receivers, meters and valves, operations building, and a communications facility.

Offshore components associated with the proposed Bluewater project are defined as those components located seaward of the MHT line located at the interface of San Jose Island and the GOM. Offshore project components include:

- Approximately 26.76 miles of two (2) new 30-inch-diameter crude oil pipelines extending from the shoreline crossing at the interface of San Jose Island to the offshore Bluewater deepwater port for crude oil delivery to Single Point Mooring (SPM) buoys.
- Two (2) SPMs in Outer Continental Shelf Matagorda Island Area TX4 lease blocks 698 and 699, approximately 15 nautical miles (17.26 statute miles) off the coast of San Patricio County, Texas in a water depth of approximately 89 feet.
- A catenary anchor leg mooring (CALM) system for each SPM buoy connected to a pipeline end manifold (PLEM) system, mooring hawsers, floating hoses, and sub-marine hoses to allow for the loading of crude oil to vessels moored at the proposed deepwater port. The SPM buoy system will be permanently moored with a symmetrically arranged six-leg anchor dual chain configuration extending to twelve (12) 72-inch-diameter pile anchors installed on the seafloor.
- Each of the proposed SPM buoy systems will consist of inner and outer cylindrical shells subdivided into twelve equal-sized watertight radial compartments. A rotating table will be affixed to the SPM buoy and allow for the connection of moored vessels to the SPM buoy system via mooring hawsers. Two floating hoses equipped with marine break-away couplings will be utilized for the transfer of crude oil from the SPM buoy systems to the moored vessel. Floating hoses will be equipped with strobe lights at 15-foot intervals for detection at night and low-light conditions.

2. In the **Federal Register** of August 7, 2020, in FR Doc 2020–17327, on page 48071, in the second column, correct the ''Inshore Components'' caption to read:

On May 30, 2019, Bluewater Texas Terminal, (BWTT) revised the design and layout of the proposed facility located on Harbor Island, in Nueces County, Texas. The following notice provides corrected information regarding the originally submitted design and the revised proposed design with respect to the facility located on Harbor Island.

The originally proposed Harbor Island facility occupied an approximate 19-acre area and included two (2) 181,000-barrel (bbl) crude oil storage tanks and two (2) 181,000 bbl water storage tanks. The tanks served to allow for the flushing of crude oil from the offshore pipeline infrastructure in the event of an emergency or for maintenance purposes.

The correct proposed project scope change and BWTT preferred option design eliminates the originally proposed four (4) storage tanks and pumps from Harbor Island. The revised design still maintains pipeline flushing capabilities. This will be accomplished through the use of previously-planned crude oil storage tanks and a new water storage tank located at the planned onshore Multi-Use Terminal (MUT). Based on this design, the facility on Harbor Island would now occupy an approximate 12-acre area, a reduction of 7 acres of permanent impacts.

The preferred Harbor Island project design would still consist of a number of originally proposed infrastructure components, which are required for the operation of the deepwater port (DWP). These facilities include pig launchers/receivers, meters and valves, an operations building, and a communications facility. The USCG valve (*i.e.,* first on land valve from the proposed DWP) is the same as that proposed in the original design at Harbor Island. The facility located on Harbor Island would be surrounded by a 10-foot-tall storm surge protection levee including a 20-footwide vehicle access road, as originally proposed. Based on this design, the facility on Harbor Island would occupy an approximate 12-acre area. The temporary construction workspace located on Harbor Island remains the same as originally proposed to allow the space necessary for the installation of pipeline infrastructure utilizing horizontal directional drill (HDD) installation methods. The 30-inch diameter pipelines entering and exiting the facility located on Harbor Island are proposed to remain the same and be

installed using the construction methodology originally proposed.

Privacy Act

The electronic form of all comments received into the Federal Docket Management System can be searched by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). The DOT Privacy Act Statement can be viewed in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78) or by visiting *http://www.regulations.gov.*

DATES:

Comments must be received on or before December 21, 2020.

The license application is available for viewing at the *Regulations.gov* website: *http://www.regulations.gov* under docket number MARAD–2019–0094.

We encourage you to submit comments electronically to the public docket at *http://www.regulations.gov.* If you submit your comments electronically, it is not necessary to also submit a hard copy. If you cannot submit material using *http://www.regulations.gov,* please contact either Mr. Roddy Bachman, USCG or Ms. Yvette M. Fields, MARAD, as listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. This section provides alternate instructions for submitting written comments. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted. Anonymous comments will be accepted. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. The Federal Docket Management Facility's telephone number is 202–366–9317 or 202–366–9826, the fax number is 202–493–2251.

(Authority: 33 U.S.C. 1501, *et seq.;* 49 CFR 1.93(h))

Dated: November 10, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–25237 Filed 11–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the statement of liability of lender, surety, or other person for withholding taxes.

DATES: Written comments should be received on or before January 19, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to LaNita Van Dyke, at (202) 317–6009 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Statement of Liability of Lender, Surety, or Other Person for Withholding Taxes.

OMB Number: 1545–2254.

Form Number: Form 4219.

Abstract: Third parties who directly pay another's payrolls can be held liable for the full amount of taxes required to be withheld but not paid to the Government (subject to the 25% limitation). IRC 3505 deals with persons who supply funds to an employer for the purpose of paying wages. The notification that a third party is paying or supplying wages will usually be made by filing of the Form 4219, Statement of Liability of Lender, Surety, or Other Person for Withholding Taxes. The Form 4219, Statement of Liability of Lender, Surety, or Other Person for Withholding Taxes, is to be submitted and associated with each employer and for every calendar quarter for which a liability under section 3505 is incurred.

Current Actions: There have been no changes to the form that would affect burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Not-for-profit institutions, Farms, Federal Government, State, Local, or Tribal Government.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 12 hours, 50 minutes.

Estimated Total Annual Burden Hours: 12,833.

The following paragraph applies to all of the collections of information covered by this notice.

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. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 13, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–25539 Filed 11–18–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the health insurance marketplace statement.

DATES: Written comments should be received on or before January 19, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to LaNita Van Dyke, at (202) 317–6009, or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Health Insurance Marketplace Statement.

OMB Number: 1545–2232.

Regulation Project Number: Form 1095–A.

Abstract: The IRS developed Form 1095–A under the authority of ICR section 36B(f)(3) for individuals to compute the amount of premium tax credit to which they are entitled under the Patient Protection and Affordable Care Act, P.L. 111–148, as amended, and file an accurate tax return. Marketplaces also must report certain information monthly to the IRS about individuals who receive from the Marketplace a certificate of exemption from the individual shared responsibility provision.

Current Actions: There is no change to this existing regulation. However, the agency has updated the number of respondents to reflect the most recent data available.

Type of Review: Revision of a currently approved collection.

Affected Public: State, local, or tribal government.

Estimated Number of Respondents: 3,250,000.

Estimated Time per Respondent: .3 minutes.

Estimated Total Annual Burden Hours: 16,250.

The following paragraph applies to all of the collections of information covered by this notice.

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. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 13, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–25538 Filed 11–18–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8924

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the excise tax on certain transfers of qualifying geothermal or mineral interests.

DATES: Written comments should be received on or before January 19, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to LaNita Van Dyke, at (202) 317–6009, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Excise Tax on Certain Transfers of Qualifying Geothermal or Mineral Interests.

OMB Number: 1545–2099.

Form Number: Form 8924.

Abstract: Form 8924, Excise Tax on Certain Transfers of Qualifying Geothermal or Mineral Interests, is required by Section 403 of the Tax Relief and Health Care Act of 2006 which imposes an excise tax on certain transfers of qualifying mineral or geothermal interests.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 20.

Estimated Time per Respondent: 5 hours, 33 minutes.

Estimated Total Annual Burden Hours: 111.

The following paragraph applies to all of the collections of information covered by this notice:

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. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to

minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 13, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–25537 Filed 11–18–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 12854, Government Service Information

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 12854, Government Service Information.

DATES: Written comments should be received on or before January 19, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to LaNita Van Dyke, at (202) 317–6009, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Government Service Information.

OMB Number: 1545–1919.

Form Number: Form 12854.

Abstract Part : of the hiring process requires applicants to provide IRS with specific information to verify previous employment history. Form 12854, Government Service Information, requests information from applicants who were previously employed by the Federal Government. The information on the form is needed to assist in providing information for pay setting determinations of potential new employees.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals.

Estimated Number of Respondents: 24,813.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 6,203.

The following paragraph applies to all of the collections of information covered by this notice:

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. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 13, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–25536 Filed 11–18–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2003–84

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of information collection; request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Revenue Procedure 2003–84, Optional election to make monthly 706(a) computations.

DATES: Written comments should be received on or before January 19, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to LaNita Van Dyke, at (202) 317–6009, 1111 Constitution Avenue NW, Room 6526, Washington, DC 20224, or through the internet at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Optional election to make monthly 706(a) computations.

OMB Number: 1545–1768.

Revenue Procedure Number: Revenue Procedure 2003–84.

Abstract: This procedure allows certain partnerships that invest in tax-exempt obligations to make an election that enables the partners to take into account monthly the inclusions required under sections 702 and 707(c) of the Code and provides rules for partnership income tax reporting under section 6031 for such partnerships. Rev. Proc. 2002–68 modified and superseded.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours. 500.

The following paragraph applies to all the collections of information covered by this notice:

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. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 13, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–25535 Filed 11–18–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Funding Availability Under Supportive Services for Veteran Families Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice of fund availability.

SUMMARY: The Department of Veterans Affairs (VA) is announcing the availability of funds for supportive services grants under the Supportive Services for Veteran Families (SSVF) Program. This Notice of Fund Availability (NOFA) contains information concerning the SSVF Program, renewal of supportive services grant application processes, and the amount of funding available. Awards made for supportive services grants will fund operations beginning October 1, 2021.

DATES: Applications for supportive services grants under the SSVF Program must be received by the SSVF Program Office by 4:00 p.m. Eastern Time on February 5, 2021. In the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages or other submission-related problems.

ADDRESSES: For a Copy of the Application Package: Copies of the application can be downloaded from the SSVF website at *www.va.gov/homeless/ssvf.* Questions should be referred to the SSVF Program Office at *SSVF@va.gov.* For detailed SSVF Program information and requirements, see 38 CFR part 62.

Submission of Application Package: Applicants must submit applications electronically following instructions found at *www.va.gov/homeless/ssvf.* Applications may not be mailed, hand carried or sent by facsimile (FAX). Applications must be received in the SSVF Program Office by 4:00 p.m. Eastern Time on the application deadline date. Applications must arrive as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected. See Section II.C. of this NOFA for maximum allowable grant amounts.

Technical Assistance: Information regarding how to obtain technical assistance with the preparation of a renewal supportive services grant application is available on the SSVF Program website at *www.va.gov/homeless/ssvf.*

FOR FURTHER INFORMATION CONTACT: Mr. John Kuhn, National Director, Supportive Services for Veteran Families, at *SSVF@va.gov* or by phone at 816–806–7348.

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: Supportive Services for Veteran Families Program.

Announcement Type: Initial.

Funding Opportunity Number: VA–SSVF–103120.

Catalog of Federal Domestic Assistance Number: 64.033, VA Supportive Services for Veteran Families Program.

I. Funding Opportunity Description

A. *Purpose:* The SSVF Program's purpose is to provide supportive services grants to private non-profit organizations and consumer cooperatives, who will coordinate or provide supportive services to very low-income Veteran families who:

(i) Are residing in permanent housing and at risk of becoming homeless; (ii) are homeless and scheduled to become residents of permanent housing within a specified time period; or (iii) after exiting permanent housing within a specified time period, are seeking other housing that is responsive to such very low-income Veteran family's needs and preferences. SSVF prioritizes the delivery of rapid re-housing services to homeless Veteran households.

Rapid re-housing is an intervention designed to help individuals and families quickly exit homelessness, return to housing in the community and avoid homelessness again in the near term. The core components of a rapid re-housing program are housing identification, move-in and rent financial assistance and rapid re-housing case management and services. These core components represent the minimum that a program must be providing to households to be considered a rapid re-housing program, but do not provide guidance for what constitutes an effective rapid re-housing program. Applicants should familiarize themselves with the Rapid Re-housing Performance Benchmarks and Program Standards found at *https://www.va.gov/homeless/ssvf/?page=/ssvf_university/fidelity_tool_ssvf_standards.*

B. *Funding Priorities:* The principle goal for this NOFA is to provide support to those applicants who demonstrate the greatest capacity to end homelessness among Veterans or, in communities that have already met U.S. Interagency Council on Homelessness (USICH) Federal Criteria and Benchmarks, sustain the gains made in ending homelessness among Veterans. Priority will be given to grantees who can demonstrate adoption of evidence-based practices in their application. Priorities 1, 2 and 3 are open only to existing grantees. Under Priority 1, VA will provide funding to those grantees with 3-year accreditation from the Commission on Accreditation of Rehabilitation Facilities (CARF) in Employment and Community Services including: Rapid Rehousing and Homeless Prevention standards, a 4-year accreditation from the Council on Accreditation's (COA) accreditation in Housing Stabilization and Community Living Services standards, or a 3-year

accreditation in The Joint Commission's (JC) Behavioral Health Care: Housing Support Services Standards. Priority 2 includes existing grantees not included in Priority 1 with annual awards, seeking to renew their grants. Priority 3 includes existing grantees previously awarded Priority 3 grants stemming from the SSVF NOFA published on December 5, 2019.

C. *Definitions:* 38 CFR part 62, contains definitions of terms used in the SSVF Program. In addition to the definitions and requirements described in 38 CFR part 62, this NOFA provides further clarification in this paragraph on the use of *Emergency Housing Assistance* (EHA). EHA may be provided by the SSVF grantee under 38 CFR 62.34(f) to offer transition in place when a permanent housing voucher, such as is offered through the Department of Housing and Urban Development's (HUD) Section 8 program, is available from any source, but access to the permanent housing voucher is pending completion of the housing inspection and administrative processes necessary for leasing. In such circumstances, the EHA payment cannot exceed what would otherwise be paid when the voucher is utilized. EHA may also be used as part of a Rapid Resolution or diversion response that helps Veteran households avoid entry into homelessness through placements with family or friends.

D. *Approach:* Respondents to this NOFA will have their renewal funding requests scored based on applications submitted in response to the December 5, 2019, NOFA. Grantees will be expected to leverage supportive services grant funds to enhance the housing stability of very low-income Veteran families who are occupying permanent housing. In doing so, grantees are required to establish relationships with local community resources. Therefore, agencies must work through coordinated partnerships built either through formal agreements or the informal working relationships commonly found among successful social service providers.

The aim of the provision of supportive services is to assist very low-income Veteran families residing in permanent housing to remain stably housed and to rapidly transition those not currently in permanent housing to stable housing. SSVF emphasizes the placement of homeless Veteran families who are described in 38 CFR 62.11(b)–(c) as (i) very low-income Veteran families who lack a fixed, regular and adequate nighttime residence and are scheduled to become residents of permanent housing within 90 days, pending the location or development of housing suitable for permanent housing, and (ii) very low-income Veteran families who have exited permanent housing within the previous 90 days to seek other housing that is responsive to their needs and preferences. As a crisis intervention program, the SSVF Program is not intended to provide long-term support for participants, nor will it be able to address all of the financial and supportive services needs of participants that affect housing stability. Rather, when participants require long-term support, grantees should focus on connecting such participants to income supports, such as employment and mainstream Federal and community resources (*e.g.,* HUD–VA Supportive Housing program, HUD Housing Choice Voucher programs, McKinney-Vento Funded Supportive Housing Programs, Temporary Assistance for Needy Families (TANF) and Social Security Income/Social Security Disability Insurance (SSI/SSDI), etc.) that can provide ongoing support as required.

Assistance in obtaining or retaining permanent housing is a fundamental goal of the SSVF Program. Grantees must provide case management services in accordance with 38 CFR 62.31. Such case management should include tenant counseling, mediation with landlords and outreach to landlords.

E. *Authority:* Funding available under this NOFA is authorized by 38 U.S.C. 2044. VA implements the SSVF Program through regulations in 38 CFR part 62. Funds made available under this NOFA are subject to the requirements of these regulations.

F. *Requirements for the Use of Supportive Services Grant Funds:* The applicant's request for funding must be consistent with the limitations and uses of supportive services grant funds set forth in 38 CFR part 62 and this NOFA. In accordance with the regulations and this NOFA, the following requirements apply to supportive services grants awarded under this NOFA:

1. Grantees may use a maximum of 10% of supportive services grant funds for administrative costs identified in 38 CFR 62.70(e).

2. Grantees must use a minimum of 60% of the temporary financial assistance portion of their supportive services grant funds to serve very low-income Veteran families who qualify under 38 CFR 62.11(b). (NOTE: Grantees may request a waiver to decrease this minimum, as discussed in section V.B.3.a.)

3. Priority 1 and 2 grantees may use a maximum of 50% of supportive services grant funds to provide the supportive service of temporary financial assistance paid directly to a third party on behalf of a participant for child care, emergency housing assistance, transportation, rental assistance, utility-fee payment assistance, security deposits, utility deposits, moving costs and general housing stability assistance, in accordance with 38 CFR 62.33 and 38 CFR 62.34, unless a waiver is granted by the SSVF Program Office.

4. Priority 3 grantees must use a minimum of 40% of funds to support temporary financial assistance with the expectation that much of these funds will be used for rental assistance in accordance with 38 CFR 62.34(a)(8). Priority 3 awards will extend to September 30, 2023, existing awards made based on the NOFA published on December 5, 2019.

G. *Guidance for the Use of Supportive Services Grant Funds:* Grantees are expected to demonstrate adoption of evidence-based practices most likely to lead to reductions in homelessness. Housing is not contingent on compliance with mandated therapies or services; instead, participants must comply with a standard lease agreement and are provided with the services and supports that are necessary to help them do so successfully.

Grantees must develop plans that will ensure that Veteran participants have the level of income and economic stability needed to remain in permanent housing after the conclusion of the SSVF intervention. Both employment and benefits assistance from VA and non-VA sources represent a significant underutilized source of income stability for homeless Veterans. Income is not a pre-condition for housing. Case management should include income maximization strategies to ensure households have access to benefits, employment and financial counseling. The complexity of program rules and the stigma some associate with entitlement programs contributes to their lack of use. For this reason, grantees are encouraged to consider strategies that can lead to prompt and successful access to employment and benefits that are essential to retaining housing.

1. Consistent with 38 CFR 62.30–62.34, grantees are expected to offer the following supportive services: Counseling participants about housing; assisting participants in understanding leases; securing utilities; making moving arrangements; providing representative payee services concerning rent and utilities when needed; and mediation and outreach to property owners related to locating or retaining housing. Grantees may also assist participants by

providing rental assistance, security or utility deposits, moving costs, emergency housing or general housing stability assistance; or using other Federal resources, such as HUD's Emergency Solutions Grants Program, or supportive services grant funds, subject to the limitations described in this NOFA and 38 CFR 62.34.

2. As SSVF is a short-term crisis intervention, grantees must develop plans that will produce sufficient income to sustain Veteran participants in permanent housing after the conclusion of the SSVF intervention. Grantees must ensure the availability of employment and vocational services either through the direct provision of these services or their availability through formal or informal service agreements. Agreements with Homeless Veteran Reintegration Programs, funded by the U.S. Department of Labor, are strongly encouraged. For participants unable to work due to disability, income must be established through available benefits programs.

3. Per 38 CFR 62.33, grantees must assist participants in obtaining public benefits. Grantees must screen all participants for eligibility for a broad range of entitlements such as TANF, Social Security, the Supplemental Nutrition Assistance Program, the Low-Income Home Energy Assistance Program, the Earned Income Tax Credit and local General Assistance programs. Grantees are expected to access the Substance Abuse and Mental Health Services Administration's SSI/SSDI Outreach, Access and Recovery (SOAR) program directly by training staff and providing the service or subcontracting services to an organization to provide SOAR services. In addition, where available, grantees should access information technology tools to support case managers in their efforts to link participants to benefits.

4. Grantees are encouraged to provide, or assist participants in obtaining, legal services relevant to issues that interfere with the participants' ability to obtain or retain permanent housing. (NOTE: Information regarding legal services provided may be protected from being released to the grantee or VA under attorney-client privilege, although the grantee must provide sufficient information to demonstrate the frequency and type of service delivered.) Support for legal services can include paying for court filing fees to assist a participant with issues that interfere with the participant's ability to obtain or retain permanent housing or supportive services, including issues that affect the participant's employability and financial security. Grantees (in addition to employees and members of grantees) may represent participants before VA with respect to a claim for VA benefits, but only if they are recognized for that purpose pursuant to 38 U.S.C. Chapter 59. Further, the individual providing such representation must be accredited pursuant to 38 U.S.C. Chapter 59.

5. Access to mental health and addiction services are required by SSVF; however, grantees cannot fund these services directly through the SSVF grant. Therefore, applicants must demonstrate, through either formal or informal agreements, their ability to promote rapid access to and engagement with mental health and addiction services for the Veteran and family members.

6. VA recognizes that extremely low-income Veterans, with incomes below 30% of the area median income, face greater barriers to permanent housing placement. Grantees should consider how they can support these participants.

7. When serving participants who are residing in permanent housing, the defining question to ask is: ''Would this individual or family be homeless but for this assistance?'' The grantee must use a VA-approved screening tool with criteria that target those most at-risk of homelessness. To qualify for SSVF services, a participant who is served under 38 CFR 62.11(a) (homeless prevention) must not have sufficient resources or support networks (*e.g.,* family, friends, faith-based or other social networks) immediately available to prevent them from becoming homeless. To further qualify for services under 38 CFR 62.11(a), the grantee must document that the participant meets at least one of the following conditions:

(a) Has moved because of economic reasons 2 or more times during the 60 days immediately preceding the application for homelessness prevention assistance;

(b) Is living in the home of another because of economic hardship;

(c) Has been notified, in writing, that their right to occupy their current housing or living situation will be terminated within 21 days after the date of application for assistance;

(d) Lives in a hotel or motel, and the cost of the hotel or motel stay is not paid by charitable organizations or by Federal, state or local government programs for low-income individuals;

(e) Is exiting a publicly funded institution or system of care (such as a health care facility, a mental health facility or correctional institution) without a stable housing plan; or

(f) Otherwise lives in housing that has characteristics associated with instability and an increased risk of homelessness, as identified in the recipient's approved screening tool.

8. SSVF grantees are required to participate in local planning efforts designed to end Veteran homelessness. Grantees may use grant funds to support SSVF involvement in such community planning by sub-contracting with continuums of care (CoC), when such funding is essential, to create or sustain the development of these data-driven plans.

9. When other funds from community resources are not readily available to assist program participants, grantees may choose to utilize supportive services grants, to the extent described in this NOFA and in 38 CFR 62.33 and 62.34, to provide temporary financial assistance. Such assistance may, subject to the limitations in this NOFA and 38 CFR part 62, be paid directly to a third party on behalf of a participant for child care, transportation, family emergency housing assistance, rental assistance, utility-fee payment assistance, security or utility deposits, moving costs and general housing stability assistance as necessary.

10. SSVF requires grantees to offer Rapid Resolution (also known as diversion) services. These services engage Veterans immediately before or after they become homeless and assist them to avoid continued homelessness. These efforts can reduce the trauma and expense associated with extended periods of homelessness, and the strain on the crisis response and affordable housing resources in the community. Through Rapid Resolution, the grantee and the Veteran explore safe, alternative housing options immediately before or quickly after they become homeless. Rapid Resolution can identify an immediate safe place to stay within the Veteran's network of family, friends or other social networks. All Veterans requesting SSVF services should have a Rapid Resolution screening, and if not appropriate, for Rapid Resolution grantees should then assess the Veteran for other SSVF services. More information about Rapid Resolution can be found at *www.va.gov/homeless/ssvf.*

II. Award Information

A. *Overview:* This NOFA announces the availability of funds for supportive services grants under the SSVF Program and pertains to proposals for renewal of existing supportive services grant programs.

B. *Funding:* The funding priorities for this NOFA are as follows:

1. Priority 1. Under Priority 1, VA will provide funding to those grantees with 3-year CARF, 4-year COA accreditations or 3-year JC accreditations. Proof of accreditation must be submitted with the application no later than the application due date.

2. Priority 2. Priority 2 includes other existing grantees seeking to renew their annual grant awards.

3. Priority 3. Priority 3 includes existing grantees operating grants previously funded as Priority 3 awards in response to the December 5, 2019, NOFA.

All applicants must apply using Letters of Intent (LOI). Priority 1 and 2 grantees submitting a LOI must include a proposed budget for fiscal year (FY) 2022. Priority 3 grantees would include a budget covering the period through FY 2023. In response to this NOFA, VA will evaluate their previously awarded FY 2020 renewal grants for scoring purposes. To be eligible for renewal of a supportive services grant, the Priority 1 and 2 applicants' program concept must be substantially the same as the program concept of the grantees' current grant award. Renewal applications can request funding that is equal to or less than their current annualized award. If sufficient funding is available, VA may provide an increase of up to 10% from the previous year's award. Any percentage increase, if provided, will be awarded uniformly to all Priority 1 and 2 grant recipients, regardless of their grant award and may be applied to Priority 3 grant recipients if sufficient funding is available.

4. Priority 3. Under Priority 3, VA will provide funding to current grantees previously awarded grants stemming from the SSVF NOFA published on December 5, 2019. Applicants apply by submitting an LOI by the NOFA deadline indicating their intention of continuing SSVF services with a focus on rental subsidies described in 38 CFR 62.34(a). Each Priority 3 award will be up to the amount made to that applicant stemming from the SSVF NOFA published on December 5, 2019. Awards may be increased to reflect additional amounts awarded through funding processes described in 38 CFR 62.25(d) and Section II.C.8. of the December 5, 2019, NOFA. Awards may also be decreased based on annualized spending of grantee if current spending rates of that Priority 3 grantee will not exhaust available funding by September 30, 2023. These awards will extend the duration of existing awards through September 30, 2023.

C. *Allocation of Funds:* Funding will be awarded under this NOFA to existing grantees for a 1-year to 3-year period beginning October 1, 2021. The following requirements apply to supportive services grants awarded under this NOFA:

1. In response to this NOFA, only existing grantees can apply as Priority 1, 2 or 3 grantees.

2. Priority 1 and 2 renewal grant requests cannot exceed the current award. (The current award may include funds that were added to the original award through disaster relief support or through the process described in Section II.C.8.)

3. Priority 3 renewal grant requests cannot exceed the award they received based on the December 5, 2019, NOFA. The current award may include funds that were added to the original award through the process described in Section II.C.8.)

4. Existing applicants may request an amount less than their current award. (This will not be considered a substantial change to the program concept.)

5. If a Priority 1 or 2 grantee failed to use all of the awarded funds from FY 2020 by December 31, 2020, VA may elect to limit the renewal award to the amount of funds used in the previous fiscal year, or in the current fiscal year, less the money swept.

6. If, during the course of the grant year, VA determines that grantee spending is not meeting the minimum percentage milestones below, VA may elect to recoup projected unused funds and reprogram such funds to provide supportive services in areas with higher need. Should VA elect to recoup unspent funds, reductions in available grant funds would take place the first business day following the end of the quarter. VA may elect to recoup funds from Priority 1 and 2 grantees under the following circumstances:

(a) By the end of the first quarter (December 31, 2021) of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 10% of the total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 30% of the total supportive services grant award.)

(b) By the end of the second quarter (March 31, 2022) of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 30% of total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 55% of the total supportive services grant award.)

(c) By the end of the third quarter (June 30, 2022) of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 55% of the total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 80% of the total supportive services grant award.) VA may recoup funds from Priority 3 grantees if by the end of the third quarter (June 30, 2022) of the Priority 3 grantee's supportive services grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 40% of the total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds should not exceed 65% of the total supportive services grant award.)

7. Applicants should submit separate LOIs for each supportive services funding request.

8. Should additional funding become available over the course of the grant term from funds recouped under the Award Information section of this Notice, funds that are voluntarily returned by grantees, funds that become available due to a grant termination or other funds still available for grant awards, VA may elect to offer these funds to grantees in areas where demand has exceeded available SSVF resources. Additional funds will be provided first to the highest scoring grantee in the selected area who is in compliance with their grant agreement and has the capacity to utilize the additional funds.

D. *Supportive Services Grant Award Period:* Priority 2 grants are made for a 1-year period, although selected grants may be eligible for a 3-year award (see Section VI.C.6) as Priority 1 awards. All grants are eligible to be renewed subject to the availability of funding.

III. Eligibility Information

A. *Eligible Applicants:* Applicants must submit an LOI on their organization letterhead stating the intent to apply for renewal funding and agreement for VA to evaluate their previously awarded FY 2020 application and renewal grant for scoring purposes. Only eligible entities, that are existing grantees previously awarded grants stemming from the SSVF NOFA published on December 5, 2019, can apply in response to this NOFA.

B. *Cost Sharing or Matching:* None.

IV. Application and Submission Information

A. *Obtaining an Application Package:* Applications are located at *www.va.gov/homeless/ssvf.* Any questions regarding this process should be referred to the SSVF Program Office at *SSVF@va.gov.* For detailed SSVF Program information and requirements, see 38 CFR part 62.

B. *Content and Form of Application:* Applicants must submit applications electronically following instructions found at *www.va.gov/homeless/ssvf.*

C. *Submission Dates and Times:* Applications for supportive services grants under the SSVF Program must be received by the SSVF Program Office by 4:00 p.m. Eastern Time on February 5, 2021. Awards made for supportive services grants will fund operations beginning October 1, 2021. Applications must arrive as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected. Additionally, in the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages or other delivery-related problems.

D. *Funding Restrictions:* Funding will be awarded for supportive services grants under this NOFA depending on funding availability. Only existing SSVF providers may apply for grant renewals. Applicants should submit separate LOIs and accompanying material for each supportive services funding request. VA will evaluate funding requests based on previously awarded FY 2020 applications made in response to the SSVF NOFA published on December 5, 2019, for scoring purposes.

1. Funding used for staff education and training cannot exceed 1% of the overall program grant award. This limitation does not include the cost to attend VA mandated training. All training costs must be directly related to the provision of services to homeless Veterans and their families.

2. Expenses related to maintaining accreditation are allowable. Priority 1 and 2 grantees are allowed to include expenses for seeking initial accreditation only once in a 5-year period. The expenses to renew full accreditation is allowed and is based on the schedule of the accrediting agency: For instance, every 3 years for CARF and every 4 years for COA. Expenses related to the renewal of less than full accreditation are not allowed.

E. *Other Submission Requirements:*

1. Existing applicants applying for Priority 1 or 2 grants may apply only by submitting LOIs with required budgets.

2. At the discretion of VA, multiple grant proposals submitted by the same lead agency may be combined into a single grant award if the proposals provide services to contiguous areas.

3. Submission of an incorrect or incomplete application package will result in the application being rejected during threshold review. The application packages must contain all required forms. Applicants and grantees will be notified of any additional information needed to confirm or clarify information provided in the application and the deadline by which to submit such information. Applicants must submit applications electronically. Applications may not be mailed, hand carried or sent by FAX.

V. Application Review Information

A. *Criteria:* VA will only fund grantees submitting LOIs and required budget information by the application deadline.

B. *Review and Selection Process:* VA will review all supportive services renewal grant applications in response to this NOFA according to the following steps:

1. As this NOFA requires only LOIs for consideration, it is expected that all grantees will be funded at the same level as the previous award.

2. Should available funding not be sufficient to fully fund all requests, grant awards will be made proportionally with each grantee receiving the same percentage of their award request up to the amount of available funding.

3. VA will also utilize the following considerations, in 38 CFR 62.23(d), to select applicants for funding:

(a) Give preference to applications that provide or coordinate the provision of supportive services for very low-income Veteran families transitioning from homelessness to permanent housing. Consistent with this preference, where other funds from community resources are not readily available for temporary financial assistance, applicants are required to spend no less than 60% of all budgeted temporary financial assistance on participants occupying permanent housing as defined in 38 CFR 62.11(b). Waivers to this 60% requirement may be requested when grantees can demonstrate significant local progress towards eliminating homelessness in the target service area. Waiver requests must include data from authoritative sources such as USICH certification, that a community has ended homelessness, as defined by Federal Benchmarks and Criteria, or has reached Community Solution's Functional Zero. Waivers for the 60% requirement may also be requested for services provided to rural Indian tribal areas and other rural areas where shelter capacity is insufficient to meet local need. Waiver requests must include an endorsement by the impacted CoC explicitly stating that a shift in resources from rapid re-housing to prevention will not result in an increase in homelessness.

(b) To the extent practicable, ensure that supportive services grants are equitably distributed across geographic regions, including rural communities and tribal lands. This equitable distribution criteria will be used to ensure that SSVF resources are provided to those communities with the highest need as identified by VA's assessment of expected demand and available resources to meet that demand.

VI. Award Administration Information

A. *Award Notices:* Although subject to change, the SSVF Program Office expects to announce grant recipients for all applicants in the fourth quarter of FY 2021, with grants beginning October 1, 2021. Prior to executing a funding agreement, VA will contact the applicants, make known the amount of proposed funding and verify that the applicant would still like the funding. Once VA verifies that the applicant is still seeking funding, VA will execute an agreement and make payments to the grant recipient in accordance with 38 CFR part 62 and this NOFA.

B. *Administrative and National Policy Requirements:* As SSVF grants cannot be used to fund treatment for mental health or substance use disorders, applicants must provide evidence that they can provide access to such services to all program participants through formal and informal agreements with community providers.

C. *Reporting:* VA places great emphasis on the responsibility and accountability of grantees. As described in 38 CFR 62.63 and 62.71, VA has procedures in place to monitor supportive services provided to participants and outcomes associated with the supportive services provided under the SSVF Program. Applicants should be aware of the following:

1. Upon execution of a supportive services grant agreement with VA, grantees will have a VA regional coordinator, assigned by the SSVF Program Office, who will provide

oversight and monitor supportive services provided to participants.

2. Grantees will be required to enter data into a Homeless Management Information System (HMIS) web-based software application. These data will consist of information on the participants served and types of supportive services provided by grantees. Grantees must treat the data, for activities funded by the SSVF Program separate from that of activities funded by other programs. Grantees will be required to work with their HMIS Administrators to export client-level data for activities funded by the SSVF Program to VA on at least a monthly basis.

3. VA will complete annual monitoring evaluations of each grantee. Monitoring will also include the submittal of quarterly and annual financial and performance reports by the grantee. The grantee will be expected to demonstrate adherence to the grantee's proposed program concept, as described in the grantee's application. All grantees are subject to audits conducted by VA or its representative.

4. Grantees will be assessed based on their ability to meet critical performance measures. In addition to meeting program requirements defined by the regulations and applicable NOFA(s), grantees will be assessed on their ability to place participants into housing and the housing retention rates of participants served. Higher placement for homeless participants and higher housing retention rates for at-risk participants are expected for very-low income Veteran families when compared to extremely low-income Veteran families with incomes below 30% of the area median income.

5. Organizations receiving renewal awards that have had ongoing SSVF program operation for at least 1 year (as measured from the start of initial SSVF services until February 5, 2021) may be eligible for a 3-year award. Grantees meeting outcome goals defined by VA and in substantial compliance with their grant agreements (defined by meeting targets and having no outstanding corrective action plans) and who, in addition, receive 3-year accreditation from CARF in Employment and Community Services: Rapid Rehousing and Homeless Prevention standards, a 4-year accreditation from COA accreditation in Supported Community Living Services standards, or a 3 year accreditation in The Joint Commission's Behavioral Health Care: Housing Support Services Standards are eligible for a 3-year grant renewal subject to funding availability. (NOTE: Multi-year awards are contingent on funding availability.) If awarded a multiple year renewal, grantees may be eligible for funding increases as defined in NOFAs that correspond to years 2 and 3 of their renewal funding.

VII. Other Information

A. *VA Goals and Objectives for Funds Awarded Under this NOFA:* In accordance with 38 CFR 62.24(c), VA will evaluate an applicant's compliance with VA goals and requirements for the SSVF Program. VA goals and requirements include the provision of supportive services designed to enhance the housing stability and independent living skills of very low-income Veteran families occupying permanent housing across geographic regions and program administration in accordance with all applicable laws, regulations and guidelines. For purposes of this NOFA, VA goals and requirements also include the provision of supportive services designed to rapidly re-house or prevent homelessness among people in the following target populations who also meet all requirements for being part of a very low-income veteran family occupying permanent housing:

1. Veteran families earning less than 30% of area median income, as most recently published by HUD for programs under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) (*http://www.huduser.org*).

2. Veterans with at least one dependent family member.

3. Veterans returning from Operation Enduring Freedom, Operation Iraqi Freedom or Operation New Dawn.

4. Veteran families located in a community, as defined by HUD's CoC, or a county not currently served by an SSVF grantee.

5. Veteran families located in a community, as defined by HUD's CoC, where the current level of SSVF services is not sufficient to meet the demand of Category 2 and 3 (currently homeless) Veteran families.

6. Veteran families located in a rural area.

7. Veteran families located on Indian Tribal Property.

B. *Payments of Supportive Services Grant Funds:* Grantees will receive payments electronically through the U.S. Department of Health and Human Services Payment Management System. Grantees will have the ability to request payments as frequently as they choose, subject to the following limitations:

1. During the first quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 35% of the total supportive services grant award without written approval by VA.

2. By the end of the second quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 60% of the total supportive services grant award without written approval by VA.

3. By the end of the third quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 80% of the total supportive services grant award without written approval by VA.

4. By the end of the fourth quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 100% of the total supportive services grant award.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on November 12, 2020, for publication.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2020–25402 Filed 11–18–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0205]

Agency Information Collection Activity Under OMB Review: Title 38 Positions—Applications and Appraisals for Employment

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration,

Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0205.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, Office of Quality, Performance and Risk (OQPR), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 421–1354 or email *danny.green2@va.gov* Please refer to ''OMB Control No. 2900–0205'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–3521.

Title: Title 38 Positions—Applications and Appraisals for Employment (VA Forms 10–2850, 10–2850a, 10–2850c, FL 10–341(a)).

OMB Control Number: 2900–0205.

Type of Review: Reinstatement of a previously approved collection.

Abstract: The collection of this information is authorized by Title 38, United States Code (U.S.C.) 7403, (Veterans' Benefits), which provides that appointments of Title 38 employees will be made only after qualifications have been satisfactorily verified in accordance with regulations prescribed by the Secretary. Occupations listed in 38 U.S.C. 7401(1) and 7401(3) (Appointments in Veterans Health Administration), are appointed at a grade and step rate or an assignment based on careful evaluation of their education and experience.

VA Forms 10–2850, 10–2850a, and 10–2850c are applications designed specifically to elicit appropriate information about each candidate's qualifications for employment with Department of Veterans Affairs (VA) as well as educational and experience. To assure that a full evaluation of each candidate's credentials can be made prior to employment, the forms require disclosure of details about all licenses ever held, Drug Enforcement Administration certification, board certification, clinical privileges, revoked certification or registration, liability insurance history, and involvement in malpractice proceedings.

VA Form Letter 10–341a is the pre-employment reference form used to elicit information concerning the prior education and/or performance of the Title 38 applicant. This collection of information is necessary to determine eligibility for employment and the appropriate grade and step rate or assignment.

a. VA Form 10–2850, Application for Physicians, Dentists, Podiatrists, Optometrists, and Chiropractors, will collect information used to determine eligibility for appointment to VHA.

b. VA Form 10–2850a, Application for Nurses and Nurse Anesthetists, will collect information used to determine eligibility for appointment to VHA.

c. VA Form 10–2850c, Application for Associated Health Occupations, will collect information used to determine eligibility for appointment to VHA.

d. VA Form Letter 10–341(a), Appraisal of Applicant, will collect information used to determine if applicant meets the requirements for employment.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 85 FR 73 on April 15, 2020, page 21071.

VA Form 10–2850

Affected Public: Individuals and households.

Estimated Annual Burden: 8,064 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 16,128.

VA Form 10–2850a

Affected Public: Individuals and households.

Estimated Annual Burden: 32,256 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 64,511.

VA Form 10–2850c

Affected Public: Individuals and households.

Estimated Annual Burden: 10,752 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 21,504.

VA Form Letter 10–341(a)

Affected Public: Individuals and households.

Estimated Annual Burden: 25,410 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 50,820.

By direction of the Secretary.

Danny S. Green,

VA Clearance Officer, Office of Quality, Performance and Risk (OQPR), Department of Veterans Affairs.

[FR Doc. 2020–25591 Filed 11–18–20; 8:45 am]

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Part II

Environmental Protection Agency

40 CFR Part 63

Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2019–0282; FRL–10014–50–OAR]

RIN 2060–AM75

Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule finalizes amendments to the General Provisions that apply to National Emission Standards for Hazardous Air Pollutants (NESHAP). These amendments implement the plain language reading of the ''major source'' and ''area source'' definitions of section 112 of the Clean Air Act (CAA) and provide that a major source can be reclassified to area source status at any time upon reducing its potential to emit (PTE) hazardous air pollutants (HAP) to below the major source thresholds (MST) of 10 tons per year (tpy) of any single HAP and 25 tpy of any combination of HAP. This rule also finalizes amendments to clarify the compliance dates, notification, and recordkeeping requirements that apply to sources choosing to reclassify to area source status and to sources that revert back to major source status, including a requirement for electronic notification.

DATES: This final rule is effective on January 19, 2021.

ADDRESSES: The Environmental Protection Agency (EPA) has established a docket for this action under Docket ID No. EPA–HQ–OAR–2019–0282. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, 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 and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov/.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room was 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. For further information and updates on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For questions about this final rule, contact Ms. Elineth Torres, Sector Policies and Programs Division (D205–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–4347; fax number: (919) 541–4991; and email address: *torres.elineth@epa.gov.* Questions concerning specific reclassifications should be directed to the appropriate Regional office.

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

CAA Clean Air Act
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
D.C. Cir. the United States Court of Appeals for the District of Columbia Circuit
EAV equivalent annualized value
EIA economic impact analysis
EPA Environmental Protection Agency
FIP Federal Implementation Plan
HAP hazardous air pollutant(s)
MACT maximum achievable control technology
MM2A Major MACT to Area
MRR monitoring, recordkeeping, and reporting
MST major source thresholds
NESHAP national emission standards for hazardous air pollutants
NMA National Mining Association
NSPS new source performance standards
NSR New Source Review
NTTAA National Technology Transfer and Advancement Act
OIAI Once In, Always In
OMB Office of Management and Budget
PRA Paperwork Reduction Act
PSD prevention of significant deterioration
PTE potential to emit
PV present value
RTO regenerative thermal oxidizers
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RTR residual risk and technology review
SIP State Implementation Plan
TIP Tribal Implementation Plan
TSM technical support memorandum
tpy tons per year
UMRA Unfunded Mandates Reform Act
VOC volatile organic compound(s)

Background information. On July 26, 2019, the EPA proposed revisions to the General Provisions that apply to the NESHAP to implement the plain language reading of the ''major source'' and ''area source'' definitions of CAA section 112 and provide that a major source can be reclassified to area source status at any time upon limiting its potential to emit HAP to below the MST of 10 tpy of any single HAP and 25 tpy of any combination of HAP (also referred to herein as Major Maximum Achievable Control Technology (MACT) to Area or ''MM2A proposal'') (see 84 FR 36304). In this rule, we are taking final action on some of the amendments as proposed, and we are taking final action on other amendments as modified based on the public comments to clarify the requirements that apply to sources choosing to reclassify to area source status at any time, including reclassification that occurs after the first substantive compliance date of applicable major source NESHAP requirements and the requirements that apply to sources that reclassify from major to area source status and then revert back to their previous major source status. Regarding the proposed amendments to the PTE definition, we are not finalizing the definition of ''legally and practicably enforceable'' PTE limits or the effectiveness criteria for those limits in this action. We are, however, promulgating a ministerial amendment to the regulatory definition of ''potential to emit'' in the interim. We are also finalizing revisions to the General Provisions tables and initial notification requirements within most NESHAP subparts to account for the regulatory provisions we are finalizing in this rule. We summarize some of the more significant public comments we received regarding the proposed rule and provide our responses to those comments in this preamble. A summary of all other public comments on the proposal and the EPA's responses to those comments is available in the Response to Comments document available in the docket No. EPA–HQ–OAR–2019–0282. A ''track changes'' version of the regulatory language that incorporates the changes finalized in this rule is also available in the docket.

Organization of this document. The information in this preamble is organized as follows:

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C. Impacts of the Final Regulatory Action
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VI. Other Considerations
A. PTE Determination
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IX. Statutory and Executive Order Reviews
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G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA)
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
L. Determination Under CAA Section 307(d)
M. Congress Review Act (CRA)

I. Executive Summary

A. Purpose of the Regulatory Action

In this final rule (also referred to herein as ''final MM2A rule'' or final rule), the EPA is finalizing amendments to the General Provisions of the NESHAP regulations in 40 CFR part 63, subpart A to implement the plain language reading of the ''major source'' and ''area source'' statutory definitions of section 112 of the CAA and provide that a major source can be reclassified to area source status at any time upon reducing its emissions and PTE, as defined in 40 CFR 63.2, to below the MST of 10 tpy of any single HAP and 25 tpy of any combination of HAP. Prior to proposing these amendments, the EPA reviewed the statutory provisions that govern when a major source can reclassify to area source status, including after being subject to major source requirements under section 112 of the CAA (also referred to herein as ''CAA section 112 requirements'' or ''requirements''). After further review of CAA section 112 provisions and public comments received on the MM2A proposal, the EPA is finalizing its conclusion that the statutory definitions of major source and area source contain no language fixing a source's status at any particular point in time and contain no language suggesting a cutoff date after which the source's status cannot change. Accordingly, the Agency is finalizing its reading that a major source may be reclassified as an area source at any time upon reducing its HAP emissions and PTE below the applicable CAA section 112 MST. Thus, major sources that reclassify to area source status at any time, including after the first substantive compliance date of an applicable major NESHAP, will no longer be subject to CAA section 112 major source NESHAP requirements and will be subject to any applicable area source NESHAP requirements. A full discussion of the statutory authority for this final MM2A rule can be found in section IV of this preamble.

B. Summary of the Major Provisions of the Regulatory Action

The EPA is finalizing amendments to the General Provisions of the NESHAP regulations in 40 CFR part 63, subpart A to clarify the requirements that apply to sources choosing to reclassify to area source status at any time, including after being subject to major source requirements under section 112 of the CAA. The EPA is finalizing amendments to the applicability section found in 40 CFR 63.1 by adding a new paragraph (c)(6). This paragraph specifies that a major source may become an area source at any time upon reducing its emissions of and PTE HAP, as defined in this subpart, to below the major source thresholds established in 40 CFR 63.2.

The EPA is finalizing in 40 CFR 63.1(c)(6) that a major source reclassifying to area source status remains subject to any applicable major source NESHAP requirements until the reclassification becomes effective. After the reclassification becomes effective, the source is subject to any applicable area source NESHAP requirements in 40 CFR part 63. For sources that reclassify from major to area source status and then revert back to their previous major source status, the EPA is also finalizing in 40 CFR 63.1(c)(6) that the source becomes subject to the applicable major source NESHAP requirements of 40 CFR part 63 immediately upon becoming a major source again. The EPA is finalizing in 40 CFR 63.1(c)(6) regulatory text to address the interaction of the reclassification of sources with enforcement actions arising from violations that occurred before reclassification. Specifically, we are finalizing that the reclassification of a source does not affect the source's liability or any enforcement investigations or enforcement actions for a source's past conduct that occurred prior to the source's reclassification.

To ensure that all sources that reclassify notify the EPA, the EPA is finalizing amendments clarifying the existing notification requirements in 40 CFR 63.9(b) and (j). With these amendments, the notification requirements of 40 CFR 63.9 will cover not only cases where a source switches from major to area source status, but also cases where an area source reverts to major source status. A source that reclassifies in either direction must notify the EPA of any changes in the applicability of the standards that the source was subject to per the notification requirements of 40 CFR 63.9(j). The EPA is also finalizing amendments to the notification requirements in 40 CFR 63.9(b) and (j) to require in certain circumstances that the notification be submitted electronically through the Compliance and Emissions Data Reporting Interface (CEDRI). The final rule amends the General Provisions to add 40 CFR 63.9(k) to include the CEDRI submission procedures. The EPA is finalizing amendments to remove the time limit for record retention in 40 CFR 63.10(b)(3) so sources that obtain enforceable PTE limits after the effective date of this final rule are required to keep the applicability determination records as long as they rely on the PTE limits to be area sources. The EPA is also finalizing amendments to 40 CFR 63.12(c) to clarify that a source may not be exempted from electronic reporting requirements. Further, the EPA is finalizing amendments to 40 CFR 63.13 to clarify that when required by this part, or at the request of the EPA Regional office, submitting a report or notification to CEDRI fulfills the obligation to report to the EPA Regional office.

This final action includes amendments to the General Provisions applicability tables contained within most subparts of 40 CFR part 63 to add a reference to the new provision in 63.1(c)(6) discussed above. We are also finalizing revisions to several NESHAP subparts by removing the date limitation after which a major source cannot become an area source. The provisions amended are: 40 CFR part 63, subpart HH at 63.760(a)(1); 40 CFR 63, subpart HHH at 63.1270(a); 40 CFR part 63, subpart QQQ at 63.1441; 40 CFR part 63, subpart QQQQQ at 63.9485; 40 CFR

part 63, subpart RRRRR at 63.9581; and Table 2 of 40 CFR part 63, subpart WWWW. The final rule also includes amendments to the initial notification requirements of most NESHAP subparts because the date that was specified in the regulations has passed.

The EPA is still considering the proposed effectiveness criteria for HAP PTE limits and the proposed changes to the definition of ''potential to emit'' in 40 CFR 63.2 and is not taking any final action on those aspects of the proposed rule at this time. Thus, this final rule does not include responses to comments on proposed effectiveness criteria for PTE limits or comments related to the proposed changes to the PTE definition. The EPA is still reviewing comments received and will respond to them in a subsequent action. In the meantime, while we continue to consider what final action to take on the proposed amendments, the EPA is making an interim ministerial revision to the PTE definition to address the court decision in *National Mining Association (NMA)* v. *EPA,* 59 F.3d 1351, 1363–1365 (D.C. Cir. 1995). Specifically, this revision removes the word ''federally'' from the phrase ''federally enforceable'' in the PTE definition. This interim ministerial revision is also consistent with the EPA's long-standing policy [1] that allows for any physical or operational limitation on the capacity of the stationary source to emit a pollutant to be treated as part of the source's design if the limitation or the effect it would have on emissions is, first, either federally enforceable or legally enforceable by a state or local permitting authority and, second, practicably enforceable.

C. Impacts of the Final Regulatory Action

The final rule does not require any source to reclassify to area source status. An evaluation of the potential to reclassify from major source to area source status involves many source-specific considerations. Each source will assess its own circumstances to determine whether it is feasible and advantageous to undergo the reclassification process. The unique nature of each source's decision process makes it difficult for the EPA to determine the number and type of sources that may choose to reclassify under this rule. Because of this, the EPA is limited to presenting illustrative analyses concerning the impacts of this final rule. The illustrative assessment of impacts includes the potential net cost savings and potential emissions changes that may result from this final action. The illustrative impacts are estimated for the three analytical scenarios established for the rule and are estimated in relation to a baseline in which sources remain subject to major source NESHAP requirements after the first substantive compliance date of such standards. The potential impacts presented in the preamble reflect the results of the illustrative analysis of the primary scenario, which, for analytical purposes, is defined as including those facilities whose actual emissions are below 75 percent of the MST (*i.e.,* 7.5 tpy for a single HAP and 18.75 tpy for all HAP). This scenario is further described in section VIII of this preamble, in the technical support memorandums (TSM),[2] and the Regulatory Impact Analysis (RIA) that is available in the docket for this action. The memorandums and RIA also present an analysis of two alternative scenarios to provide a range of estimated potential cost impacts.[3]

The EPA estimates that this final action may result in substantial annual cost savings of $90.6 million (2017$) based on illustrative estimates of its potential reduction in administrative burden if sources reclassify to area source status.[4] The voluntary actions taken by sources to reclassify will be carried out over a period of time, but once a source reclassifies, the cost savings will accrue for as long as the source continues to operate as an area source. While cost savings will accrue for the life of the facility, we present a 5-year outlook of potential cost savings from this action to provide insight into the cost distribution over time. Results are also presented as the present value (PV) and equivalent annualized value (EAV) of the cost savings of the final MM2A rule in 2017 dollars. The PV is the one-time value of a stream of impacts over time, discounted to the current (or nearly current) day. The EAV is a measure of the annual cost that is calculated consistent with the PV. The illustrative cost savings of the final MM2A rule in 2017 dollars are presented in detail later in section VIII of this preamble and in the RIA.

Table 1 presents a summary of key results from the RIA for the final MM2A rule. This table presents the PV and EAV, estimated in 2017 dollars using discount rates of 7 and 3 percent and discounted to 2020, of the illustrative net cost savings of the final MM2A rule. The EAV estimates are consistent with the PV and reflect the illustrative total net cost savings of the rule from 2021, the first year after rule promulgation, and subsequent years.

TABLE 1—ILLUSTRATIVE NET COST SAVINGS INCREMENTAL TO THE BASELINE

[(Including following years) (Billions 2017$) *]

	7 Percent		3 Percent	
	Present value	Equivalent annualized value	Present value	Equivalent annualized value
Potential Net Cost Savings	$0.86	0.07	$1.50	0.08

* The overall analytic timeline begins in 2021 and continues thereafter for an indefinite period. The cost savings in 2016 dollars and discounted to 2016, as defined as a present value, are $0.654 billion at 7 percent and $1.13 billion at 3 percent. As equivalent annualized values, the cost savings are $52 million at 7 percent and $58 million at 3 percent.

[1] See January 25, 1995, memorandum titled ''*Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)*'' and December 20, 1999, memorandum titled ''*Third Extension of January 25, 1995 Potential to Emit Transition Policy.*'' Available at *https://www.epa.gov/guidance/guidance-documents-managed-office-air-and-radiation* and in the docket of this rule.

[2] See ''*Documentation of the Data for Analytical Evaluations and Summary of Industries Potentially Impacted by the Final Rule titled Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,*'' and ''*Analysis of Illustrative 125% Scenario for MM2A Final—Potential Cost Impacts from HAP Major Sources Reducing Emissions as part of Reclassifying to HAP Area Sources.*''

[3] Alternative scenario 1 analyzes those facilities whose actual emissions are below 50 percent of the MST (5 tpy for a single HAP and 12.5 tpy for all HAP). Alternative scenario 2 analyzes that sources below 125 percent of the MST (12.5 tpy for a single HAP and 31.25 tpy for all HAP). Discussions of these scenarios and results can be found in the RIA for this final action.

[4] Annual cost savings reflect impacts in Year 2 of the reclassification process for all sources that choose to reclassify under the primary scenario. All cost savings are net of any additional permitting and recordkeeping costs to state regulatory agencies and sources. These annual cost savings are those for 2025 and subsequent years.

Impacts in Table 1 reflect the potential impacts of the final MM2A rule for the year in which all reclassifications are expected to have taken place (2025) and beyond.

To assess the potential changes in emissions that may result from the reclassification of major sources to area sources under this rule, we reviewed the permits and other information from 69 sources that have reclassified since January 2018, consistent with the EPA's plain language reading of the CAA section 112 definitions of ''major'' and ''area'' source, and also performed an illustrative analysis of 72 source categories in detail. Because we do not have information on the major sources that may choose to reclassify to area source status in the future and the enforceable conditions they will take in order to reclassify, we are not able to provide an assessment of the emissions impacts for actual reclassifications beyond the 69 sources that have already reclassified.[5] Therefore, we conducted a detailed illustrative analysis of 72 source categories to provide a broad characterization of the potential changes in emissions for all NESHAP source categories that could be impacted by this action. The assessment of the 69 reclassifications shows that 68 facilities have requirements in their operating permits that would continue to implement the compliance methods used to comply with the major source NESHAP requirements and prevent emissions increases. However, the EPA found that one of the 69 reclassified sources will not continue to employ the same compliance methods that it used to meet the major source NESHAP and thus it may increase its emissions. For the illustrative analysis of emissions impacts conducted, we find that 65 source categories in the major source NESHAP program will either not be impacted or will not increase emissions as a result of the rule. Based on the broad assumptions applied in the analysis, we found a potential for emissions increases for some facilities in seven source categories. While a majority of facilities are not anticipated to change emissions, approximately 3.1 percent of the facilities in the MM2A database that we were able to analyze could increase emissions if sources: (1) Voluntarily opt to reclassify and (2) were allowed to reduce operation of adjustable add-on controls. We also found a potential for emissions decreases in cases where sources choose to reduce emissions from above the MST to below the MST to reclassify. The facilities that we were able to assess for emission increases and decreases are located across the United States (*i.e.,* in more than 10 states and in every region of the United States) and are not clustered in close proximity to each other. Further discussion of the impacts of the final rule are presented in section VIII of this preamble and presented in detail in the technical support memorandums, titled *Documentation of the Emissions Analysis for the Final Rule ''Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act''* and the *Analysis of the Illustrative 125% Scenario for MM2A Rule—Potential Cost Impacts from HAP Major Sources Reducing Emissions as part of Reclassifying to HAP Area Sources,* and the RIA for the final rule, all of which are available in the docket for this action.

II. General Information

A. Does this rule apply to me?

Categories and entities potentially impacted by this rule include sources subject to NESHAP requirements under section 112 of the CAA.

The final amendments are applicable to sources that reclassify from major source to area source status under section 112 of the CAA and sources that revert from their reclassified area source status to their previous major source status.

Federal, state, local, and tribal governments may be affected by this rule if they own or operate sources that choose to request reclassification from major source status to area source status or if reclassified sources choose to revert to their previous major source status at some time in the future. The EPA is the permitting authority for issuing, rescinding, and amending permits for sources that request reclassification in Indian country, with four exceptions.[6] State, local, or tribal regulatory authorities[7] may receive requests to issue new permits or make changes to existing permits for sources in their jurisdiction to address reclassification-related activities (*e.g.,* title V, synthetic minor permits, establishing limits on a source's PTE).

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of the final MM2A rule is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112-clean*. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version and key technical documents at this same website.

A redline version of the regulatory language that incorporates the amendments finalized in this rule is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2019–0282).

C. Judicial Review and Administrative Reconsideration

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (DCCir.) by January 19, 2021. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that only an objection to a rule or procedure that was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. This section also provides a mechanism for the EPA to reconsider the rule if the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within the period for public comment or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule. Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, WJC South Building,

[5] Of the 69 sources, 68 have already reclassified and one was undergoing the process of reclassification.

[6] Two tribes have approved title V programs or delegation of 40 CFR part 71. The tribes may have sources that request to no longer be covered by title V. Neither of these two tribes have approved minor source permitting programs but may in the future. In the meantime, the tribes will need to coordinate with the EPA, who is the permitting authority in Indian country for these requests. In addition, two other tribes have approved Tribal Implementation Plans (TIPs) authorizing the issuance of minor source permits. Only one of these tribes has a major source that would be eligible to request reclassification. If that source requests a new permit, the tribe may issue the minor source permit, but the EPA would need to be made aware of the request, as the EPA is the permitting authority for title V.

[7] The term regulatory authority is intended to be inclusive of the federal, state, tribal, or local air pollution control agency with authority to process reclassification requests and issuance of enforceable PTE limits.

1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

III. Background

Shortly after the EPA began implementing individual NESHAP resulting from the 1990 CAA Amendments, the Agency received multiple requests to clarify when a major source of HAP could avoid CAA section 112 requirements applicable to major sources by taking enforceable limits on its PTE below the major source thresholds. In response, the EPA issued, on May 16, 1995, a memorandum from John Seitz, Director of the Office of Air Quality Planning and Standards, to the EPA Regional Air Division Directors (the May 1995 Seitz Memorandum).[8] The May 1995 Seitz Memorandum provided guidance on three timing issues related to avoidance of CAA section 112 requirements for major sources:

- ''By what date must a facility limit its PTE if it wishes to avoid major source requirements of a MACT standard?''
- ''Is a facility that is required to comply with a MACT standard permanently subject to that standard?''
- ''In the case of facilities with two or more sources in different source categories: If such a facility is a major source for purposes of one MACT standard, is the facility necessarily a major source for purposes of subsequently promulgated MACT standards?''

In the May 1995 Seitz Memorandum, the EPA stated its interpretation of the relevant statutory language that facilities that are major sources of HAP may switch to area source status at any time until the ''first compliance date'' of the standard.[9] Under this interpretation, facilities that are major sources on the first substantive compliance date of an applicable major source NESHAP were required to comply permanently with that major source standard even if the source was subsequently to become an area source by limiting its PTE. This position was commonly referred to as the ''Once In, Always In'' (OIAI) policy. The May 1995 Seitz Memorandum provided that a source that is major for one NESHAP would not be considered major for a subsequent NESHAP if the source's potential to emit HAP emissions was reduced to below major source levels by complying with the first major source NESHAP. In the May 1995 Seitz Memorandum, the EPA set forth transitional policy guidance that was intended to remain in effect only until the Agency proposed and promulgated amendments to the 40 CFR part 63 General Provisions.

After issuing the May 1995 Seitz Memorandum, the EPA twice proposed regulatory amendments that would have altered the OIAI policy. In 2003, the EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention (P2) activities. Apart from certain provisions associated with the EPA's National Environmental Performance Track Program—a national voluntary program designed to recognize and encourage top environmental performers whose program participants go beyond compliance with regulatory requirements to attain levels of environmental performance that benefit people, communities, and the environment—that proposal was never finalized. See 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004). In 2007, the EPA issued a proposed rule to replace the OIAI policy set forth in the May 1995 Seitz Memorandum. See 72 FR 69 (January 3, 2007). In that proposal, the EPA reviewed the provisions in CAA section 112 relevant to the OIAI policy interpretation, applicable regulatory language, stakeholder concerns, and potential implications. *Id.* at 71–74. Based on that review, the EPA proposed an interpretation of the relevant statutory language that a major source that is subject to a major source NESHAP would no longer be subject to that major source standard if the source were to become an area source through enforceable limitations on its PTE HAP emissions. *Id.* at 72–73. Under the 2007 proposal, major sources could take such limits on their PTE and obtain ''area source'' status at any time and would not be limited to doing so only before the ''first substantive compliance date,'' as the OIAI policy provided. *Id.* at 70. The EPA did not take final action on this 2007 proposal.

In 2017, the EPA received public comments pursuant to Executive Order 13777, Enforcing the Regulatory Reform Agenda (February 24, 2017), and the Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017) supporting the withdrawal of the OIAI policy.[10] Per these comments, the OIAI policy imposed an artificial time limit on major sources obtaining area source status not found in the definitions of ''major source'' and ''area source'' in CAA sections 112(a)(1) and (2). Commenters further stated that the temporal limitation imposed by the OIAI policy was inconsistent with the CAA and created an arbitrary date by which sources must determine whether their HAP PTE will exceed either of the major source thresholds.

On January 25, 2018, the EPA issued a guidance memorandum from William L. Wehrum, Assistant Administrator of the Office of Air and Radiation, to the EPA Regional Air Division Directors titled ''*Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*'' (MM2A Memorandum).[11] The MM2A Memorandum discussed the statutory provisions that govern when a source subject to major source NESHAP requirements under section 112 of the CAA may be reclassified as an area source and thereby avoid being subject thereafter to major source NESHAP requirements and other requirements applicable to major sources under CAA section 112. In the MM2A Memorandum, the EPA discussed the plain language of CAA section 112(a) stating Congress's definitions of ''major source'' and ''area source'' and determined that the OIAI policy articulated in the 1995 Seitz Memorandum was contrary to the plain language of the CAA and, therefore, must be withdrawn. In the MM2A Memorandum, the EPA announced the future publication of a proposed rule to receive input from the public on adding regulatory text consistent with the plain reading of the statute as described in the MM2A Memorandum.

On July 26, 2019, the EPA proposed regulatory text to implement the plain

[8] See ''*Potential to Emit for MACT Standards-Guidance on Timing Issues.*'' From John Seitz, Director, Office of Air Quality Planning and Standards, to the EPA Regional Air Division Directors. May 16, 1995, *https://www.epa.gov/sites/production/files/2018-02/documents/pteguid.pdf.* Also available in the docket of this rule.

[9] The ''first substantive compliance date'' is defined as the first date a source must comply with an emissions limitation or other substantive regulatory requirement (*i.e.,* leak detection and repair programs, work practice measures, etc . . . , but not a notice requirement) in the applicable standard.

[10] See Executive Order 13777 at 82 FR 12285 (February 24, 2017) and request for comment at 82 FR 17793 (April 13, 2017), Docket ID No. EPA–HQ–OAR–2017–0190. See Presidential Memorandum at 82 FR 8667 (January 24, 2017) and request for information at 82 FR 12786 (March 7, 2017), Docket ID No. DOC–2017–0001.

[11] See notice of issuance of this guidance memorandum at 83 FR 5543 (February 8, 2018).

language reading of the statute as discussed in the MM2A Memorandum. See 84 FR 36304. The 2019 MM2A proposal superseded and replaced the 2007 proposal. See 72 FR 69 (January 3, 2007). The EPA solicited comment on all aspects of the MM2A proposal, including the EPA's position that the withdrawal of the OIAI policy and the proposed approach gives proper effect to the statutory definitions of ''major source'' and ''area source'' in CAA section 112(a) and is consistent with the plain language and structure of the CAA as well as the impacts of the proposal on costs, benefits, and emissions impacts. Publication of the MM2A proposal in the **Federal Register** opened comment on the proposal for an initial 60-day public comment period. The EPA held a public hearing on August 15, 2019, in Washington, DC. In response to requests for an extension of the comment period, the EPA reopened the public comment period for an additional 30 days through November 1, 2019. The EPA received more than 16,000 comments on the MM2A proposal. After review and consideration of public comments, the EPA is finalizing the implementation of the plain language reading of the definitions of major source and area source under CAA section 112. Per CAA section 307(d)(6)(B), the EPA is providing a response to the to the most significant comments received on the MM2A proposal in this preamble, and responses to the other comments in the Response to Comments document available in the docket.

IV. Statutory Authority

As discussed in the preamble of the MM2A proposal at 84 FR 36304, 36309–36313 (July 26, 2019), CAA section 112 distinguishes between major and area sources of HAP emissions. Indeed, the very first provisions in CAA section 112 are the major source definition in CAA section 112(a)(1) and area source definition in CAA section 112(a)(2)) that create the major/area distinction. Major sources emit more HAP than area sources and, generally, different requirements apply to major sources and area sources. For some section 112 source categories, the EPA has promulgated requirements for only major sources, and HAP emissions from area sources are not regulated under the NESHAP program.

Whether a source is a ''major source'' or an ''area source'' depends on the amount of HAP emitted by the source based on its actual and potential emissions. Congress defined ''major source'' to mean a source that emits or has the potential to emit at or above either of the statutory thresholds of 10 tpy of any one HAP or 25 tpy of total HAP. CAA section 112(a)(1). An ''area source'' is defined as any source of HAP that is not a major source. CAA section 112(a)(2). If a source does not emit or does not have the potential to emit at or above either of the major source thresholds, then it is an ''area source.'' The statutory definitions of ''major source'' and ''area source'' do not contain any language that fixes a source's status as a major source or area source at any particular point in time, nor do they otherwise contain any language suggesting that there is a cutoff date after which a source's status cannot change.

Congress did, however, create a distinction based on timing in CAA section 112 in defining and creating provisions related to ''new sources'' and ''existing sources.'' Specifically, Congress defined ''new source'' to mean a source that is constructed or reconstructed after the EPA first proposes regulations covering the source. CAA section 112(a)(4). An ''existing source'' is defined as any source other than a new source. CAA section 112(a)(10). A source will be subject to different requirements depending on whether it is a new source or an existing source. See, *e.g.,* CAA section 112(d)(3) (identifying different minimum levels of stringency (known as ''MACT floors'') for new and existing sources).

The emissions-based distinction (arising from the definitions of major source and area source) and the timing-based distinction (arising from the definitions of new source and existing source) are independent, and neither is tied to the other. For example, the statutory definition of ''major source'' does not provide that major source status is determined based on a source's emissions or PTE as of the date that the EPA first proposes regulations applicable to that source or any other point in time. As noted above, the plain language of the ''major source'' and ''area source'' definitions create a distinction that is based solely on amount of emissions and PTE, and not timing. Similarly, with respect to the timing-based distinction, a source is a ''new source'' or an ''existing source'' based entirely on the timing of its construction or reconstruction and without consideration of its actual emissions or PTE. The contrast between the temporal distinction in the contrasting definitions of existing and new sources on the one hand, and the absence of any temporal dimension to the contrasting definitions of major and area sources on the other, is further evidence that Congress did not intend to place a temporal limitation on a source's ability to be classified as an area source (including a source's ability to be classified as an area source through the permitting authority's ''considering controls'' that may have been imposed after the source was initially classified as major).

Notwithstanding the independence of the two distinctions that the statute created based on amount of emissions and timing (and without addressing that independence or otherwise addressing the plain language of the statutory definitions of ''major source'' and ''area source''), the EPA issued the May 1995 Seitz Memorandum, which set forth the OIAI policy. Under the OIAI policy, a source's status as a major source for the purpose of applying a specific major source MACT standard issued under the requirements of CAA section 112 was deemed to be unalterably fixed on the first substantive compliance date of the specific applicable major source requirements. Thus, a source that was a major source on that first compliance date would continue to be subject to the major source requirements for that specific NESHAP even if the source reduced its emissions of and PTE HAP to below the statutory thresholds in the definition of ''major source,'' and, thus, fell within the definition of ''area source.''

On January 25, 2018, the EPA issued the MM2A Memorandum. The MM2A Memorandum discussed the statutory definitions of ''major source'' and ''area source'' and explained that the OIAI policy articulated in the May 1995 Seitz Memorandum was contrary to the plain language of the CAA, and, therefore, must be withdrawn.

As discussed above, Congress expressly defined the terms ''major source'' and ''area source'' in CAA section 112(a) in unambiguous language. Nonetheless, under the OIAI policy, a source that reduced its emissions of and PTE HAP to below the statutory thresholds for major source status after the relevant compliance date would continue to be subject to the requirements applicable to major sources. This policy was applied notwithstanding that the statutory definitions of ''major source'' and ''area source'' lack any reference to the compliance date of major source requirements or any other text that indicates a time limit for changing between major source status and area source status. In short, Congress placed no temporal limitations on the determination of whether a source emits or has the potential to emit HAP in sufficient quantity to be a major source

under CAA section 112. Because the OIAI policy imposed such a temporal limitation (before the ''first compliance date''), the EPA had no authority for the OIAI policy under the plain language of the CAA. Under the plain language of the statute, a major source that takes enforceable limits on its PTE to bring its HAP emissions below the CAA section 112 major source thresholds, no matter when it may choose to do so, becomes an area source under Congress's definition in CAA section 112(a)(2). In this final action, we are implementing the plain language of CAA section 112 and making clear that such a source can reclassify to area source status at any time, and after reclassification, will no longer be subject to the CAA section 112 requirements applicable to the source as a major source under CAA section 112—so long as the source's actual and PTE HAP emissions remain below the CAA section 112 thresholds—and will instead be subject to any applicable area source requirements.

A discussion of the statutory definitions of ''new source'' and ''existing source'' in CAA section 112(a)(4) and (10) further demonstrates that the OIAI policy was inconsistent with the language of the statute. As discussed above, the major source/area source distinction and the new source/existing source distinction are two separate and independent features of the statute. Significantly, the statutory definitions of ''new source'' and ''existing source'' dictate that the new source/existing source distinction is determined by when a source commences construction or reconstruction and says nothing about the source's volume of emissions. No one can reasonably suggest that this silence concerning volume of emissions indicates that Congress intended to give the EPA the discretion to conclude that sources should be classified as new or existing based, in part, on how much they emit. For example, if the EPA were to say that a source is only a new source if it both (1) commences construction after regulations are first proposed (as stated in CAA section 112(a)(4)), and (2) emits more than 20 tpy of any single HAP (which is not stated anywhere in the statute), that second element would be contrary to the plain language of the statute. Similarly, the OIAI policy of considering timing as part of the major source/area source distinction is contrary to the plain language of the statute, because it interjects timing into the major/area distinction when Congress provided that such distinction would be based only on the source's actual and potential emissions. In short, Congress's creation of the timing distinction in the new source and existing source definitions shows that Congress was explicit when it wanted to classify sources based on timing, and it did not do so in creating the major/area source distinction.

Some commenters have argued that the EPA's plain language reading cannot be correct in light of various provisions in CAA section 112. The EPA has considered these comments and concluded that the EPA's plain language reading is the correct reading, for the reasons discussed below, in the Response to Comments document and elsewhere in the record.

CAA section 112(i)(3)(A)—Some commenters assert that the EPA's plain language reading of the definitions of ''major source'' and ''area source'' is contradicted by CAA section 112(i)(3)(A). Specifically, they contend that the first phrase in CAA section 112(i)(3)(A) precludes a major source from reclassifying to area source status after the source has become subject to a major source standard and that this statutory text compels the OIAI policy. The EPA disagrees with this contention. The first phrase in CAA section 112(i)(3)(A) states: ''After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation . . . .'' As discussed in the proposal (84 FR 36311), the EPA reads this phrase to have the same meaning as similar ''effective date'' provisions in the CAA, such as CAA section 111(e), notwithstanding that CAA section 112(i)(3)(A) has somewhat different phrasing. In short, this text simply provides that, after the effective date of a CAA section 112 rule, sources to which a standard is applicable must comply with that standard. This text is not reasonably read to say that, once a standard is applicable to a source, that standard continues to be applicable to the source for all time, even if the source's potential to emit changes such that it no longer meets the applicability criteria for the standard. Such a reading would produce some results that are clearly incorrect. For example, if the first phrase in CAA section 112(i)(3)(A) were read to say that a source's applicable requirements are determined at the point in time that a source first becomes subject to CAA section 112 requirements, then an area source would continue to be subject to area source requirements even if that source increased its potential to emit above either of the major source thresholds. Such a result would be contrary to the EPA regulations, which provide that an area source that increases its emissions or PTE above the MST becomes subject to the applicable major source requirements. 40 CFR 63.6(a)(2), 63.6(b)(7), 63.6(c)(5).

Further, reliance on CAA 112(i)(3)(A) to argue against the EPA's plain language reading and for a return to the OIAI policy ignores that the ''effective date'' of a CAA section 112 standard is not the same as the ''compliance date.'' CAA section 112(i)(3)(A) expressly provides that the EPA may set the ''compliance date'' for existing sources up to 3 years after the ''effective date.'' Similarly, CAA section 112(i)(5) (which is applicable in certain circumstances for sources that make early reductions in HAP emissions) provides for a delayed compliance date that will be after the effective date. This is significant because the cutoff deadline for reclassification that the commenters say is required under CAA section 112(i)(3)(A) is not the effective date. Under the OIAI policy, the cutoff date for reclassification was the first substantive compliance date, which (as just discussed) is clearly distinguished from the effective date in CAA section 112(i)(3)(A) in the statute. Thus, commenters' reading of CAA section 112(i)(3)(A) would not only be contrary to the EPA's plain language reading but would also be contrary to the OIAI policy under which sources could reclassify after the effective date as long as they did so before the first substantive compliance date.

In sum, the EPA has concluded that the CAA section 112 definitions of ''major source'' and ''area source'' and the ''effective date'' provision in CAA section 112(i)(3)(A) are properly read together to say that sources must comply with the applicable requirements corresponding to their major source or area source status, and that if this status changes, then the source becomes subject to the requirements corresponding to its status after the change.

CAA sections 112(c)(3) and (6)—Some commenters argue that CAA sections 112(c)(3) and (6) reflect a Congressional intent that sources be subject to continuous, permanent compliance with major source standards and that these provisions are, therefore, inconsistent with the EPA's plain language reading. But there is no inconsistency here. Those provisions required the EPA to ensure that sources accounting for 90 percent of the emissions of specific pollutants were listed and regulated by November 2000. The premise of the commenters' argument based on CAA

sections 112(c)(3) and (6) is that these provisions do not simply require the EPA to list and regulate sufficient source categories to meet the 90-percent requirement at a given point in time; rather, they require that the EPA's regulations ensure that 90 percent of emissions are subject to regulation on an ongoing basis. This is not a reasonable reading of CAA sections 112(c)(3) and (6) because, as explained in greater detail in the proposed rule preamble at 84 FR 36311, the requirements of the statute and subsequent standards will result in the emissions from the listed source categories falling below the 90-percent threshold once those source categories are regulated. If commenters' interpretation were correct, CAA sections 112(c)(3) and (6) would create a never-ending cycle of listing and regulation in order to achieve an unattainable goal of ensuring that 90 percent of emissions are regulated. See 84 FR 36311.

In response to the EPA's discussion in the proposed rule preamble, commenters have stated that the statutory text in CAA sections 112(c)(3) and (6) is properly read not to focus on the source categories that those provisions require to be listed but on the individual sources that are within those categories—specifically, that these provisions require the EPA to regulate the sources that produced those emissions. But if the listing and regulation required pursuant to CAA sections (c)(3) and (6) were read to apply to the sources that produced the emissions as of the time of the listing of the categories, then that would mean that new sources within the listed source categories would not be regulated. The EPA does not think this is a reasonable reading of those provisions. Instead, the proper reading of these provisions is that the EPA is to list and regulate source categories, and then a source is regulated pursuant to the standard applicable to a given source category to the extent that, and as long as, the source remains within the source category. Thus, under a proper reading of CAA sections 112(c)(3) and (6), those provisions do not prevent reclassification, so there is no conflict between the EPA's plain language reading of CAA sections 112(a)(1)–(2) and the requirements of CAA sections 112(c)(3) and (6).

CAA section 112(f)(2)—Commenters also point to CAA section 112(f)(2) (commonly referred to as the residual risk provision) and contend that the EPA's plain language reading allows reclassified sources to avoid the review required under that provision. But this argument fails to refute the discussion that the EPA provided in the proposed rule preamble (at 84 FR 36311–36312). First, as a general matter, Congress in CAA section 112 plainly distinguished between major sources emitting above the MST and area sources emitting below the MST and subjected them to different requirements. Second, with regard to CAA section 112(f), CAA section 112(f)(5) contains an express exemption from the CAA section (f)(2) review for area sources, and there is no statutory basis or logical reason for treating an area source differently just because it is a former major source. For these reasons, CAA section 112(f) is not inconsistent with the EPA's plain language reading.

CAA section 112(d)—Some commenters have pointed to the requirements of CAA section 112(d) as requiring sources that are at any point subjected to major source standards must continue to be subject to major source standards permanently. These commenters have argued that the EPA's plain language reading undermines the emissions reductions required by these CAA section 112 standards. Section 112(d)—and in particular, sections 112(d)(2) and (3) of the CAA—addresses how the EPA sets MACT standards for major sources (based on the maximum degree of emissions reduction the EPA determines is achievable, which may be a complete prohibition on emissions). But the question of what standard is applicable to major sources in a source category—whether MACT floor standards or otherwise—logically cannot determine which sources are major sources . Instead, the text and structure of CAA section 112 demonstrate that whether a source is classified as a major source or an area source is the threshold question under CAA section 112, and what requirements apply to the source flows from how the source is classified, with major sources and area sources facing significantly different regulation.

As noted above, the very first provisions in CAA section 112 are the major source definition in CAA section 112(a)(1) and area source definition in CAA section 112(a)(2) that create the major/area distinction. Following from this threshold distinction, CAA section 112 treats major sources and area sources differently in fundamental ways. To state a few examples that illustrate this:

(1) The EPA must list all categories of major sources of HAP pursuant to CAA section 112(c)(1), but only has to list categories of area sources representing 90 percent of HAP under CAA section 112(c)(3). This distinction is then carried over to what sources are regulated, as provided in CAA section 112(d)(1), which provides that the EPA will regulate those categories listed under CAA section 112(c).

(2) Major sources are subject to MACT standards under CAA section 112(d)(2) and (3), but area sources may be subject to generally available control technology (GACT) standards under CAA section 112(d)(5).

(3) Area source categories and subcategories listed under CAA section 112(c)(3) and for which standards are set under CAA section 112(d)(5) are not subject to residual risk review under CAA section 112(f)(2), pursuant to CAA section 112(f)(5).

In short, to the extent that major sources become area sources by reducing their emissions of and PTE HAP below the MST, and, thus, are no longer subject to major source requirements, that is not a ''loophole'' or an ''end-run'' around the major source requirements. That is simply the result of the provisions and structure of CAA section 112 that Congress enacted and reflects the fundamental distinction between how CAA section 112 addresses major sources and area sources.

Further, allowing a major source to take a PTE limit below the major source threshold and thereby avoid having to comply with major source requirements is not a new concept under MM2A. Indeed, that is precisely what happened under the OIAI policy. The only change under MM2A is one of timing. Under the OIAI policy, major sources could reclassify if they took the PTE limit before the first substantive compliance date. Under MM2A, sources can reclassify at any time. Nothing in the statute says, and there is no logical reason why, a major source that could reclassify to area source status on the day before its first substantive compliance date (as allowed under the OIAI policy) is foreclosed from doing so on the day after its first substantive compliance date.

Similarly, having a source reclassify after the first substantive compliance date is not a new concept under MM2A. During the time that the OIAI policy was in effect, area sources were reclassified to major source status at any time that they increased emissions or their PTE above the major source threshold, even if the increase occurred after the first substantive compliance date under the applicable area source rule.

For these reasons, the EPA concludes that the standard-setting provisions in CAA sections 112(d)(2) and (3) do not contradict the plain language of the major source and area source definitions

on the issue of whether a source can reclassify at any time.

Parties opposed to the EPA's plain language reading also suggest that the EPA's reading is inconsistent with the purpose and provisions of CAA section 112 because it will lead major sources that reclassify to area source status to increase their emissions above what they could emit if they continued to be major sources. The EPA disagrees with the suggestion that a source's reclassification from major source to area source will necessarily lead to an increase in emissions from the source above what would have been allowed to emit under the major source standard. As discussed in section VIII of the preamble, there are a number of reasons why reclassified sources are generally not expected to increase their emissions. The EPA's analysis of the sources that have reclassified to date and sources that might reclassify from various source categories shows that in 68 out of 69 operating permits for sources that have already reclassified to area source status since January 2018, sources achieved and maintain area source status by operating the emission controls or continuing to implement the practices they used to comply with the major source NESHAP requirements. However, the EPA found that one of the 69 reclassified sources will not continue to employ the same compliance method that it used to meet the major source standard, and thus may increase its emissions. In addition to this review of actual reclassification actions since January 2018, the EPA also prepared an illustrative analysis for 72 source categories in the major source NESHAP program (114 total) to evaluate the potential emissions impacts. After considering the information and data available for the illustrative emissions analysis, we found that 65 source categories will not change emissions as a result of the rule. For the other seven, there was a potential for (but not a certainty of) emissions increases based on conservative assumptions that are likely to overstate the change in emissions at some facilities. Sources in these in seven source categories assessed in the primary scenario could increase emissions if those facilities (1) opted to reclassify and (2) were permitted to change the operation of adjustable add-on controls. Further details of this illustrative analysis and the results are provided below in section VIII.

Further, allowing major sources to reclassify to area source status after the first substantive compliance date may create an incentive for sources to evaluate their operations and consider changes that can further reduce their HAP emissions to below the MST if the source views those changes as an opportunity to reduce costs of production, increase productivity, or reduce the costs of complying with major source NESHAP requirements. For example, sources using surface coatings may see the opportunity to become an area source as an extra incentive to invest in the development of new low- or no-HAP content coatings, inks, and binders. Similarly, sources with boilers and engines may benefit from replacing old boilers and engines with new, more efficient, and clean technologies. Such a replacement not only could help a source reduce HAP to below the MST but could also reduce fuel use and associated costs. To assess the opportunity for such emission decreases, we looked at an alternative scenario and determined that some sources operating between 75 and 125 percent of the MST could decrease emissions if those sources were to reclassify. Further details of this illustrative analysis and the results are provided below in section VIII.

In the MM2A proposal, the EPA took comment on whether it can and should promulgate regulatory provisions that would prevent a source that has reclassified from major to area source status from increasing emissions above what the source was allowed to emit when it was a major source. See 84 FR 36312–36313. Upon further consideration of this issue and the comments received, the EPA has concluded that the plain language of CAA section 112 precludes the promulgation of such provisions. As discussed above, the plain language of CAA section 112 provides that a source is an area source if its emissions and PTE are below the thresholds of 10 tpy of any one HAP and 25 tpy of any combination of HAP. Just as there is nothing in the statutory definitions in CAA sections 112(a)(1) and (2) or elsewhere in CAA section 112 that sets, or gives the EPA the authority to set, a cut-off date after which a major source cannot classify to area source status, there is nothing in CAA section 112 that imposes, or gives the EPA the authority to impose, a requirement that a source can only be an area source if it limits its emissions to some level below the MST. Congress clearly identified the thresholds of 10 tpy of any one HAP and 25 tpy of all combined HAP as the dividing line between major source status and area source status. The EPA cannot impose a different dividing line from what Congress wrote into CAA section 112. See *Utility Air Regulatory Group* v. *EPA,* 573 U.S. 302, 325–326 (2014) (where Congress created precise numerical thresholds in the statute, the EPA's rewriting of the statutory thresholds is impermissible).

Further, even if there were some ambiguity in the text and structure of CAA section 112 that gave the EPA the discretion to impose such a requirement, the EPA's conclusion in light of both the statute and policy considerations is that such a requirement should not be imposed. As discussed above, whether a source is classified as a major source or an area source is the threshold question under CAA section 112, and what requirements apply to the source flows from how the source is classified, with major sources and area sources facing significantly different statutory requirements. If the EPA were to mandate that a reclassified area source maintain its emissions below the level that the source was subject to as a major source, that would be contrary to the fundamental structure that Congress created in CAA section 112. Further, as discussed below in section VIII, even in the absence of any provisions preventing emissions above what a reclassified source was allowed to emit as a major source, most sources are not expected to increase emissions and those that do would have only modest increases. Thus, as a matter of policy judgment, the EPA would not interpret any ambiguity in the statute to allow the imposition of a new limit on reclassified area sources more stringent than the limit applied to other area sources.

For these reasons, the EPA is not promulgating provisions that would prevent a source that has reclassified from major to area source status from increasing emissions above what the source was allowed to emit when it was a major source.

V. Summary of Final Amendments

To implement the plain language reading of the statute as discussed in section IV above, the EPA is finalizing amendments to the General Provisions of 40 CFR part 63, subpart A. The EPA is also finalizing amendments to the General Provisions tables contained within most subparts of 40 CFR part 63 to account for the regulatory provisions we are finalizing in the General Provisions of 40 CFR part 63, subpart A. Finally, the EPA is finalizing changes to several individual NESHAP intended to remove rule-specific OIAI provisions. For all comments not discussed in this preamble, comment summaries and the EPA's responses can be found in the Response to Comments document available in the docket.

A. Final Amendments to 40 CFR Part 63, Subpart A: General Provisions

1. Applicability

The EPA is finalizing amendments to the applicability section of the General Provisions of 40 CFR part 63.1 by adding a new provision 40 CFR 63.1(c)(6) to implement the plain language reading of the ''major source'' and ''area source'' statutory definitions of section 112 of the CAA and provide that a major source can be reclassified to area source status at any time upon reducing its actual emissions of and potential to emit HAP to below the MST of 10 tpy of any single HAP and 25 tpy of any combination of HAP. At proposal, this new applicability provision also included regulatory language addressing the compliance date with applicable NESHAP requirements for reclassification and interactions with enforcement actions. We received comments on all aspects of the new applicability provision. Below we discuss each aspect of the proposed MM2A applicability provision and what we are finalizing after considering public comments.

a. Reclassification Provision

The EPA proposed to amend 40 CFR 63.1 by adding a new paragraph (c)(6). As proposed, this paragraph specifies that a major source can become an area source at any time by limiting its PTE HAP to below the major source thresholds established in 40 CFR 63.2, provided certain conditions are met. We received comments in support of and against the proposed text in 40 CFR 63.1(c)(6) and comments requesting changes to or clarification on the proposed provision. Comments against the proposed reclassification provision based on the statutory text or other legal issues (such as legal comments opposing the EPA's plain language reading of CAA section 112 definitions of major and area sources allowing sources to reclassify at any time) are addressed in section IV of this preamble and in the Response to Comments document available in the docket. The comments requesting changes to or clarification on the new provision are summarized below.

Some commenters recommended that the EPA add language to the new provision in 40 CFR 63.1(c)(6) to specify that the provision applies to sources that reclassify to area source status after being subject to major source NESHAP requirements. The EPA disagrees that the language only applies to reclassification by a major source after the source has been subject to major source NESHAP requirements. The regulatory language in this provision implements the EPA's plain language reading of the definition of major and area sources in section 112 of the CAA, as discussed in length in section IV of this preamble, allowing sources to reclassify at any time. This provision allows for reclassification to area source status regardless of whether the reclassification occurs before or after the first substantive compliance date of a major source NESHAP.

Other commenters stated that the proposed provision in 40 CFR 63.1(c)(6) could be read to require all types of sources to obtain PTE limits in order to be reclassified to area source status. These commenters stated that this could be problematic for sources that were major at the first substantive compliance date of a particular NESHAP but are no longer within the definition of ''major source'' at the time of reclassification because the source's emissions of and PTE HAP are below the MST even in the absence of a governmental restriction on emissions in a PTE limit. The EPA agrees with the commenters that the language in the proposed provision can be clarified and has amended the language of 40 CFR 63.1(c)(6) in the final rule to read: ''A major source may become an area source at any time upon reducing its emissions of and potential to emit (PTE) hazardous air pollutants, as defined in this subpart, to below the major source thresholds established in 40 CFR 63.2, subject to the provisions in paragraphs (c)(6)(i) and (ii) of this section.'' The provisions in 40 CFR 63.1(c)(6)(i) and (ii) as finalized in this action are discussed later in this preamble.

In the final regulatory language of 40 CFR 63.1(c)(6), the EPA replaced the phrase ''limiting its potential to emit (PTE) hazardous air pollutants . . .'' with the phrase ''reducing its emissions of and potential to emit (PTE) hazardous air pollutants . . .''. This updated language removes the ambiguity in the proposed language and makes it clear that PTE limits would be needed for area source reclassification for sources with PTE HAP at or above the MST. In contrast, consistent with the statutory definitions of ''major source'' and ''area source'' and the regulatory definition of PTE in 40 CFR 63.2, so called ''true'' area sources,[12] which in this preamble means sources that do not have the capacity to emit HAP at major source levels under their physical and operational design (even if the source owner and regulatory agency disregard any enforceable limitations), are not within the definition of ''major source.'' These ''true'' area sources do not need to obtain enforceable PTE limits to be reclassified to area source status. Accordingly, sources that have permanently removed equipment, changed their processes, or by other means currently do not have a maximum capacity to emit HAP at major source levels are ''true'' area sources (*i.e.,* enforceable limits are not needed on the source's physical or operational design to restrict the source's PTE HAP below MST) and do not need to adopt PTE limits to be reclassified. Any source that adopts a physical or operational limit on its maximum capacity to emit (including requirements for the use of air pollution control equipment or restrictions on the hours of operations or on the type or amount of material combusted, stored, or processed) to limit its PTE HAP below the MST is not a true area source. These are often referred to as ''synthetic'' area sources.[13]

Relatedly, commenters claimed that the MM2A proposal did not appear to explain that the definition of ''potential to emit'' does not require enforceable limitations for restrictions on HAP emissions that are inherent in the physical or operational design of the production process. Note that the EPA recognizes that, on a case-by-case basis, a situation may warrant an assessment of whether a given device or strategy should be considered as air pollution control equipment or as an inherent part of the process.[14] That said, the final rule is not revising the EPA's view on how to determine ''the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.'' Sources with questions about the proper way to determine PTE HAP or whether they should obtain PTE limits for reclassification to area source

[12] This preamble follows the convention about the meaning of these terms adopted in an EPA memorandum titled ''*Potential to Emit (PTE) Guidance for Specific Source Categories*'' (April 14, 1998), available at *https://www.epa.gov/sites/production/files/2015-07/documents/lowmarch.pdf.*

[13] We note that in the Oil and Natural Gas Federal Implementation Plan (O&NG FIP) in Indian County, ''true area sources'' include the reductions due to compliance with various NESHAP and new source performance standards (NSPS) standards, which are applicable requirements of the O&NG FIP. True minor sources in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector are required to comply with the O&NG FIP instead of obtaining a source-specific minor source permit, unless a source chooses to opt out of the FIP and to obtain a source-specific minor New Source Review (NSR) permit instead under the ''Federal Minor New Source Review (NSR) Program in Indian Country.'' See FIP for True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector. 81 FR 35944 (June 3, 2016).

[14] See *https://www.epa.gov/sites/production/files/2015-07/documents/readymix2.pdf.*

status are encouraged to consult applicable permitting program regulations and work with their corresponding regulatory authorities on a determination that considers their situation. See also, 40 CFR 63.10(b)(3), which explains in detail the analysis and contents of the records to be kept for applicability determinations made by a source for purposes of 40 CFR part 63.

Multiple commenters objected to the EPA's proposed viewpoint that a major source that had been complying with a NESHAP as of the first substantive compliance date of the standard, but reduced its PTE HAP below the MST by complying with non-section 112 CAA requirements, would be required to obtain HAP PTE limits to ensure that HAP emissions remain below the MST. These commenters argued the EPA should make clear in the final rule that a limitation on another pollutant or parameter can be recognized as a limitation on the source's potential to emit HAP if the limitation on the other pollutant emissions or parameter results, as a practical matter, in a restriction on the source's HAP emissions. The commenters noted that limits that qualify to reduce a source's PTE HAP emissions do not need to be ''HAP PTE limits,'' *i.e.,* a requirement need not place limits directly on a HAP to have the effect of limiting a HAP. The commenters cited as example that volatile organic compound (VOC) limits could reduce HAP emissions and further stated that the EPA provided no explanation why requiring the source to obtain HAP PTE limits is essential to ensure that the area source's HAP emissions are effectively limited. The EPA recognizes that the proposal may have caused confusion about whether the EPA recognizes HAP reductions due to surrogate criteria pollutant controls for purposes of reclassifying to area source status.[15] That said, the EPA has concluded that it does not need to revise the regulatory text to make this specific point because the definition of PTE (as revised in this final rule) allows for the effect of such limitations to count toward limiting the PTE HAP. A source relying on the effect of non-HAP enforceable limitation to constrain its PTE HAP below the MST may need to show the regulatory authority processing the reclassification the effect of such limitation on the source's PTE HAP to confirm that such source has a PTE HAP that allows it to reclassify to area source status.[16] As explained before, the determination of a source's PTE HAP under the PTE definition in 40 CFR 63.2 requires consideration of any enforceable controls, including ''nested'' HAP usage limits in permits intended as enforceable VOC limits, and other enforceable non-HAP limitations within a permit that have the effect of reducing HAP emissions. To the extent that a source's PTE considering controls exceeds the MST, a source would need to obtain enforceable limitations constraining its PTE HAP below the MST in order to be reclassified to area source status. Finally, the revised language in 40 CFR 63.1(c)(6) that now states ''reducing emissions and its potential to emit (PTE) hazardous air pollutants . . .'' (as opposed to the proposed language stating ''limiting its potential to emit (PTE) hazardous air pollutants . . .'') supports the EPA's conclusion that the PTE regulatory definition means that enforceable limits on other pollutants can have the effect of reducing PTE HAP and can be the basis for reclassification. See also 40 CFR 63.10(b)(3) about the analysis and record contents.

Finally, some commenters asked the EPA to clarify what requirements apply to sources that reclassified before the effective date of this rule. These commenters asked the EPA to state in the final rule that sources that reclassified to area source status prior to the MM2A final rule would not be required to undertake any additional actions. To the extent that sources have reclassified before the effective date of this final rule, their ability to reclassify is governed by the plain language reading of the statute. We discuss the notification and recordkeeping requirements for sources that reclassified before the effective date of this final rule later in this preamble. In contrast, sources that reclassify after the effective date of this final rule are governed by the plain language reading of the statute and by the provisions being finalized in this final rule. In either case, a reclassification is not a safe harbor for the source if the limits taken do not effectively limit the HAP emissions and the source emits HAP in excess of the MST.

b. Compliance Dates for Applicable Standards

In the proposed language of 40 CFR 63.1(c)(6), the EPA included regulatory text addressing applicability of standards and other requirements under 40 CFR part 63 for sources that reclassify to area source status, including dates for compliance with standards and notifications requirements. Because sources must comply with requirements corresponding to their status, the proposed provision in 40 CFR 63.1(c)(6) specified, ''Until the PTE limitations become effective, the source remains subject to major source requirements. After the PTE limitations become effective, the source is subject to any applicable requirements for area sources.'' In response to comments and to clarify the requirements associated with applicability of NESHAP requirements and the compliance dates for sources reclassifying to area source status, both before and after compliance with applicable major source NESHAP requirements, and for reclassified area sources that subsequently become major sources again, the EPA is consolidating these requirements in the final regulatory text at 40 CFR 63.1(c)(6)(i). The final provision also addresses the notification requirements for these sources. We discuss notification requirements below in section V.A.2 of the preamble.

The final regulatory text in 40 CFR 63.1(c)(6)(i)(A) addresses the applicability of standards and compliance dates for sources reclassifying to area source status either before or after being subject to major source requirements under 40 CFR part 63. The final regulatory text in 40 CFR 63.1(c)(6)(i)(B) addresses the applicability of standards and compliance dates for reclassified area sources that subsequently become major sources again. These final provisions are discussed below.

In this final rule, the EPA is updating the regulatory language in 40 CFR 63.1(c)(6)(i)(A) to include the applicability of standards and compliance dates for sources reclassifying to area source status. The final amended text in 40 CFR 63.1(c)(6)(i)(A) reads as follows: ''A major source reclassifying to area source status under this part remains subject to any applicable major source requirements established under this part until the reclassification becomes

[15] See, *e.g.,* January 25, 1995, memorandum titled ''*Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act),*'' also, memorandum, ''*Crediting of Maximum Achievable Control Technology (MACT) Emission Reductions for New Source Review (NSR) Netting and Offsets,*'' available at *https://www.epa.gov/sites/production/files/2015-07/documents/netnoff.pdf. See,* also, 81 FR 35944, explaining that HAP compliance reductions of volatile organic HAP to meet MACT may also result in emissions reductions of VOC.

[16] The EPA expects that state and local and tribal agencies will exercise care when drafting enforceable permit conditions in the situation where the ''effect'' of criteria pollutant limits will not be straight forward. See January 25, 1995, memorandum titled ''*Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act).*''

effective. After the reclassification becomes effective, the source must comply with any applicable area source requirements established under this part immediately, provided the compliance date for the area source requirements has passed. The owner or operator of a major source that becomes an area source subject to newly applicable area source requirements under this part must comply with the initial notification pursuant to § 63.9(b). The owner or operator of a reclassified source must also provide to the Administrator notification of the change in the information already provided under § 63.9(b) per § 63.9(j).''

As stated in this provision, sources remain subject to any applicable major source requirements under 40 CFR part 63 ''until the reclassification becomes effective'' instead of the proposed language ''until the PTE limitations become effective.'' In the MM2A proposal, the EPA explained that reclassification to area source status is a voluntary action on the part of a source, and sources are required to apply with their corresponding regulatory authority and follow the corresponding authority's procedures to be reclassified to area source status. This includes sources that, at the time of reclassification, are no longer within the definition of ''major source'' because they are true area sources (as described above in the preamble), because they had already obtained PTE limits below the MST, or due to other enforceable compliance obligations under a permit, permit by rule, or State Implementation Plan (SIP). As explained elsewhere in this preamble, such sources are area sources under the CAA section 112 definition, but as a result of our previous policy they may continue to have enforceable permit conditions, including major source NESHAP requirements, for example, until their title V permit is revised or revoked in agreement with their permitting authority procedures.

Because reclassification to area source status currently occurs under a regulatory authority's area or minor source program, the reclassification of a source to area source status is effective when the corresponding regulatory authority grants a source's request to be considered an area source via a permit registration, permit by rule, applicability determination, etc. (As explained in this preamble, 40 CFR part 63 separately requires notification of the applicability of a standard and recordkeeping of information on the applicability determination decision.) We expect that the process for sources to reclassify to area source status for HAP will rely on existing programs (*e.g.,* minor source programs, title V permitting procedures, and/or approved programs for issuing PTE limits under CAA section 112(l)). Consistent with how regulation of area sources is currently implemented under CAA programs, the EPA expects that determinations of area source status or major source status, as requested by a source for reclassification, will occur in a single action or concurrently with permitting actions needed to reconcile the revised requirements for the source under the newly acquired status or as appropriate for permit closure or revocation. (A permitting authority program may have simpler, less burdensome processes for specific groups of sources.) The language finalized about the effective date of reclassification equitably considers the current implementation mechanisms and sources situation.

As proposed, the regulatory language in 40 CFR 63.1(c)(6)(i) stated that ''[a] major source that becomes an area source must meet all applicable area source requirements promulgated under this part immediately upon becoming an area source, provided the first substantive compliance date for the area source standard has passed, . . .'' Some commenters requested that the EPA include language in the final rule providing that sources reclassifying to area source status may meet the major source NESHAP requirements as a means of complying with newly applicable area source NESHAP requirements. The EPA is not including such language in the final rule. Any source that reclassifies to area source status is no longer subject to major source NESHAP requirements and is subject to area source NESHAP requirements instead. That said, the area source is not precluded from streamlining the applicable area source NESHAP requirements with permit terms from a previously applicable major source NESHAP standard if compliance with applicable area source NESHAP requirements is assured. Because the reclassification to area source status is a voluntary action on the part of the source, the source must evaluate the area source NESHAP requirements that will become applicable to the source at the time of the reclassification to area source status and be in a position to meet such requirements at the time it reclassifies.

In the regulatory language of 40 CFR 63.1(c)(6)(i)(A), the EPA is finalizing the proposed immediate compliance rule for major sources that reclassify to area source status. These sources will be subject to applicable area source NESHAP requirements in 40 CFR part 63 immediately upon reclassification to area source status, provided the compliance date for the area source requirements has passed. In the MM2A proposal, the EPA proposed to allow for additional time for compliance with applicable area source NESHAP requirements for particular situations. For reclassifications from major source to area source status, the EPA proposed that additional time (not to exceed 3 years) may be granted by the EPA (or a delegated authority) in a compliance schedule where an area source standard would apply to an existing source upon reclassification and different emission points would need controls or different emission controls would be necessary to comply with the area source standard or other physical changes would be needed to comply with the standard.

The EPA received many comments on the proposed immediate compliance rule, compliance extension provisions, and the process for obtaining a compliance extension. Some commenters agreed with the proposed immediate compliance rule for sources that reclassify to area source status, while others opposed the immediate compliance rule if the EPA did not include provisions to obtain a compliance extension. Commenters supporting the immediate compliance rule without compliance extension provisions argued that sources should be aware of applicable requirements and plan for timely compliance at the time they request reclassification. These commenters opposed the proposed compliance extension provision, noting that any provision to allow compliance at periods later than 3 years from a standard's effective date was unlawful and unnecessary. The commenters argued that CAA section 112(i)(3)(A) requires that compliance must be within 3 years of the effective date of the standard; furthermore, CAA section 112(i)(3)(A) requires compliance ''as expeditiously as practicable.'' The commenters argued that just because physical changes may be required for a source to comply with newly applicable area source NESHAP requirements, it does not mean that compliance cannot be achieved immediately upon reclassification. The commenters emphasized that CAA section 112(i)(3) is clear on the compliance schedule for existing sources; that the schedule is determined by the effective date of any emission standard, limitation, or regulation promulgated under CAA section 112; and that compliance has to be as expeditious as practicable, but in no event later than 3 years after the

effective date of such standard. On the other hand, some commenters stated that there may be a short period of time when a stationary source needs to discontinue compliance with a major source NESHAP requirement before complying with the area source NESHAP requirements to conduct testing and verify monitoring protocols or to physically install emission controls. These commenters argued that the rule should recognize the need for such exceptions to the requirement to comply immediately with the area source NESHAP requirements and that the regulatory authority must be able to consider all the relevant factors in allowing for a compliance extension. While the commenters stated that a stationary source would want an exception to discontinue compliance with major source NESHAP requirements for a short period of time in order to come into compliance with the new area source NESHAP requirements to which they will be subject immediately after reclassification, the commenters did not provide supporting evidence or concrete examples showing that there are real situations where such compliance exception is needed.

The EPA agrees with the commenters that the statutory language in CAA section 112(i)(3)(A) precludes the compliance extension as proposed. For this reason, the EPA is not finalizing the proposed compliance extension for sources reclassifying to area source status. If a source reclassifies to area source status in a source category for which there are applicable area source NESHAP requirements, and the effective date of such requirements has passed, the source must comply immediately upon reclassification. If the compliance date of the applicable area source NESHAP requirements is in the future, the source must comply by the future compliance date specified in the individual subpart. Because reclassification is a voluntary action on the part of the source, the immediate compliance requirement does not represent a compliance issue because a source could delay their reclassification until such time as they are able and equipped to meet the applicable area source NESHAP requirements.

In the MM2A proposal, the EPA included in the proposed provision at 40 CFR 63.1(c)(6)(ii) regulatory language addressing the compliance schedule for sources that reclassify between major and area source status more than once. The EPA proposed that ''A major source subject to standards under part 63 that subsequently becomes an area source, and then later becomes a major source again by increasing its emissions to at or above the major source thresholds, must comply with the previous applicable major source requirements of this part immediately upon becoming a major source again . . .'' The EPA also proposed a compliance extension provision for these sources: If the previously applicable standard has been revised since the source was last subject to the standard and, in order to comply, the source must undergo a physical change, install additional emission controls, and/or implement new control measures, the source will have up to the same amount of time to comply as the amount of time allowed for existing sources subject to the revised standard. The EPA received multiple comments on the proposed compliance schedule and compliance extension provision for reclassified area sources reverting to major source status.

Some commenters argued that there was no need for the EPA to address compliance timelines in the context of the MM2A rulemaking for sources that reclassify to area source status and then revert back to major source status. These commenters noted that the existing General Provisions in 40 CFR 63.6(c)(5) already include compliance dates for area sources that become major sources, and that by including compliance dates within the provision in 40 CFR 63.1(c)(6), the EPA was creating disparate compliance schedule requirements. Several other commenters agreed with the proposed immediate compliance rule for area sources reverting to major source status, stating that sources should be aware of applicable requirements and plan for timely compliance at the time they request reclassification. These commenters opposed the proposed compliance extension provision, noting that any provision to allow compliance at periods later than 3 years from a standard's effective date is unlawful and unnecessary. The commenters argued that CAA section 112(i)(3)(A) requires that compliance must be within 3 years of the effective date of the standard. In addition, the commenters pointed out that CAA section 112(i)(3)(A) does not allow additional time for a source that reverts to major source status when the applicable major source NESHAP has increased in stringency; thus, there is no reason for the proposed extension. The commenters noted that CAA section 112(g)(2) requires that any entity that modifies or constructs a major source first secure a determination that applicable maximum-achievable standards will be met. The commenters argued that any source that proposes to increase its emissions to exceed the MST should be required to plan sufficiently to comply with the applicable major source NESHAP requirements before it increases its emissions. These commenters stressed that it would be inappropriate to allow stationary sources to prolong compliance with applicable standards, and that allowing sources additional time for compliance could incentivize sources to continually shift stationary source applicability status to avoid complying with applicable NESHAP requirements. These commenters objected to any compliance extension, stating that any extension or consideration of special conditions would remove the protections in existing rules, allowing the public and environment to be exposed to increased HAP emissions.

Other commenters argued that the proposed immediate compliance provisions for sources that revert back to their previous major source status are onerous and seem to be designed to discourage sources from opting to become area sources. These commenters supported the proposed compliance extension provisions but noted that there is no justification to conditioning any extension to the immediate compliance requirement for these sources on an intervening change to the major source standard. They argued that this appeared to be a backdoor attempt to force sources opting to become area sources to continue using major NESHAP add-on controls in case they might need to become a major source again, and that this is something for which the EPA lacks authority. Some commenters supported the immediate compliance rule if appropriate exceptions are made in the final rule and it includes a reasonable process for requesting an extension. The commenters recommended that the compliance extensions be left to the air pollution control agencies and that the EPA should not try to define what changes would be eligible for a longer compliance period, thus, eliminating unnecessary EPA oversight of the process for area sources and simplifying the procedures for acquiring additional compliance time. Finally, the commenters stated that a source that once was a major source may, for example, maintain its area source status for 20 years before seeking to become a major source again; for this source, many things may have changed while it was an area source, including process changes that render the previous compliance approach inapplicable or

require the source to comply in different ways.

The EPA agrees with the commenters that stated that the statutory language in CAA section 112(i)(3)(A) is properly read to preclude the proposed compliance extension for sources that revert back to their previous major source status and are subject to major source requirements for which the compliance date of such requirements has passed. These sources must comply with the major source requirements immediately, even if faced with the circumstances listed in the proposal (needing to ''undergo a physical change, install additional emissions controls and/or implement new control measures'' in order to meet the applicable NESHAP requirements). In the circumstance where a source is reverting back to major source status for which there are applicable major source NESHAP requirements and the compliance date of such requirements at the time of reclassification is still in the future, the source needs to comply with such requirements by the future compliance date specified in the individual subpart. In sum, a source should not reclassify (in either direction) until it is ready to meet the requirements that are imposed by the new classification.

For the reasons explained above, the final regulatory text included in 40 CFR 63.1(c)(6)(i)(B) addresses the applicability of standards and compliance dates for reclassified area sources that subsequently become major sources again. In this provision, the EPA is finalizing the proposed immediate compliance rule for area sources that become major sources again, if they were previously major sources under 40 CFR part 63. The EPA has amended the language to read as follows: ''An area source that previously was a major source under this part and that becomes a major source again must comply with the applicable major source requirements established under this part immediately upon becoming a major source again, provided the compliance date for the major source requirements has passed, notwithstanding any other provision within the applicable subparts. The owner or operator of a source that becomes a major source again must comply with the initial notification pursuant to § 63.9(b). The owner or operator must also provide to the Administrator any change in the information already provided under § 63.9(b) per § 63.9(j).'' This updated final provision in 40 CFR 63.1(c)(6)(i)(B) for reclassified area sources that subsequently become major sources again covers both situations of sources that reclassify back to major source status: (1) Major sources that reclassify to area source status prior to being subject to major NESHAP requirements (including sources that reclassified under the OIAI policy) and then return to major source status and (2) major sources that reclassify to area source status after being subject to major NESHAP requirements and then return to major source status. On the other hand, the compliance dates for area sources that never operated as major sources previously (including sources constructed with enforceable controls or other type of enforceable PTE limits) but that increase emissions or PTE and become major sources for the first time are governed by the provisions in the individual NESHAP (which are not being amended in this rule) and not the provisions applicable to reclassified area sources that return to major source status that are being finalized in this action. The EPA is also finalizing amendments to 40 CFR 63.6(c)(1) to account for the immediate compliance rule as included in the final revisions to 40 CFR 63.1(c)(6)(i)(A) and (B) as discussed above.

Finally, while some commenters requested assurance that if sources revert back to their previous major source status, sources will not be considered new sources, others argued the EPA should expressly provide that relaxation or elimination of a PTE limit that results in the source becoming a major source requires that the source comply with CAA section 112 NESHAP requirements for a new source. These commenters asserted that as a result of a loophole in the existing 40 CFR part 63 regulations, some sources and states are currently under the impression that a source can have its original PTE limit taken at the time of construction relaxed or eliminated without triggering the requirement to comply with major source NESHAP requirements that would have otherwise applied to the source when it was built. This confusion could have arisen from the text in 40 CFR 63.6(c)(5) stating that ''the owner or operator of an area source that increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source shall be subject to relevant standards for existing sources.'' As explained in section IV of this preamble, the CAA section 112 definitions of ''new source'' and ''existing source'' dictate that the new source/existing source distinction is determined by when the affected source commences construction or reconstruction with respect to the date of proposal of the standard and say nothing about the source's volume of emissions. For this reason, the EPA disagrees that a source reclassifying to major source status after having previously been subject to the major source standards would necessarily be classified as an existing source. The EPA also disagrees with commenters that a reclassifying source would necessarily be a new source for purposes of determining which standard applies. Whether an affected source is new or existing for purposes of compliance with an applicable NESHAP is dictated by when the source commenced construction or reconstruction in relation to when the applicable NESHAP was proposed and not whether the status of the source is major or area.

Moreover, the regulatory text at 40 CFR 63.6(c)—Compliance dates for existing sources—applies only to ''existing sources.'' Therefore, the regulatory language at 40 CFR 63.6(c)(5) states that ''the owner or operator of an [existing] area source that increases its emissions . . . shall be subject to relevant standards for existing sources.'' The intent of 40 CFR 63.6(b)(7) and (c)(5) was further explained in the preamble for the March 23, 2001, rule that proposed revisions to 40 CFR 63.6(b)(7) and (c)(5) (66 FR 16328),[17] ''[w]e are proposing to revise 63.6(b)(7) and (c)(5) to require new source MACT only on affected sources that commenced construction or reconstruction after the proposal date of the NESHAP . . . Affected sources at former area sources that become major that have not constructed or reconstructed *after the proposal date of the NESHAP* (emphasis added) would be subject only to existing source MACT . . . .'' Again, each NESHAP provides the dates that determine whether a source is a new source or an existing source. A source's status of new or existing is determined by dates given in each individual NESHAP, and that does not change when a source reclassifies. If a major source reclassifies to area source status after being subject to new major source NESHAP requirements and then returns back to major source status, the sources that were originally subject to new source requirements would once again be subject to new source requirements. In light of these comments, the EPA is including in the final rule amendments to 40 CFR 63.6(b)(7) and (c)(5) to reflect the new or existing status of sources that become major sources as being determined by

[17] These provisions were finalized on April 5, 2002 (See 67 FR 16582).

the dates provided in the applicable subparts and to also reflect the immediate compliance rule as finalized in 40 CFR 63.1(c)(6)(i)(B) for reclassified area sources that revert back to major source status. The amendments to 40 CFR 63.6(b)(7) read as follows: ''When an area source increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source, the portion of the facility that meets the definition of a new affected source must comply with all requirements of that standard applicable to new sources. The source owner or operator must comply with the relevant standard upon startup.'' The amendments to 40 CFR 63.6(c)(5) read as follows: ''Except as provided in paragraph (b)(7) of this section, the owner or operator of an area source that increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source and meets the definition of an existing source in the applicable major source standard shall be subject to relevant standards for existing sources. Except as provided in § 63.1(c)(6)(i)(B), such sources must comply by the date specified in the standards for existing area sources that become major sources. If no such compliance date is specified in the standards, the source shall have a period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in the relevant standard for existing sources in existence at the time the standard becomes effective.''

c. Reclassifications and Enforcement Actions

In the MM2A proposal, the EPA included regulatory language in the MM2A applicability provision in 40 CFR 63.1(c) to address the interaction of the reclassification of sources and potential enforcement actions. Specifically, we noted reclassification of a source from major to area source status would not absolve a source of prior liability for noncompliance. Although sources that are the subject of an investigation or enforcement action may still seek area source status for purposes of future applicability, such sources remain liable for any previous or pending violations of the CAA that occurred prior to the reclassification. Enforcement of major source requirements could include penalties, mitigation for illegal emissions, and/or other remedies to address noncompliance. Accordingly, a source cannot use its new area source status as a defense for major source NESHAP violations that occurred prior to its reclassification. Similarly, becoming a major source does not absolve a source subject to an enforcement action or investigation for area source violations from the consequences of any actions occurring when the source was an area source.

Multiple commenters agreed with the premise that a major source that reclassifies should not be absolved from potential enforcement actions that occurred prior to the reclassification. However, some commenters argued that if a major source is rightfully an area source at the time of an alleged violation, then the source should not be subject to enforcement as a major source. Other commenters argued that it is also appropriate for the EPA to consider the misclassification of a major source instead of the appropriate area source classification, and the requirements for major sources versus area sources, and to examine a past violation to determine if the source actually violated the requirements of the classification under which the firm should have been registered.

One commenter recommended that the EPA add language to 40 CFR 63.1(c)(6) that would allow for modification of an enforcement order affecting a reclassified source if the enforcement order was based on the enforcement authority's finding that the source was a major source or based on the application of the OIAI policy. The commenter argued that the EPA's proposed new language in 40 CFR 63.1(c)(6) would leave unclear whether it is the EPA's intent that: (1) Such a source can never apply to the enforcement authority for relief from such obligations (which often include obligations imposed pursuant to a court's equity jurisdiction or that otherwise fall outside the universe of obligations specified in the NESHAP) in exchange for accepting restrictions on its PTE in order to become a synthetic HAP area source; or (2) the enforcement authority can never enter into a modification of the order, settlement, or decree that grants such relief. The commenter argued that this lack of clarity could result in foreclosure of such relief in future proceedings that are informed by the final rules, depending on the EPA's posture at the time and the deference that is sometimes given to agencies' interpretations of their own regulations.

The commenter argued that because the EPA has withdrawn the OIAI policy on the grounds that it was inconsistent with ''the plain language reading of the 'major source' and 'area source' definitions of section 112'' of the CAA, then it stands to reason that: (1) No historical application of the OIAI policy in the formulation of enforcement orders and negotiation of settlement agreements and consent decrees was ever lawful or appropriate; and (2) orders, agreements, and decrees that were imposed or negotiated based materially on the OIAI policy ought to be subject to retroactive review, on a case-by-case basis and subject to the needs of the particular case, upon application by the respondent for a modification of the instrument. Finally, a commenter argued that the EPA should explicitly state in its regulations that the consequence of violating PTE limitations is the requirement to comply with the applicable major source NESHAP requirements—in addition to an appropriate penalty for violating the PTE limitations.

In the MM2A proposal, the EPA included regulatory language in the proposed MM2A applicability provision in 40 CFR 63.1(c)(6) stating that reclassification from major source to area source does not affect a source's liability or any enforcement investigations or enforcement actions for a source's past conduct or violations of major source requirements that occurred prior to the effective date of the source's enforceable limitations (*i.e.,* the reclassification). This rule revision underscores the importance of a source's PTE in determining NESHAP, 40 CFR part 63, applicability. The plain language reading of the definitions of ''major'' and ''area'' source in section 112 of the CAA as explained in the 2018 MM2A Memorandum and implemented through this rulemaking does not change the Agency's position that a source may take enforceable production and/or operational limits to effectively constrain its PTE and, thereby, avoid applicability. Rather, it eliminates the timing constraint imposed by the OIAI policy as to when a source may take such limits to avoid applicability. If, before taking such limits to avoid applicability, a source emitted a single HAP in an amount of 10 tpy or greater, or emitted any collection of HAP in an amount of 25 tpy or greater, or it is determined that the source has (or had) a PTE that meets or exceeds these amounts, the source would be considered a major source and subject to the requirements of 40 CFR part 63 (as applicable) up and until the effectiveness of the limits. The same holds true after taking such limits to avoid applicability. That is, even after taking such limits, if a source emits a single HAP in an amount of 10 tpy or greater, or emits any collection of HAP in an amount of 25 tpy or greater, or it is determined that the source has (or

had) a PTE that meets or exceeds these amounts, the source would be considered a major source and subject to the requirements of 40 CFR part 63 (as applicable). Now, as before, any time a source operates as a major source, it must meet the applicable major source requirements in 40 CFR part 63. Neither this rule, nor the 2018 MM2A Memorandum, intends to allow a source that emits (or has the PTE) greater than the MST to avoid compliance with applicable requirements for major sources. Any source that operates without complying with the applicable requirements is subject to enforcement. The revision proposed at 40 CFR 63.1(c)(6) underscores the EPA's position that unless, and until, a source has enforceable production and/or operational limits that effectively limit a source's PTE (and are not just chimeras that do not really restrain an operator from emitting pollution in amounts equal to or exceeding the major source thresholds), the source is a major source and must comply with the major source requirements (as applicable). The D.C. Cir. said as much in its review of the 2018 MM2A Memorandum, *California Communities Against Toxics, et al.* v. *EPA,* 934 F.3d. 627, 638–639 (D.C. Cir. 2019), (''Major sources must obtain a permit in order to operate, and unless and until that permit is amended or set aside, the stringent requirements set forth therein must be complied with while that equipment is operational. The [MM2A Memorandum]itself does not revoke or amend a single permit.'')

Any order, settlement, or decree (collectively, agreements) issued or entered into addressing a source's compliance with the requirements of NESHAP, 40 CFR part 63, is not affected by this rule or the 2018 MM2A Memorandum. Those agreements were entered into based on the specifics of each case. Reopening or modification of settlements approved by, or orders issued by, federal courts is governed by the Federal Rules of Civil Procedure (F. R. Civ. P. Rule 60). Nothing in this final rule is intended to suggest that any of the prerequisites for reopening any judicial or administrative settlement or modifying a prior order of a court (including orders approving settlements) have been met. There is no additional clarification needed regarding these authorities. While the OIAI policy may have informed the contours of those agreements, it did not (and, in fact, could not) change the statutory basis for those enforcement actions. These agreements reflect a mutual understanding of the parties that settlement is in the interest of all involved after taking into account the legal and factual circumstances at the time of the settlement. Accordingly, the EPA is finalizing the regulatory language in 40 CFR 63.1(c)(6)(ii) addressing the interaction of the reclassification of sources with enforcement actions as proposed.

d. Reclassifications and Operation of Add-On Pollution Control Equipment

After the issuance of the MM2A Memorandum, some stakeholders were concerned that if sources were to reclassify to area source status, they could stop using the add-on emission control equipment or emission reduction practices implemented for major source NESHAP compliance or no longer maintain the same level of control efficiency as before. At proposal, the EPA requested comments on whether facility owners or operators of sources that reclassify will cease to properly operate their add-on control devices where the operation of the add-on control device is needed to restrict the PTE and appropriate monitoring, recordkeeping, and reporting (MRR) are established as enforceable conditions.

In the proposal, the EPA explained that a source seeking reclassification because it has reduced its HAP emissions to below the MST through use of add-on control devices or emission reduction practices implemented for compliance with major source NESHAP requirements will need to demonstrate to the regulatory authority issuing the PTE limits the degree to which the add-on control devices and emission reduction practices are needed to restrict the source's PTE. In the absence of the applicability of the major source NESHAP requirements, if the source relies on its existing NESHAP add-on control devices and/or emission reduction practices to limit its HAP PTE below the MST, the use of these control devices and/or emission reduction practices must be made enforceable under a permitting authority's legal mechanism. Alternatively, if a source intends to stop using the add-on control device equipment or emission reduction practices used to comply with a previously applicable major source NESHAP requirement, the source must demonstrate that other physical controls or operational limits that the source adopts will restrict the source's actual emissions and maximum capacity to emit HAP below the MST and that these limits are or can be made enforceable to ensure that the source will not emit or have the potential to emit HAP at or above the MST.

Some commenters argued that there is no reason to believe that facility owners or operators would cease to properly operate their add-on control devices where the operation of the control is needed to restrict the PTE and appropriate MRR are established as enforceable conditions. Similarly, some commenters asserted that sources that achieve area source status through compliance with MACT have significant disincentives to alter their control measures to increase emissions thereafter. They argued that HAP emissions control devices are not designed to achieve partial emissions reductions; rather, they are designed to reduce emissions by a specified efficiency rate and a source that already has invested in controls for the purpose of major source MACT compliance is unlikely to cease using them or remove them in favor of less-effective measures to limit its HAP emissions—especially if the source's reclassification to area source status is contingent upon compliance with an enforceable PTE limit.

On the other hand, other commenters expressed concern with the EPA statement in the proposal saying that ''it has no reason to believe, and does not anticipate'' that sources will cease operating their control devices and hence increase emissions as a result of the MM2A action. One commenter argued that the EPA has collected insufficient data and included no explanation to support what the commenter called an ''economically irrational conclusion.'' The commenter argued that the EPA has not acknowledged the financial incentives to reduce usage of expensive control devices.

Commenters arguing that sources will reduce control device operation and emission monitoring if the major source NESHAP requirements no longer apply stated the EPA must include in the final rule conditions requiring the continued use of add-on controls and conditions ensuring that monitoring and parametric limits are adequate to meet the required destruction efficiencies needed for sources to constrain their PTE and emissions at area source levels. These commenters argued that without such requirements, sources that reclassify are likely to operate the control device only part of the year. They claim sources will make cost-saving business decisions to turn off controls for several months a year or use less-effective controls to remain just below the MST. Some commenters summarized, as an example, the information collected by the EPA to justify the monitoring requirements for flares in the NESHAP

for Petroleum Refineries and described how, without rigorous monitoring, flare efficiency could be highly variable and substantially lower than 98 percent. The commenters also argued that the EPA cannot assume that other control devices, such as fabric filter baghouses and electrostatic precipitators, would be as effective once the major source NESHAP operating limits or monitoring requirements no longer apply. The commenters argued that the EPA must require the facility to periodically perform source tests to verify that the restriction actually correlates with emissions that are below the MST. The commenters further argued that without requirements ensuring proper operation, maintenance, and monitoring of add-on controls, sources will stop consistently operating the control devices that limit the release of HAP and allow the sources to reclassify to area source status.

The EPA sees these comments as pertaining to the proposed effectiveness criteria of PTE limits. In particular, the EPA may consider provisions concerning the operation and monitoring of add-on controls in the context of the criteria for ensuring that a PTE limit used to reclassify from major source to area source status is practicably enforceable. As discussed later in section VII of the preamble, the EPA is not taking action on the proposed amendments to 40 CFR 63.2 at this time and is continuing to consider the comments received on this aspect of the MM2A proposal. The EPA intends to take final action on this aspect of the MM2A proposal in a separate final action at a later date.

2. 40 CFR 63.9 Notification Requirements

In the MM2A proposal, the EPA included language in the reclassification provision in 40 CFR 63.1(c)(6) specifying that sources reclassifying must comply with the notification requirements of 40 CFR 63.9(b) and (j). The EPA also proposed to clarify the notification requirements for sources reclassifying by amending 40 CFR 63.9(b) so that an owner or operator of a facility must notify the Administrator of any standards to which it becomes subject. The proposed amendment covers situations where a source reclassifies from major to area source status and where a source reclassifies from major to area and subsequently reverts back to major source status. The EPA also proposed to clarify that a source that reclassifies must notify the EPA of any changes in the applicability of the standards to which the source was subject per the notification requirements of 40 CFR 63.9(j).

Most of the commenters supported the proposed amendments to the notification provisions in 40 CFR 63.9(b) and (j), but a few disagreed that the established General Provisions require notification when going from being subject to not being subject. Other commenters requested that the EPA reduce the number of duplicative notifications and simplify the regulatory authorities that must review 40 CFR 63.9(j). Other commenters requested clarification between notification provisions within individual NESHAP that allow for 120 days for notification versus the 15-day notification in the General Provisions in 40 CFR 63.9(b) and (j). These commenters asked the EPA to clarify the differences between these requirements, harmonize the reporting requirements, and minimize duplicative requirements. The EPA disagrees that the General Provisions do not require a notification when a source is no longer subject to a standard. The provisions of 40 CFR 63.9(j) are applicable to a change in information already provided. The change in a source's status from major to area (or vice versa) is a change in the information provided that determined the initial status of the source as subject to the major or area source standards. This is different from the initial notification required by 40 CFR 63.9(b), as that provides the relevant information to the Administrator of the newly governed provisions and is required to be submitted, per 40 CFR 63.9(b)(2), no later than 120 days after the source becomes subject. The notification of a change in information already required within 15 days is a result of the previously applicable standard. There are cases for which there is no applicable area source standard; the notification required by 40 CFR 63.9(j) is the only notification that would be submitted in those cases. These requirements in two provisions do not require harmonizing, as they are due to different NESHAP subparts being applicable and are not duplicative.

The EPA is finalizing the reclassification provision in 40 CFR 63.1(c)(6) notification requirements as proposed for both major sources that reclassify to area source status and area sources that revert back to major source status. The EPA is also finalizing the proposed amendments to 40 CFR 63.9(b) so that an owner or operator of a facility must notify the Administrator of any standards to which it becomes subject. Further, for clarity, the EPA has finalized at 40 CFR 63.9(j)(i)–(iv) the data elements that a reclassifying source must provide in the notification of a ''change in information already provided'' required under 40 CFR 63.9(j). Finally, the EPA is clarifying that the notification requirement of 40 CFR 63.9(j) is an existing requirement. Thus, the EPA requires any source that reclassified after January 2018 (issuance of the 2018 MM2A Memorandum) and before the effective date of this final rule that has not yet provided the notification of a change in information per 40 CFR 63.9(j) to provide such notification within 15 calendar days after the effective date of this final rule.

For the notification requirements in 40 CFR 63.9(b) and (j), the EPA also proposed to require sources that reclassify to submit the notification electronically through CEDRI. The EPA proposed amending the General Provisions to add 40 CFR 63.9(k) to include the CEDRI submission procedures. Several commenters support using CEDRI for notification of status changes. Some commenters requested the EPA to clarify that the new requirements in 40 CFR 63.9(k) only apply when a facility is reclassifying from a major source to an area source or from an area source to a major source, so regulatory authorities could not conclude that all notifications or reports should be done using CEDRI. Some commenters strongly supported the Agency providing this information to the public. While the EPA agrees that the provisions of 40 CFR 63.9(k) only apply when specifically directed there from another provision, as stated in 40 CFR 63.9(k), ''[i]f you are required to submit notifications or reports *following the procedures specified in this paragraph (k),*'' (emphasis added), we do not believe that further clarification within the regulatory language is necessary. We are finalizing this provision as proposed requiring sources that reclassify to submit the notification electronically through CEDRI. Additionally, the EPA has clarified that sources that reclassify between January 25, 2018, and the effective date of this final rule also must submit the notification through CEDRI. The EPA acknowledges the support for the public availability of the notifications and notes that the submitted notifications, along with any other notifications and reports submitted through CEDRI, become available to the public through the WebFIRE database (*https://www.epa.gov/electronic-reporting-air-emissions/webfire*) after time for review and approval by the regulatory agencies.

Multiple commenters recommended that the EPA should clarify CEDRI reporting. One commenter indicated that notification is not delegable and

needs to adjust the language in 40 CFR 63.13 that requires submittal of information to Regional offices at specific addresses. The commenter pointed out that the proposed CEDRI reporting makes this requirement excessive and the regulatory text should be fixed to remedy the requirement of reporting in triplicate (Regional offices, CEDRI, Administrator/state). The commenter noted that the last sentence of 40 CFR 63.12(c) does not address this issue and should be deleted/altered to avoid reporting in triplicate. Another commenter indicated that a separate notification to state agencies should be sent directly to the permitting agency. The commenter requested that the following paragraph be added to 40 CFR 63.9(k):

''If a state or local permitting agency has received delegation for a Part 63 standard that requires you to submit notifications or reports and that permitting agency requires, by way of statute, rule, policy, guidance, permit, or other mechanism, that such notifications or reports must be submitted also to the permitting agency, then such notifications and reports must be submitted to the permitting agency as well as to CEDRI.''

The EPA agrees with the commenters that the language at 40 CFR 63.13 and 63.12(c) was not clear that submission to CEDRI, when required by regulation, fulfills the obligation of submittal to the EPA Regional office. Therefore, the EPA is finalizing at 40 CFR 63.13 a clarifying statement that when required by 40 CFR part 63, the submission of a report or notification to CEDRI fulfills the obligation of reporting to the EPA Regional office. The EPA does not agree that additional language to reflect that reporting to a delegated agency is required in addition to reporting to CEDRI, as that is implicit in 40 CFR 63.12(c), which requires that all information required to be submitted to the EPA be submitted to the delegated authority. The manner of submission is at the discretion of the delegated authority, but the reports and notifications that are required to be submitted to the EPA electronically through CEDRI must be delivered to the EPA through CEDRI. However, delegated authorities have the discretion to consider the submission to CEDRI as meeting the requirement to submit the report to them.

In the MM2A proposal, the EPA identified two broad circumstances in which extensions of the timeframe for electronic submittal may be provided. In both circumstances, the decision to accept the claim of needing additional time to submit is within the discretion of the Administrator, and submittal should occur as soon as possible. The EPA provided these potential extensions to protect owners or operators from noncompliance in cases where they cannot successfully submit a notification by the submittal deadline for reasons outside of their control. The situation where an extension may be warranted due to outages of the EPA's Central Data Exchange or CEDRI that preclude an owner or operator from accessing the system and submitting a required notification is addressed in 40 CFR 63.9(k)(1). The situation where an extension may be warranted due to a *force majeure* event, which is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents an owner or operator from complying with the requirement to submit electronically as required by this rule, is addressed in 40 CFR 63.9(k)(2). Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. Finally, the EPA also proposed to amend 40 CFR 63.12(c) to specify that a delegated authority may not exempt sources from reporting electronically to the EPA when stipulated by this part.

One commenter recommended that the CEDRI late-notification language in proposed 40 CFR 63.9(k)(1) and (2) should be stricken because air pollution control agencies already have experience in using enforcement discretion for addressing late notifications and that discretion should not be codified or limited by regulation. The commenter also argued that the full range of circumstances that could legitimately cause a late notification cannot be covered by the regulation, and the discretion to grant an extension should not be solely within the discretion of the Administrator. Another commenter did not support the proposed additional requirements detailing when late notifications are forgiven for a *force majeure* event or federal EPA computer glitch but not in other meritorious situations. Another commenter suggested that time extensions for electronic reporting should be allowed for circumstances other than CEDRI outage and *force majeure* events, which allow for other situation-specific reasons that may impact the reasonable ability of a facility to achieve timely electronic reporting.

The EPA disagrees with the commenter that the reporting extension allowance for *force majeure* and CEDRI outage should be stricken. Granting an extension is at the discretion of the Administrator, which is defined in 40 CFR 63.2 to be ''the Administrator of the United States Environmental Protection Agency or his or her authorized representative (*e.g.,* a State that has been delegated authority to implement the provisions of this part).'' The extension provision does not remove the authority of an air pollution control agency to grant an extension for those subparts for which they have been delegated authority. Further, the EPA disagrees with the commenters that other situations that are not included in these provisions are excluded from obtaining an extension to their reporting deadline. The extension provisions as proposed and finalized are limited to those circumstances out of control of the facility and provide clear direction on the process for requesting an extension. Facilities may still engage with the Administrator on any delays in submittal not specifically covered under the CEDRI outage or *force majeure* provisions. After consideration of public comments, the EPA is finalizing the extension provisions as proposed.

The electronic submittal of the notifications addressed in this rulemaking will increase the usefulness of the notification; is in keeping with current trends in data availability and transparency; will further assist in the protection of public health and the environment; will improve compliance by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance and the applicability of major and area source standards to a facility; and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic submittal also eliminates paper-based, manual processes, thereby saving time and resources and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [18] to implement Executive Order 13563 and is in keeping with the EPA's Agency-wide policy [19] developed in response to the White House's Digital Government Strategy.[20] For more information on the

[18] The EPA's ''*Final Plan for Periodic Retrospective Reviews,*'' August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[19] ''*E-Reporting Policy Statement for EPA Regulations,*'' September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[20] ''*Digital Government: Building a 21st Century Platform to Better Serve the American People,*'' May 2012. Available at: *https://*

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benefits of electronic reporting, see the memorandum, ''*Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,*'' available in Docket ID No. EPA–HQ–OAR–2019–0282.

3. 40 CFR 63.10 Recordkeeping and Reporting Requirements

In the MM2A proposal, the EPA proposed to amend the recordkeeping requirements for applicability determinations in 40 CFR 63.10(b)(3) by adding text to clarify that this requirement applies to an owner or operator with an existing or new stationary source that is in a source category regulated by a standard established pursuant to CAA section 112 but that is not subject to the relevant standard because of enforceable limitations on the source's PTE. Specifically, the EPA proposed removing the time limit for record retention in 40 CFR 63.10(b)(3) and requiring that the records be maintained until the source becomes an affected major source subject to major source requirements under 40 CFR part 63.

Many commenters supported the proposed amendment to remove the time limit for record retention such that sources that obtain new enforceable PTE limits are required to keep the required record of the applicability determinations for as long as the source continues to be an area source based on PTE limitations. While many commenters agreed with the removal of time limit in 40 CFR 63.10(b)(3), some commenters argued that major sources that reclassify to area sources should not be subject to additional recordkeeping requirements that do not apply to other area sources. These commenters argued that the EPA should not revise the 5-year record requirement for the applicability determinations because the EPA has not provided a proper justification for adding this requirement for ''reclassified'' area sources. The commenter noted that the EPA has not described any issue with respect to compliance of PTE limits and emission-standard applicability that arose from the existing 5-year recordkeeping requirement, nor has the EPA explained why area source recordkeeping requirements should differ based on temporal considerations. The commenters noted that title V major sources are subject to a 5-year records requirement for all applicability determinations used to support identification of applicable requirements and application of the title V permit shield, and this is consistent with the statute of limitations that generally allows only a 5-year period to enforce against alleged violations. The commenter argued that the EPA has not explained why area sources should be subject to more stringent recordkeeping requirements. These commenters stated that the change in the requirement would impose a burden on the facility without additional environmental protection, because 5 years is sufficient time considering that sources still need to report annually that they are in compliance. Some commenters also noted that if the EPA or an air pollution control agency has reason to doubt any source's exempt status, they can take action under CAA sections 113 and 114 or state/local/tribal ''Open Records'' analogs to obtain the necessary information.

The EPA disagrees that the extended recordkeeping requirement as proposed applies disproportionately to reclassifying area sources or has any temporal consideration. The requirement to retain the applicability determination applies to all area sources that require an enforceable limitation on the source's potential to emit to not be subject to a relevant standard or other requirement established pursuant to CAA section 112. The requirement for an applicability determination is only relevant to these sources; the applicability determination itself, rather than the recordkeeping requirement, is the determining factor. The extension of the recordkeeping requirement is in the best interest of the source relying on an applicability determination to avoid CAA section 112 major source requirements, as many sources will rely on such determination for an extended period of time that can last beyond the 5 years. The EPA disagrees with the commenters that the revised record retention requirements are unnecessary due to annual reporting requirements. While many sources may have annual or semiannual reporting requirements after reclassifying into an area source rule, there are some major source NESHAP that do not have a corresponding area source standard. For these sources, the retention of the applicability determination enables the source to easily demonstrate that the major source standard does not apply without the potential additional burden of re-creating the applicability determination. The EPA agrees with the commenter that the EPA under CAA sections 113 or 114, and air pollution control agencies under their analogs, have the authority to request the necessary information; however, the retention of the applicability determination while the source continues to be an area source based upon that PTE limit and applicability determination provides a lesser burden to facilities compared to potentially re-creating the applicability determination. For the reasons presented above, the EPA is finalizing removing the time limit for record retention in 40 CFR 63.10(b)(3) and requiring that the records be maintained for as long as the source continues to be an area source based on PTE limitations.

Other commenters requested clarification as to whether the amended recordkeeping requirement applies to sources that became area sources prior to the first substantive compliance date of a NESHAP standard or that reclassified after the 2018 MM2A Memorandum. In the preamble of the MM2A proposal, the EPA stated that this amendment was directed to sources that obtain new enforceable PTE limits. The EPA agrees that the proposed language was unclear as to the applicability of the recordkeeping provisions on sources with applicability determinations preceding the date of proposal. We have amended the regulatory text in 40 CFR 63.10(b)(3) clarifying that the owner or operator must keep a record of the applicability determination on site at the source for a period of 5 years or until the source changes its operation to become an affected source subject to the relevant standard or other requirement established under this part, whichever comes first if the determination is made prior to January 19, 2021. For a determination made on or after January 19, 2021, the owner or operator must keep a record of the applicability determination until the source changes its operations to become an affected source subject to the relevant standard or other requirement established under this part. The EPA does, however, strongly recommend that all facilities retain their applicability determination for the time that the source continues to be an area source based upon that PTE limit and such applicability determination.

In addition to the removal of the time limit for record retention, the proposal amended the text that describes the record of the applicability determination. In particular, the proposal clarified that the record must include an ''emissions'' analysis (or other information) that demonstrates the owner or operator's conclusion that the source is not subject to major source requirements. The analysis (or other

obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.

information) must be sufficiently detailed to allow the Administrator to make an ''applicability'' finding for the source with regard to the relevant standard or other requirements.

With regard to the analysis for applicability determinations, some commenters expressed concern with the language that the applicability determinations ''should be performed in accordance with EPA guidance materials.'' The commenters stated that the language is vague and could create binding requirements that are not legislative rules and have not gone through required notice-and-comment rulemaking. The commenter suggested that the EPA should indicate that this is a recommendation rather than a requirement by stating: ''EPA recommends that the analysis be performed in accordance with EPA guidance materials . . . .'' The EPA disagrees that further clarification is necessary regarding the use of guidance documents in this context, as the use of EPA guidance materials was an element of the existing provisions of 40 CFR 63.10(b)(3). However, to avoid creating the impression of additional requirements being imposed due to the proposed edits to the language, the EPA is retaining the sentence of 40 CFR 63.10(b)(3), which states: ''If relevant, the analysis should be performed in accordance with EPA guidance materials published to assist sources in making applicability determinations under CAA section 112, if any,'' as currently exists in the existing provision without finalizing the changes proposed to it.

The commenters also suggested that the EPA clarify the applicability determination analysis for specific situations, and others advised that additional guidance could be incorporated into the regulation or the preamble to the final rule to recognize that sources often need to use best engineering judgment to estimate emissions from minor sources when assessing the PTE of a whole facility. The commenters then recommended that the EPA indicate that the level of detail and precision for potential to emit calculations can be lower for operations that contribute a relatively small amount to total facility HAP emissions. The wording in the proposed amendments are intended to clarify and to promote better understanding of the current recordkeeping requirements. The EPA did not propose a new view on how to estimate PTE and, relatedly, on how to do major source applicability determinations. In section VII of this preamble, we include references to our PTE guidance that may be of help to parties with questions about the EPA's views on these issues.

The EPA also proposed to amend the recordkeeping requirements for records submitted through CEDRI by adding 40 CFR 63.10(g) to clarify that the records submitted through CEDRI may be maintained in electronic format. As proposed, this provision does not remove the requirement for facilities to make records, data, and reports available upon request by a delegated air agency or the EPA. We are not finalizing the proposed addition of 40 CFR 63.10(g) because the provision is redundant with 40 CFR 63.10(b)(1), which allows for storage of records on computer.

B. Amendments to Individual NESHAP General Provisions Applicability Tables

The EPA proposed to amend the General Provisions applicability tables contained within most subparts of 40 CFR part 63 to add a reference to a new reclassification provision contained in 40 CFR 63.1(c)(6) discussed in the section V.A of this preamble and add a reference to reflect the proposed CEDRI submission procedures of 40 CFR 63.9(k) discussed above in section V.A of this preamble. We are finalizing the amendments to the General Provisions applicability tables as proposed. Additionally, the EPA identified four subparts containing the General Provision applicability requirements which did not properly reference the notification provisions. These subparts are 40 CFR part 63 subparts G, H, II, and YY. Accordingly, we are also finalizing revisions to these applicability requirements of 40 CFR part 63 subparts G, H, II, and YY to account for the final amendments to the General Provisions as described above in section V.A.

C. Amendments to Individual NESHAP

At proposal, the EPA identified one general category of regulatory provisions in several NESHAP subparts that reflect the 1995 OIAI policy that requires revision pursuant to this action. This category of provisions addresses the date by which a major source can become an area source. We proposed to revise the following provisions: 40 CFR part 63, subpart QQQ at 63.1441; 40 CFR part 63, subpart QQQQQ at 63.9485; 40 CFR part 63, subpart RRRRR at 63.9581; and Table 2 of 40 CFR part 63, subpart WWWW. We solicited comment on whether there are any other regulatory provisions in any of the individual subparts that include OIAI provisions that should be revised pursuant to this action. The EPA received comments regarding multiple provisions in 40 CFR part 63, subpart F at 63.100(b)(4); subpart I at 63.190(b)(7); subpart HH at 63.760(a)(1); and subpart HHH at 63.1270. The EPA reviewed the provisions raised by commenters in these subparts and is including in this final rule revisions to the provisions in subpart HH at 63.760(a)(1) and subpart HHH at 63.1270(a). The EPA is not making changes with respect to the identified provisions in subparts F and I at 63.100(b)(4) and 63.190(b)(7). The EPA sees these provisions as expired exclusion provisions, not OIAI provisions, that do not prevent a source from reclassifying to area source status.

At proposal, we also identified several area source NESHAP containing notification provisions (*i.e.,* initial notification) applicable to existing sources for which the dates have passed. We proposed to amend the following area source NESHAP that contain notification requirements for existing sources with specific deadlines that are in the past: 40 CFR part 63, subpart HHHHHH at 63.11175; 40 CFR part 63, subpart XXXXXX at 63.11519; 40 CFR part 63, subpart YYYYYY at 63.11529; 40 CFR part 63, subpart AAAAAAA at 63.11564; 40 CFR part 63, subpart BBBBBBB at 63.11585; 40 CFR part 63, subpart CCCCCCC at 63.11603. Consistent with other area source NESHAP notification requirements, we proposed that, for an existing source that reclassifies from major to area source status, the notification shall be submitted no later than 120 calendar days after the source becomes subject to the relevant area source NESHAP requirements. Regarding whether there are any other individual subparts that would warrant modification because initial notification requirements are in the past, commenters pointed at the initial notification requirements in many of the major source NESHAP subparts. They stated that if an area source were to revert back to major source status, these initial notification requirements would have been in the past. The EPA reviewed the initial notification provisions of all NESHAP subparts and is including in this final rule amendments to the initial notification requirements within most NESHAP subparts to include additional language so that the notification shall be submitted no later than 120 calendar days after the source becomes subject to the relevant NESHAP requirements. The EPA is amending the initial notification requirements in the following subparts: 40 CFR part 63, subpart G at 63.151(b)(2) (i), (ii) and (ii); subpart H at 63.182(b)(2)(i), (ii), and (iii); subpart L at 63.311(a); subpart M at 63.324(g); subpart N at 63.347(c)(1); subpart Q at

63.405(a)(1) and (2); subpart S at 63.455(a); subpart T at 63.468(a), (b), (c), and (d); subpart Y at 63.567(b)(2) and (3); subpart DD at 63.697(a)(1); subpart EE Table 1; subpart HH at 63.77(c)(1); subpart JJ Table 1; subpart KK at 63.830(b)(1)(i), subpart CCC at 63.1163(a)(3); subpart PPP at 63.1434(d) and (e), and at 63.1439(e)(3)(ii)(B) and (C); subpart QQQ at 63.1454(b); subpart UUU at 63.1574(b); subpart VVV at 63.1591(a)(1) and (2); subpart DDDD at 63.2280(b); subpart EEEE at 63.2382(b)(1) and (2); subpart FFFF at 63.2515(b); subpart GGGG at 63.2860(a); subpart IIII at 63.3110(b); subpart JJJJ at 63.3400(b)(1); subpart KKKK at 63.3510(b); subpart MMMM at 63.3910(b); subpart NNNN at 63.4110(a)(1); subpart OOOO at 63.4310(b); subpart PPPP at 63.4510(b); subpart QQQQ at 63.4710(b); subpart RRRR at 63.4910(b); subpart SSSS at 63.5180(b)(1); subpart TTTT at 63.5415(b); subpart UUUU, Table 7; subpart XXXX at 63.6009(b); subpart YYYY at 63.6145(b); subpart ZZZZ at 63.6645(b) and (d), subpart AAAAA at 63.7130(b) and (c); subpart BBBBB at 63.7189(b); subpart CCCCC at 63.7340; subpart DDDDD at 63.7545(b) and (c), subpart EEEEE at 63.7750(b); subpart FFFFF at 63.7840(b); subpart GGGGG at 63.7950(b) and (c); subpart HHHHH at 63.8070(b)(1); subpart IIIII at 63.8252(b); subpart JJJJJ, Table 8; subpart KKKKK, Table 9; subpart LLLLL at 63.8692(b), subpart MMMMM at 63.8816(b); subpart NNNNN at 63.9045(b), subpart PPPPP at 63.9345(b)(1); subpart QQQQQ at 63.9535(c); subpart RRRRR at 63.9640(b); subpart SSSSS at 63.9812(b); subpart TTTTT at 63.9930(b); subpart BBBBBB at 63.11086(e) and Table 3; subpart CCCCCC at 63.11124(a)(1), (b)(1), and Table 3; subpart HHHHHH at 63.11175(a); subpart PPPPPP at 63.11425(b) and (c); subpart QQQQQQ at 63.11432(b) and (c); subpart RRRRRR at 63.11441(a); subpart TTTTTT at 63.11469(a); subpart WWWWWW at 63.11509(a)(3); subpart XXXXXX at 63.11519(a)(1); subpart YYYYYY at 63.11529 (a); subpart AAAAAAA at 63.11564(a)(2); subpart BBBBBBB at 63.11585(b)(1); and subpart CCCCCCC at 63.11603(a)(1).

VI. Other Considerations

A. PTE Determination

In the MM2A proposal, the EPA included a background discussion associated with the HAP PTE determination. The discussion was intended to provide context for evaluating whether the EPA should include in the General Provisions to 40 CFR part 63 certain elements of the Federal Minor New Source Review Program in Indian Country, which included application content requirements in those rules as well as the proposed hierarchy of acceptable data and methods a source seeking reclassification would use to calculate and determine the source PTE. We received many comments regarding PTE determinations, including suggestions for clarification on how to do these calculations, which are already addressed in guidance. See section VII of this preamble for additional information regarding implementation of PTE limits and the EPA guidance addressing related topics. Importantly, at this time, the EPA is not taking final action on whether to include in the General Provisions a hierarchy of data and methods for calculating PTE. The EPA will continue to evaluate whether there is a need to issue guidance or rulemaking for such hierarchy and methods in the future.

In the MM2A proposal, the EPA requested comments on whether it would be appropriate to include in the General Provisions of 40 CFR part 63 the minimum requirements for the information that a major source of HAP must submit to its regulatory authority when seeking to obtain PTE limitations to reclassify as area sources under section 112 of the CAA, similar to the information included in a synthetic minor source permit application under Tribal Minor New Source Review. Most of the industry and state commenters asserted that regulatory authorities should retain authority to determine what a major source must submit to reclassify. They argued that these requirements already exist in federal, state, and local rules, and asking state and local governments to add new regulatory requirements onto programs that already provide for the creation and enforcement of synthetic minor limits would be an unnecessarily burdensome administrative resource drain. The EPA agrees with commenters that the addition of minimum requirements for the information that a major source of HAP must submit to its regulatory authority when seeking to obtain PTE limitations to reclassify as area sources under section 112 of the CAA ignores that permitting authorities already have permit application requirements under their programs. Also, the EPA has reconsidered that permit application requirements for PTE programs would be more appropriate under 40 CFR part 63, subpart E and is not including such requirements in the final rule. See section VII of this preamble. This position does not, however, alter how the EPA will apply the policy that the Agency has been following since 1995, which allows for any physical or operational limitation on the capacity of the stationary source to emit a pollutant (such as air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed), to be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or legally enforceable by a state or local permitting authority and practicably enforceable.

B. Reclassification Process and Permitting

The proposal addressed questions from sources and permitting authorities regarding permit process, mechanisms, and the requirements for reclassifying to area source status for 40 CFR part 70 sources. These questions were brought to our attention per our request in the MM2A Memorandum about specific situations that may need to be considered at proposal. The purpose of the discussion was to inform stakeholders about our expectations on how the reclassification process will work in those specific circumstances. The EPA did not propose changes to any of the rules for the permitting programs or to their interpretation. Below, we clarify the related proposal preamble discussion, since it may have introduced ambiguity about our interpretation of the regulations.

Stakeholders asked the EPA to clarify whether a reclassified source continues to have an obligation to comply with the major source requirements in their title V permit that were included solely to comply with the OIAI policy. These scenarios consisted of sources that no longer have the maximum capacity to emit HAP in amounts that exceed major source thresholds because of physical or operational limitations but whose title V permit still includes major source NESHAP requirements. (Often, the operational limitations are enforceable limitations the source has taken to avoid major source requirements in the future, in agreement with the OIAI policy.) The proposal's preamble acknowledged that in that case the source is an area source under the CAA section 112 definition, but it still must comply with its title V permit terms and conditions until the permit is revised or revoked in agreement with the title V permitting authority that issued the permit. The proposal's preamble advised that sources must follow the permitting authority's procedures for permit modification or closure. We continue to stand by our view that the permitting

authority will be in the best position to help a source decide on the appropriate procedures under the specific program rules to reconcile permitting obligations.

The preamble illustrated, with examples, how situations may differ and that we expect those differences to require different procedures. The proposal concluded that in a hypothetical situation when the major source NESHAP permit terms are relied upon to demonstrate compliance with some other applicable requirement (*e.g.,* in the case of streamlining the permit conditions), concurrently with their removal, the permitting authority may need to reevaluate the MRR for applicable requirements remaining in the permit and that the regulations in 40 CFR part 71 would require a significant modification to add these requirements to a title V permit. With regard to this advice, commenters argued that the EPA misspoke in the proposal as to the appropriate process for 40 CFR part 71 sources. The commenters argued that revising the 40 CFR part 71 permit to reflect a change in applicable requirements may not always require a significant modification to a title V permit, and the EPA provided no explanation in the proposal for this cursory conclusion relative to 40 CFR part 71. The EPA first clarifies that the explanation in the proposal about the procedures that apply to the changes in the scenarios presented reflect the EPA's current view regarding the 40 CFR part 71 permitting authority for a general case and does not imply that a particular situation may not merit a different treatment based on the facts and the 40 CFR part 71 regulations. The basis for the EPA conclusion in the preamble is that removing non-applicable NESHAP requirements would almost always involve significant changes to monitoring, recordkeeping, and/or reporting, and, thus, the modification would not qualify as a minor modification under 40 CFR 71.7(e)(1)(i)(2). This is especially true if revised monitoring requirements must be added to substitute for removed NESHAP monitoring requirements. However, we recognize that the procedures will generally depend on the program regulations and the facts of the situation. While the commenter does not provide a compelling argument to change our view on the permit modification procedures that would most likely apply for removing no-longer-applicable requirements from a 40 CFR part 71 permit, a source is free to show that in its situation the changes to existing monitoring, reporting, or recordkeeping, etc., due to the removal of the no-longer-applicable requirements are not significant. Importantly, the EPA did not propose changes to, and this final rule does not make any changes to, the 40 CFR part 70 or 71 rules and is not prejudging any future proposed process for modifying any 40 CFR part 71 permits.

The EPA received multiple comments regarding the public notice and comment procedures associated with reclassification. As discussed below in section VII, the EPA is not taking action on the proposed effectiveness criteria for PTE limits at this time and is continuing to consider the comments received on this aspect of the MM2A proposal. The EPA intends to take final action on this aspect of the MM2A proposal in a separate final action at a later date. Notwithstanding this, on the issue of public notice and comment procedures currently in use for reclassifications, the EPA reiterates that, consistent with our long-standing policy, regulatory agencies implement public notice and comment procedures for state, local, and tribal programs as required under their regulations and statutes. The authority under which the PTE limits are issued contain issuance procedures, including any procedures for public notice and comment. Importantly, regulatory authorities use different issuing mechanisms depending on the complexity of the PTE limits required for the situation and the pollutants addressed. Typically, states issue enforceable PTE limits for individual sources in a SIP construction permit or a synthetic minor type of operating permit (*e.g.,* operating permits other than title V permit). States can also utilize less burdensome mechanisms for limiting PTE, such as general permits for source categories, permits by rule, or registration programs, as appropriate. Regardless of the mechanism used to issue an enforceable PTE limit, the regulatory agency must follow the applicable procedures for that mechanism, including providing for public notice and comment when required.

Some commenters on the proposal asserted that the EPA had failed to analyze federalism implications of the proposal. According to the commenters, states also rely on title V permitting fees to support permitting, monitoring, and enforcement of title V sources, and the EPA had not considered how states will do so with the loss of title V funds since area sources are frequently exempted from title V. The commenters stated that the EPA had a duty to consult with state and local governments for proposed rules with federalism implications and substantial compliance costs. The EPA disagrees that this action imposes substantial compliance costs to state and local governments. As the EPA explained in section IV of this preamble, the OIAI policy imposed a time constraint on the ability of a source to change its status for purposes of applicability with CAA section 112 standards that is not found in the statute. This action simply implements the plain language reading of the statutory definitions of major source and area source which contain no language fixing a source's status at any particular point in time and contain no language suggesting a cutoff date after which the source's status cannot change. This rule explains what sources must do if and when they elect to reclassify and does not change the standards established under CAA section 112 nor it changes the permitting authority programs that are used for processing reclassifications.

VII. Interim Ministerial Revision of 40 CFR Part 63 PTE Definition

The definition of PTE in 40 CFR 63.2 interprets the statutory term ''potential to emit'' found in the definition of a major source in section 112 of the CAA and provides a legal mechanism for sources that wish to restrain their emissions to avoid triggering major source requirements. Under the PTE definition in 40 CFR 63.2 promulgated in 1994, any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.[21] In *National Mining Association (NMA)* v. *EPA,* 59 F.3d 1351 (D.C. Cir. 1995), the D.C. Cir. remanded the definition of ''potential to emit'' found in 40 CFR 63.2 to the EPA to justify the requirement that physical or operational limits be ''federally enforceable.'' The *NMA* decision confirmed that the EPA has an obligation to ensure that limits considered in determining a source's PTE are effective, but it stated that the Agency had not adequately explained how ''federal enforceability'' furthered effectiveness. 59 F.3d at 1363–1365.

In the MM2A proposal, the EPA proposed specific criteria that PTE limits must meet for these limits to be effective. The EPA also proposed to amend the definition of ''potential to

[21] See 40 CFR 63.2 definition of ''federally enforceable'' available at *https://ecfr.io/Title-40/se40.11.63_12.*

emit'' in 40 CFR 63.2 accordingly by removing the requirement for federally enforceable PTE limits and requiring instead that HAP PTE limits meet the effectiveness criteria of being both legally enforceable and practicably enforceable. The EPA also proposed to amend 40 CFR 63.2 to include the definitions of ''legally enforceable'' and ''practicably enforceable'' described in the MM2A proposal. The EPA then took comment on the effectiveness criteria and the proposed amendments to 40 CFR 63.2.

The EPA received significant comments from many stakeholders on the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. One of the main concerns raised by stakeholders in their comments is the interactions and effects of the proposed amendments with other CAA programs, including prevention of significant deterioration (PSD), NSR, SIP, and title V, and the impacts of the proposed amendments to existing state, local, and tribal agency rules. The EPA is not taking action on the proposed amendments to 40 CFR 63.2 at this time and is continuing to consider the comments received on this aspect of the MM2A proposal. The EPA intends to take final action on this aspect of the MM2A proposal in a separate final action at a later date.

In the meantime, the EPA is making an interim ministerial revision to the definition of ''potential to emit'' in 40 CFR 63.2. Specifically, the Agency is removing the word ''federally'' from the phrase ''federally enforceable'' in the definition of ''potential to emit.'' A few points need to be made to explain what this interim ministerial revision is and what it is not. First, this revision is not the EPA's final decision and should not be read to suggest that the EPA is leaning towards or away from any particular final action on this aspect of the proposal. This revision is simply an interim revision to cover the period of time while the EPA continues to consider the comments on this aspect of the proposal and until the Agency takes final action with respect to the proposed amendments concerning the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. Second, this revision is ministerial because it merely reflects the *NMA* decision, which held that the EPA had not explained why a PTE limit had to be ''federally enforceable'' to be considered as the basis for reclassifying a major source to area source status. See *NMA* v. *EPA,* 59 F.3d at 1363–1365.[22] Again, this revision does not represent a final decision by the EPA or signal any direction that the EPA is intending to take in a future final action. It simply makes a ministerial change to the regulatory text that appears in the CFR to reflect the *NMA* decision.

Further, this interim ministerial revision does not alter any rights or legal consequences and simply preserves the status quo that has been in effect since the late 1990s. This revision will not change how the EPA will apply the transitional policy that the Agency has been following since 1995. By removing the word ''federally,'' the EPA hopes to avoid any ongoing confusion about how the transitional policy is applied. This transitional policy allows for any physical or operational limitation on the capacity of the stationary source to emit a pollutant (such as air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed) to be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or legally enforceable by a state or local permitting authority and practicably enforceable.

For implementing reclassifications in the interim, state programs may use PTE guidance they have developed for their programs and/or may also continue to rely on the EPA PTE guidance. As noted in the proposal preamble, there is a substantial body of EPA guidance and administrative decisions relating to PTE and PTE limits.[23]

VIII. Summary of Cost, Environmental, and Economic Impacts

In this section, the EPA summarizes the findings of several analyses that we conducted to assess the cost, environmental, and economic impacts of the final rule. It is important to restate that the final rule does not *require* any source to reclassify to area source status. Each source must assess its own circumstances to determine whether it is feasible and advantageous to undergo the reclassification process. The unique nature of each source's decision process makes it difficult for the EPA to determine the number and type of sources that may choose to reclassify under this rule. Because of this, the EPA can only present illustrative analyses concerning the impacts of this final rule.

For the final rule analyses, based on comments received on the data used for the overall analyses for the MM2A proposal, the EPA updated the MM2A database, removed double counting of facilities, and expanded the number of source categories evaluated for cost, environmental, and economic impacts. The updated MM2A database contains data from the 2017 National Emissions Inventory (NEI), data collected to conduct residual risk and technology reviews (RTR) under sections 112(d)(6) and 112(f) of the CAA (henceforth referred to as RTR modeling file data), and data from the EPA's Enforcement and Compliance History On-line (ECHO) database. The EPA used the RTR modeling file data and NEI data to estimate the number of facilities in each of 74 source categories and the number of sources within those facilities that could be eligible to reclassify from major to area source status. We used the ECHO data to estimate the number of facilities in 27 additional source categories for which we did not have RTR modeling file data, and we then used an extrapolation methodology to approximate the number of facilities within these 27 source categories that could be eligible to reclassify from major to area source status.[24]

[22] The EPA notes that in two subsequent decisions, the D.C. Cir. relied on the *NMA* decision and presented no additional legal analysis. In *Chemical Manufacturers Assoc,* v. *EPA,* 70 F.3d 637 (D.C. Cir. 1995), the D.C. Cir. reviewed a ''federally enforceable'' limitation in the PTE definition in the PSD and NSR regulations and both vacated and remanded the federal enforceability requirement in those provisions with a three sentence decision that provided no additional analysis and simply referenced the *NMA* decision: ''Petitioners challenge regulations of the Environmental Protection Agency that define the term ''potential to emit'' to exclude controls and limitations on a source's maximum emissions capacity unless those controls are federally enforceable. We recently decided a similar challenge in *National Mining Association* v. *EPA,* 313 U.S. App. D.C. 363, 59 F.3d 1351 (D.C. Cir. 1995). Accordingly, it is *ordered* and *adjudged* that the regulations are vacated and the case is remanded to the Environmental Protection Agency for reconsideration in light of *National Mining Association.*'' In *Clean Air Implementation Project* v. *EPA,* No 96–1224 1996 WL 393118 (D.C. Cir., Jun. 28, 1996) (*CAIP*), the D.C. Cir. also vacated and remanded the federal enforceability requirement in the title V (40 CFR part 70) regulations.

[23] There is a substantial body of EPA guidance and administrative decisions relating to PTE and PTE limits. *E.g.,* see generally, Terrell E. Hunt and John S. Seitz, ''*Limiting Potential to Emit in New Source Permitting*'' (June 13, 1989); John S. Seitz, ''*Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act*'' (January 25, 1995); Kathie Stein, ''*Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits*'' (January 25, 1995); John Seitz and Robert Van Heuvelen, ''*Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit*'' (January 22, 1996); ''*In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,*'' Order on Petition No. II–2001–05 (April 8, 2002) at 4–7.

[24] There are about 114 major source categories subject to NESHAP. The EPA determined that 13 source categories are not impacted by this rule and did not include these categories in the costs or impacts analyses. For the remaining categories, 74 were analyzed using RTR modeling file data while 27 were analyzed using an extrapolation approach.

As a result of updates to the MM2A database, the number of facilities estimated to be subject to major source NESHAP has been reduced from 7,920 at proposal to 7,187. The detailed methods applied to update the MM2A database and estimate the number of facilities subject to major source NESHAP for purposes of the final rule analyses are described in the TSM titled ''*Documentation of the Data for Analytical Evaluations and Summary of Industries Potentially Impacted by the Final Rule titled Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,*'' which is included in the docket for this action.

A. Analytical Scenarios

The potential costs and cost savings presented in the final cost memorandum and RIA are the result of an illustrative assessment. It is unknown how many major sources would choose to take enforceable PTE limits to levels below the MST and reclassify to area source status. If a source voluntarily chooses to reclassify to area source status, it will no longer be subject to previously applicable major source NESHAP, which may result in compliance cost savings for the source. However, the source will be required to comply with any applicable area source NESHAP in response to reclassification, which could result in some compliance costs. Facilities will also have costs associated with applying to modify the facility's operating permit when they reclassify from major to area source status. Regulatory agencies will also have costs to process those applications. Overall, the sum of costs and cost savings of all actions taken to reclassify under this rule is expected to be a net annual cost savings.

To illustrate the potential emissions changes, costs, and economic impacts of the final rule, we analyzed the same three illustrative analytical scenarios as at proposal. The primary analytical scenario analyzes the sources with actual emissions below 75 percent of the MST (7.5 tpy of a single HAP or 18.75 tpy of all combined HAP). Alternative scenario 1 analyzes facilities with actual emissions below 50 percent of the MST (5 tpy for a single HAP and 12.5 tpy for all HAP). Alternative scenario 2 analyzes sources with actual emissions between 75 percent and 125 percent of the MST (12.5 tpy for a single HAP and 31.25 tpy for all HAP).

The primary analytical scenario considers that sources will normally build a compliance margin into their operations to ensure that their emissions remain below the MST and they do not revert to major source status. Some commenters suggested that the EPA should conduct its analyses based on the assumption that all sources will emit up to the MST, or the Agency should analyze a scenario with a smaller compliance margin (*i.e.,* at 90 percent of the MST). The appropriate compliance margin to apply is specific to each facility and its operating experience. Some reclassified sources may choose to operate 10 percent below the MST while others may choose to maintain a larger compliance margin to ensure they do not jeopardize their area source status. In addition, some facilities operating slightly above the MST may opt for reclassification to area source status by taking PTE limitations and reducing emissions to a level below the MST. Therefore, we provide illustrative analyses of potential changes in costs and emissions at various compliance margins. The level of actual emissions relative to the MST at which facilities may consider participating in the MM2A reclassification process is actually a continuous line from some level below the MST to a reasonable level above the MST, and our illustrative analyses include three points on this continuous line to estimate the potential impacts of different compliance margins on participation under this final rule. In this section, we present the primary illustrative scenario and two alternative scenarios, one above and one below the primary scenario.

While different compliance margins could be evaluated, the EPA has greater confidence in the primary illustrative scenario where sources at or below 75 percent of the MST can maintain emissions below the MST and thus may be more likely to opt for reclassification. Sources in the MM2A database operating between 50 and 75 percent of the MST, and those operating between 75 and 125 percent of the MST, are also addressed in our analyses, in the first and second alternative scenarios, respectively. These alternative scenarios address the impacts of sources at alternative compliance margins as suggested by commenters. In addition to these analytical scenarios, the updates to the MM2A database detailed in the TSM titled ''*Documentation of the Data for Analytical Evaluations and Summary of Industries Potentially Impacted by the Final Rule titled Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*'' presents the incremental count of facilities at 90 and 100 percent of the MST to illustrate a comparison of the difference between the number of facilities in the database operating in the primary scenario and these alternative views suggested by commenters.[25]

B. Cost Analysis

For the illustrative cost analysis conducted for the final rule, the EPA analyzed: (1) Facilities with actual emissions below each analytical threshold, (2) the costs that we estimated to be incurred by the facilities associated with permitting actions necessary to obtain area source status, (3) the costs that we estimated to be incurred by permitting authorities associated with permitting actions necessary to process permit applications for facilities requesting reclassification, and (4) cost-savings estimates based solely on estimated reductions in labor burden related to MRR requirements that would either no longer apply or would change based on the specific requirements in the major source NESHAP rules and any area source NESHAP rules that apply to a particular source category. As part of the overall analysis of the 125-percent alternative scenario, we examined the potential control costs for major sources in eight source categories that may opt to further reduce HAP emissions in order to reclassify to area source status. Details of this potential control cost analysis are presented in the TSM titled ''*Analysis of Illustrative 125% Scenario for MM2A Final—Potential Cost Impacts from HAP Major Sources Reducing Emissions as part of Reclassifying to HAP Area Sources*'' which is available in the docket for this action. The details of the cost analysis are presented in the TSM titled ''*Documentation of the Compliance Cost Savings Analysis for the Final Rulemaking Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*'' and also are summarized in the RIA. All of these documents are available in the docket for this action.

The illustrative cost analysis presents estimates of the final rule's net costs (or savings) over two time periods. The first estimate assumes that all potential reclassifications that might occur as a result of this rulemaking with take place within 1 year of promulgation (*i.e.,* by 2021). The second estimate assumes that not all the reclassifications will occur within 1 year after the MM2A rule is finalized, and instead are assumed to occur over a more extended period of time.

[25] See the Response to Comments document for a detailed rationale for the selection of analytical scenarios for the final rule and the EPA's reasoning for not evaluating impacts at 90 percent of the MST.

For the first illustrative cost analysis, Year 1 costs include the cost for each facility to apply for and obtain an area source or synthetic minor permit or a title V permit modification and for the regulatory agencies to review and approve those applications and issue the permits. These permitting costs to the facilities and state agencies are one-time costs and occur only in Year 1 when a facility reclassifies. Then, in Year 2 and beyond, facilities do not incur the cost to process a reclassification and the net costs (or savings) are the sum of the projected annual cost savings from not having to comply with the major source NESHAP MRR requirements and the estimated cost of compliance with applicable area source NESHAP requirements. These projected savings are expected to continue for each reclassified facility each year beyond the second year, for there is no time specified for review of reclassifications under the CAA. The permitting costs to the facilities and the permitting costs to the regulatory agencies are not included in the second year because it is assumed the permitting changes are all completed in the year the source submits an application for reclassification and no action is needed in subsequent years in relation to this action.

However, based on the number of potential reclassifications discussed in this analysis, we can confidently conclude that not all of the reclassifications will occur in the first year after the rule is issued. The timing of a reclassification is influenced by several considerations, including time for facilities to determine whether it is in their best interest to reclassify, time to prepare applications for reclassification, and time for permitting authorities to review applications and process reclassification requests. There is also time allotted for the EPA to review determinations by permitting authorities and for public participation in the process. Therefore, it is reasonable to assume that not all the reclassifications will occur within 1 year after the MM2A rule is finalized, and instead the reclassifications assessed in the cost analysis are assumed to occur over a more extended period of time. To illustrate the spread of costs over time, the EPA also presents a 5-year outlook of costs and cost savings.

A summary of the results of the potential costs and cost savings across different types of source categories from the illustrative cost analysis for Year 1 and Year 2 and beyond is presented in Table 2. Results are presented for the 74 source categories evaluated using RTR modeling data and the 27 source categories that were evaluated using the extrapolation approach.

TABLE 2—ILLUSTRATIVE NET COSTS (OR COST SAVINGS) OF FINAL MM2A RULE FOR THE PRIMARY ANALYTICAL SCENARIO

Source category coverage	Total number of facilities subject to major source NESHAP	Facilities with actual emissions below 75 percent of the MST [1]	Potential net annual costs (or cost savings) in 2017$ for Year 1 [2 4] and Year 2 [3 4] and beyond
Source categories with RTR data (74 categories)	4,068	1,614	$10,147,526 (56,137,515)
Extrapolated source categories (24 categories) [5]	1,294	266	1,680,049 (9,030,684)
Industrial, commercial, and institutional boilers and process heaters (3 categories) [5]	1,821	687	4,319,300 (25,456,533)
Total (101 source categories)	7,183	2,567	16,146,875 (90,624,732)

[1] Results are for sources with actual emissions below 75 percent of the MST (*i.e.,* 7.5 tpy for one HAP and 18.75 tpy for combined HAP).
[2] Costs incurred by sources and permitting authority assumed in year 1.
[3] Year 2 impacts are also representative of annual impacts to all reclassified major sources in all subsequent years in the future. Numbers in parenthesis are negative and reflect cost savings.
[4] The analytic timeline begins in 2021 and continues thereafter for an indefinite period. Year 1 impacts are those for 1 year after reclassification of a major source with reclassifications beginning in 2021, and year 2 impacts are those for the second year after reclassification of a major source and annually afterwards.
[5] Extrapolated using the EPA's ECHO data.

Table 3 presents the illustrative potential cost (or cost savings) impact of the final rule over time for the primary analytical scenario. We present the impacts over a 5-year outlook that assumes all sources in our analysis will reclassify over that timeframe and that the reclassifications will be evenly distributed over that period.

TABLE 3—ILLUSTRATIVE NET COSTS (OR COST SAVINGS) OF THE FINAL MM2A RULE OVER TIME FOR THE PRIMARY ANALYTICAL SCENARIO *

Source category coverage	Distribution of costs (or cost savings) over a 5-year period ($2017)				
	2021	2022	2023	2024	2025+
Source categories with RTR data (74 categories)	$2,536,882	$(11,497,497)	$(25,531,875)	$(39,566,254)	$(56,137,515)
Extrapolated Source Categories (24 categories)	420,012	(1,837,658)	(4,095,329)	(6,353,000)	(9,030,684)

TABLE 3—ILLUSTRATIVE NET COSTS (OR COST SAVINGS) OF THE FINAL MM2A RULE OVER TIME FOR THE PRIMARY ANALYTICAL SCENARIO *—Continued

Source category coverage	Distribution of costs (or cost savings) over a 5-year period ($2017)				
	2021	2022	2023	2024	2025+
Industrial, Commercial, and Institutional Boilers and Process Heaters (3 categories)	1,079,825	(5,284,308)	(11,648,441)	(18,012,574)	(25,456,533)
Total (101 Source categories)	4,036,719	(18,619,464)	(41,275,647)	(63,931,830)	(90,624,732)

* These results reflect the aggregate of costs and cost savings for all facilities by year of impact. Estimates for 2025 are also representative of all subsequent years.

The EPA also calculated the PV of the illustrative cost savings for the main illustrative scenario. The PV is the value of a stream of impacts over time, discounted to the current (or nearly current) year. The PV of the cost savings for the primary illustrative scenario is $0.86 billion (in 2017 dollars) at a discount rate of 7 percent, which is discounted to 2020. At a discount rate of 3 percent, the PV is $1.50 billion (in 2017 dollars), again discounted to 2020. Another measure of the annual cost savings to complement the estimates in Table 2 is the EAV. This annual impact estimate is calculated consistent with the PV. The EAV is $67 million (2017 dollars) at a 7-percent discount rate for the primary scenario. At a 3-percent discount rate, the EAV is $75 million (2017 dollars). The PVs and EAVs for each alternative scenario and discount rate in 2017 and 2016 dollars can be found in the RIA for the final rule.

C. Environmental Analysis

At proposal, to assess the potential environmental emissions impacts associated with the reclassification of sources, the EPA reviewed permits and other information for 34 sources that had reclassified to area source status consistent with the EPA's plain language reading of the CAA section 112 definitions of ''major'' and ''area'' source since January 2018. The review of these reclassifications provided a representation of the potential real-world impacts on emissions by looking at the facts and circumstances of actual reclassification actions. In addition to the evaluation of the reclassification actions, at proposal the EPA also performed an illustrative assessment for six source categories: Wood Furniture Manufacturing Operations, Surface Coating of Metal Cans, Surface Coating of Miscellaneous Metal Parts and Products, Wet-Formed Fiberglass Mat Production, Hydrochloric Acid Production, and Non-Gasoline Organic Liquids Distribution. The analysis of these six source categories was informative in some respects but was only illustrative and speculative in nature and only presented a range of possible outcomes dependent on the assumptions that we made in the assessment. The EPA received numerous comments on the emissions analyses presented at proposal. Many commenters argued that the EPA had failed to adequately assess the effects of the rule on HAP emissions and did not perform any health impact analysis. These commenters argued the EPA did not include enough source categories in the emissions analysis at proposal to draw reasonable conclusions. Commenters also opined that the analysis of the actual reclassifications relied on a small sample, and a few speculated that we had ''cherry picked'' permits to review.

For the final rule, the EPA expanded the emissions impact analysis in several ways to address these comments. We enhanced the MM2A database to include more source categories with detailed data and improved the methodology for analysis based on public comments. We also expanded the review of reclassification actions to include the review of 35 additional reclassifications received from March 2019 through February 2020.[26] This allowed us to more than double the number of reclassifications reviewed for the final rule. The details and results of the analysis of 69 reclassification actions are summarized below and presented in detail in the Review of Reclassification Actions TSM for the final rule, which is available in the docket for this action.[27] The EPA received several comments on the permit reviews completed for the proposal; we have considered the input from commenters in the review of the reclassifications included in the final analysis. Finally, we also expanded the illustrative analysis of impacts on the program from the six source categories reviewed at proposal to 72 source categories. The 72 source categories included in the illustrative analysis represent a broad array of the sources subject to major source NESHAP requirements and the types of sources that could seek reclassification to area source status under this final rule. We discuss the reclassification actions reviewed and the illustrative analyses of source categories in detail below. Our analysis indicates that 68 of the 69 sources that have reclassified will not increase emissions. In addition to this review of actual reclassification actions, the EPA also prepared an illustrative analysis for 72 source categories in the major source NESHAP program (114 total) to evaluate the potential emissions impacts. After consideration of the information and data available for the illustrative emissions analysis, we found that 65 source categories will not change emissions as a result of the rule. For the other seven source categories, there was a potential for (but not a certainty of) emissions increases based on conservative assumptions that are likely to overstate the change in emissions at some facilities. As is discussed throughout this preamble and in the TSMs and RIA, any analysis of impacts includes uncertainties, and each subsequent level of analysis compounds the uncertainties to a much greater level. Given the compounding of uncertainty and illustrative nature of the analysis, further quantification of effects of these emissions increases would not be reliable or informative. Instead, we present a qualitative discussion of benefits and disbenefits in the *benefits/disbenefits* subsection of impacts below. Further information of the analyses and findings are presented below.

To assess the potential for emissions impacts for the 69 reclassified sources, the EPA focused its review on the

[26] The EPA obtained information about these reclassifications through the normal course of business with the permitting authorities that notify us of permitting actions within their jurisdictions.

[27] See TSM titled ''*Review of Reclassification Actions for the Final Rulemaking ''Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act*'' available in the docket of this rulemaking.

enforceable conditions associated with the PTE limitations applicable to the emission units previously subject to major source NESHAP requirements. The EPA review focused on whether these emission units at these facilities continue to have enforceable conditions that are either the same as or consistent with the previous applicable major source NESHAP compliance obligations. Summaries of the permit reviews and emissions evaluations are presented in the Review of Reclassification Actions TSM, which is available in the docket for this action.

The EPA's findings from its review of permits for the reclassifications indicate that of the 69 sources that reclassified to area source status, 68 achieved and maintain area source status by operating the emission controls or continuing to implement the practices they used to comply with the major source NESHAP requirements; we expect no emissions increases due to reclassification for these sources. While permitting authorities could allow for changes in the enforceable conditions or practices that the sources used to comply with major source NESHAP requirements that could lead to emissions increases, this happened for only one source out of the 69 actual reclassifications. Below is an overview of the EPA's findings from the permit reviews for these 69 reclassifications.[28]

Of the 69 sources that have reclassified, 45 sources are in a coating type source category; 11 are chemical sources; six are fuel combustion/boiler sources; five are oil and gas sources and two are heavy industry sources. (See Tables 3 and 4 of Review of Reclassification Actions TSM available in the docket for this action). Of the 69 reclassifications reviewed, 14 sources are classified as true area sources because these sources are no longer physically or operationally able to emit HAP above the MST. Of the 55 sources with enforceable PTE limitations, 15 sources had obtained those enforceable PTE limitations before January 2018 (pre-existing PTE limitations) while 40 obtained the PTE limitations after January 2018 in order to reclassify to area source status (new PTE limitations).

Of the 45 coating sources reviewed, 39 used compliant materials (low-HAP/no-HAP) to meet applicable major source requirements before reclassification, and their continued use of compliant materials is an enforceable condition after reclassification. Five sources relied on the use of regenerative thermal oxidizers (RTOs) to meet applicable major source requirements and maintain enforceable conditions requiring the operation of the RTOs after reclassification. As described in detail in the TSM, the EPA does not expect emissions increases from these sources due to reclassification to area source status. Finally, one source used compliant materials to meet applicable major source requirements, but after reclassification requested a change to use a HAP-containing formulation with accompanying process limitations to maintain area source status. Had the change in formulation happened while the source was a major source, the source would have had to use an add-on control device to comply with the applicable NESHAP. For this source, the change in formulation after reclassification could lead to emissions increases of 4.3 tpy of xylene or 18.75 tpy of combined HAP.

Of the 11 chemical sources reviewed, four sources are miscellaneous organic chemical manufacturing facilities; these relied on a variety of control technologies (including RTOs, scrubbers, and flares) and work practices to maintain compliance before reclassifying and continue to have enforceable conditions requiring the control technologies after reclassification. Three sources are gasoline distribution sources that relied on vapor collection and vapor flare/vapor combustion to meet applicable major source requirements before reclassification, and these controls are enforceable conditions to maintain compliance after reclassification. Three sources are off-site waste recovery facilities that relied on control technologies such as vapor balance/recovery systems, condensers, and scrubbers to meet applicable major source requirements before reclassification. All these sources continue to rely on the same (or additional) requirements as enforceable conditions to maintain compliance after reclassification and the EPA does not expect emissions increases due to reclassification to area source status. Finally, one source is a former hazardous waste combustor and cement facility that until 2015 fueled its cement kiln using collected hazardous and non-hazardous waste, using various control technologies to maintain compliance. This facility permanently removed all equipment associated with Portland cement manufacturing and took on a new primary role as a hazardous waste storage/transfer facility, using throughput limits and a carbon adsorption system to maintain compliance.

Of the six combustion/boiler sources reviewed, four made permanent operational changes (ceased combustion of coal and/or ceased operation of boilers) allowing the sources to reclassify to area source status. Another source had material and operational limitations prior to reclassification, both of which continue to be enforceable conditions after reclassification, and one source took additional operational restrictions on the usage of natural gas as the mechanism to constrain their emissions and PTE and reclassify to area source status. Three of these sources had emissions above MST before reclassifying; the reclassification of these three sources resulted in a HAP reduction of 56.9 tpy single HAP and 78.8 tpy total HAP.

All five oil and gas production and transmission sources reviewed relied on the use of control technologies (oxidation catalyst [enclosed combustion device] and flares) to meet applicable major source requirements before reclassification, and their continued use is an enforceable condition to maintain compliance after reclassification. One of these sources took additional restrictions on the amount of gas vented to the atmosphere to reclassify to area source status. Also, the reclassification of this facility prevented additional emissions that would have occurred if the source had remained a major source. As described in detail in the TSM, the EPA does not expect emissions increases from these sources due to reclassification to area source status.

Of the two heavy industry sources reviewed, one is a lime manufacturing plant and the other is a flexible polyurethane foam fabrication facility. The lime manufacturing facility, after reclassification, remains subject to other regulatory requirements, including PM emission limitations, the use of a baghouse, and monitored opacity as an operating limit via operation of a continuous opacity monitoring system. The flexible polyurethane foam fabrication facility relied on compliant

[28] The analysis of the actual reclassifications includes representation of some of the source categories subject to major source NESHAP requirements. While the actual reclassifications demonstrate a cross-section of the types of industries that have reclassified, we are unable to determine if this cross-section of industries is representative of all types of sources that may seek reclassification in the future. The illustrative emissions analysis includes a broader selection of source categories across similar sectors of the economy as these actual reclassifications (*i.e.,* chemical, energy, combustion, coatings, and heavy industry/manufacturing). While the illustrative analysis is representative with respect to a broader selection of industries in the major source program, we are unable to definitively determine whether the sources within those categories will seek reclassification. Thus, we cannot make a determination of the representativeness of the actual reclassifications.

materials, control technology (carbon adsorption systems), work practices, and operational limitations to meet applicable major source standards before reclassification and continues to rely on these as enforceable conditions to maintain compliance after reclassification. See the Review of Reclassification Actions TSM available in the docket for the detailed permit reviews and emissions evaluations.

In response to comments, for the final rule's illustrative emissions impact analysis, we have also updated the assessment conducted at proposal for six source categories and expanded our assessment to numerous additional source categories. We identified several source categories that are unlikely to experience a change in emissions as a result of MM2A. We also conducted an in-depth analysis of potential changes in emissions upon reclassification for many source categories where we have information. We also reviewed the updated operating permits for a variety of industrial processes to interpret likely response to the final MM2A rule. The details and results of the emissions analysis are summarized below and presented in detail in the illustrative emissions impact analysis TSM titled, ''*Documentation of the Emissions Analysis for the Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,*'' which is available in the docket for this action.[29]

The EPA considered many factors in assessing the potential emissions impacts from the various NESHAP source categories if facilities in these source categories were to reclassify to area source status. These factors include backstop measures from regulatory and technological limits, as well as limitations on growth for economic reasons. As for regulatory reasons, the EPA assessed, if sources were to reclassify, whether they would be subject to the same NESHAP requirements as before reclassification (which would be the case where the area source requirements are the same as the major source requirements), whether new area source NESHAP requirements will be applicable and how they impact emissions, whether there are NSPS requirements that apply to the source and control emissions at the same levels as the major source NESHAP requirements, and whether there are PSD/NSR/SIP requirements the effect of which will continue to control HAP emissions to the same extent. As for the technological and economic reasons, the EPA reviewed whether the measures used by the source to reduce emissions could be reversed or discontinued if sources were to reclassify to area source status. This includes, but is not limited to, changes in coating/adhesive formulations, fuel combustion technologies, and some level of backstop for emissions from add-on control technologies. Commenters stated that there are also other factors that will prevent emissions increases, including environmental management systems with which sources are engaged that require them to identify environmental impacts, set performance objectives, implement of standards for training and work practices, audit implementation of such standards, and take corrective action when deviations occur. Other commenters also mentioned that many sources are also required to meet Leadership in Energy and Environmental Design standards that incentivize efficient operations to minimize waste and energy usage, Occupational Safety and Health Administration requirements that protect workers from exposures to HAP and other pollutants, and toxics release inventory requirements. The commenters pointed out that these regulatory requirements continue to apply even if the source reclassifies, providing additional incentives for sources to not increase emissions. The EPA agrees with the commenters in that environmental management systems, even though they are voluntary and not regulatory in nature, will also provide additional incentive for some sources to maintain compliance with environmental legal obligations and not increase emissions.

Based on the EPA's illustrative analysis of potential emissions impacts from the 72 source categories, 65 source categories will either not be impacted by MM2A or are unlikely to experience any emissions changes for the reasons discussed in the above paragraph. After considering the information available for this illustrative analysis, we found that some facilities in seven source categories represented by detailed information from RTR modeling files in the MM2A database could increase emissions if they were to reclassify and were allowed to reduce operation of adjustable add-on controls. These facilities represent 7.9 percent of the facilities illustrated in the primary analytical scenario (*i.e.,* 128 facilities out of a total of 1,614 facilities in the primary analytical scenario), and 3.1 percent of all the facilities included in the analysis of the 72 source categories (*i.e.,* 128 facilities out of a total of 4,068 facilities operating in 72 source categories). Several of the source categories have only one or two facilities impacted, while three source categories have several facilities impacted. The facilities that we were able to assess are located in several states and are not clustered in close proximity to each other. The EPA was unable to evaluate the source categories included in the extrapolated approach used for the cost assessment due to insufficient information. Under alternative scenario 2, we determined that some facilities operating between 75 and 125 percent of the MST might opt to decrease emissions to reclassify to area source status as a result of the MM2A rule.

The EPA made several conservative assumptions when estimating the potential effect on emissions resulting from sources reclassifying from area to major source status. By ''conservative,'' we mean that these assumptions are likely to result in an overestimate of emissions changes. We detail these assumptions in the TSM referenced above.[30] Based on these conservative assumptions, the potential change in emissions in the illustrative analyses for seven source categories could be an increase ranging from 919 tpy to 956 tpy of HAP across the NESHAP program under the primary scenario.[31] In

[29] See TSM, ''*Documentation of the Illustrative Emissions Analysis for the Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,*'' available in the docket of this rulemaking.

[30] In general, the change in emissions is measured as the difference between PTE with compliance with the major source NESHAP and 75 percent of the MST (the maximum emissions assumed with a compliance margin for the primary scenario). Where the EPA does not have information on the PTE, we estimated the potential change in emissions as the difference between actual emissions and 75 percent of the MST. However, in some cases it is inappropriate to assume changes from minimal amounts of HAP (*i.e.* less than 1 tpy) up 75 percent of the MST as it represents a 100 times to 1,000 times increase in emissions (and production to the extent that production and emissions correlate). Given the production capacities at existing facilities along with economic constraints on growth, it is highly unlikely a facility would seek to increase emissions (and hence production) by 100-times to 1,000-times. Most mature industries will not experience tremendous economic growth, and some may experience a declining rate of production that impacts growth. Therefore, we assume a conservative measure of increase for facilities operating at very low levels of HAP of 10 times (*e.g.,* a facility operating at 0.5 tpy with not information on PTE would increase to 5 tpy). The measure for emission change in these instances could be higher or lower, but we selected 10 times to demonstrate a conservatively high level of potential emissions increase.

[31] The EPA also identified some facilities in the primary scenario that have an estimated PTE that is above the MST, yet their actual emissions are well below 75 percent of the MST. If these facilities opt to reclassify by taking a limit on their PTE down to a level below the MST, they will forego allowable

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addition, we also include an alternative set of assumptions in the coatings sector to reflect the findings from the review of reclassification permits that shows one facility could increase emissions. For this alternative coating scenario, we extrapolate those findings to other facilities in the coatings sector using a percentage that represents the portion of the reclassified facilities that might increase emissions (*i.e.,* 2.3 percent of the reclassified coatings facilities are assumed to increase emissions). Using this alternative assumption, we estimate a potential emissions increase of 302 tpy of combined HAP. The total range of potential emissions increases is, therefore, 919 tpy to 1258 tpy. Again, it is important to note that this is likely an overestimate of actual emissions increases, as we explain in more detail in the technical support memorandum. Under the alternative scenario 2, we estimate a potential reduction in HAP emissions of 183 tpy.

In addition to approximating the response to the MM2A rule, we present information regarding the magnitude of potential changes in HAP emissions and discuss changes in health impacts for benefit categories of criteria pollutants. The combination of these evaluations represents our assessment of benefits as defined in Office of Management and Budget (OMB) Circular A–4. Based on the results of the EPA's analysis of the reclassifications of 69 sources and the illustrative emissions analysis of 72 source categories, this final rule may potentially result in both emission reductions and increases from a broad array of affected sources. For the 69 sources that have already reclassified, we conclude there are no potential emissions increases (except for one source as discussed in section VIII above) and, therefore, no health impacts associated with nearly all of the known reclassification actions. For the one facility with a potential for an emissions increase, the change in emissions would be modest and is not likely to result in significant health impacts. Because the sources that the EPA has identified as having a potential for some level of emissions change (given the uncertainties stated throughout this preamble) are located across the United States, we do not observe a concentration of emissions changes in any particular location. However, to understand the potential impact of this rulemaking on tribal and environmental justice communities, we conducted two analyses on the 69 sources that have reclassified to area source status as described above (from which we found only one facility that could increase emissions).

In the first analysis, we looked at sources that were within 50 miles of an area of Indian country. Of the 69 sources that we analyzed, 30 are within 50 miles of at least one area of Indian country. Eleven of these are within 10 miles of an area of Indian country and three are in Indian country. However, after reviewing the reclassification of these sources, only one of these sources could have an increase in emissions. The potential increase will be minimal because the source has limited its emissions of and PTE HAP below the MST. Therefore, the EPA expects there will be no additional impact from reclassification to most areas of Indian country.

Second, we conducted a demographic analysis of the populations within 5 miles of these same 69 sources. We then compared the average concentrations of low-income and minority populations within that 5-mile radius and compared them to the national average to determine if these populations will be disproportionality impacted. In this analysis, we found that the 5-mile radius around 13 of the 69 sources has a minority population above the national average, and the area surrounding 39 sources has a low-income population above the national average. Although these results would suggest that low-income populations may be more impacted by this rule, as stated above, only one of these sources could have an increase in emissions. Therefore, the EPA expects there will be no additional impact to most of these communities.

Based on the results of the EPA's analysis of the reclassifications of 69 sources and the illustrative emissions impact analysis of 72 source categories, this final rule could result in both emissions reductions and increases from a broad array of sources located in different geographic areas. Uncertainties in estimating the number of sources that will seek reclassification, and the resulting permit conditions that will impact emissions are discussed at length in this section of this preamble. Therefore, we illustrate impacts using certain assumptions to allow readers to better understand the potential impacts of the MM2A rule associated with HAP pollutants. However, changes in HAP emissions may also impact other pollutants as well.

Benefits/disbenefits. Although the illustrative emissions analysis suggests that there may be both emissions increases and decreases, we are uncertain of the magnitude and geographic distribution of the changes in emissions resulting from this rulemaking across the broad array of sources that could reclassify. As discussed in the docket of this final rule, the emissions from different sources will be impacted in different ways, and small changes in certain non-HAP pollutants, such as fine particulate matter, can lead to significant changes in monetized benefits/disbenefits. Due to the voluntary nature of this action, we are unable to quantify changes in non-HAP emissions across these sources. In place of quantitative estimates of the number and economic value of the non-HAP pollutant changes, we instead discuss potential impacts in qualitative terms. Similar uncertainties related to the potential distribution of changes in HAP emissions resulting from this rulemaking also exist. As such, we also present a qualitative assessment of the potential impacts to human health and the environment from changes in selected HAP emissions. For more information on the qualitative characterization of benefits/disbenefits, please refer to the benefits analysis included in the RIA for this final action.

D. Economic Analysis

The economic impact analysis (EIA), an analysis that is included in the RIA, focuses on impacts at an industry level, and impacts are only calculated for the scenario that includes facilities with actual emissions below 75 percent of the MST. As part of the EIA, the EPA considered the impact of this rulemaking on small entities (small businesses, governments, and nonprofit organizations). Impacts are calculated as compliance costs (savings, in this instance) as a percentage of sales for businesses, and of budgets for other organizations. For informational purposes, the RIA includes the Small Business Administration's definition of small entities by affected industry categories (defined as North American Industry Classification System) and potential burden reductions from title V and other permitting programs. Since this rule significantly lessens the regulatory burden that resulted from the OIAI policy, no compliance costs are directly imposed upon industry categories as a result of this rule. We do, however, consider the potential costs some sources may incur to show

emissions under the major source program (*i.e.,* the reduction in PTE that the facility must take to modify their PTE to down to 18.75 tpy). This reduction in emissions can be viewed as foregone emissions under PTE. For the facilities analyzed where PTE (or allowable emissions) were identified, the foregone allowable emissions totals a reduction of about –227 tpy. Therefore, the potential change in emissions for the seven source categories with potential increases is a net change in emissions of 692–729 tpy.

compliance with applicable area source NESHAP after they reclassify to area source status. These avoided costs accrue because some reclassified sources will not be required to obtain or maintain a title V permit or continue meeting major source administrative requirements under section 112 of the CAA. Some of the facilities benefitting from this action are owned by small entities, and these entities may experience a more beneficial impact than the large entities that will also experience a reduction in costs from the burden reductions that would take place as a result of this rule.

The results of the EIA for the primary scenario show that the annual cost savings per sales for all affected industries is around 0.05 percent, using the median of these annual cost savings per sales estimates calculated by industry, with sales averaging approximately $9.3 billion per affected industry, to determine average impact. The details of the EIA and impacts on employment, as well as results of the EIA for the other two alternative scenarios, are presented in the RIA of the final rule, which is available in the docket for this action.

IX. Statutory and Executive Order Reviews

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

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

This action is an economically significant regulatory action that was submitted to OMB for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, the RIA for the final MM2A rule, is available in the docket and is summarized in section I of this preamble.

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

This action is considered an Executive Order 13771 deregulatory action. Details on the estimated potential net cost savings of this final rule can be found in the EPA's analysis of the potential costs and benefits associated with this action (see the RIA for the final rule, which is in the docket for this action).

C. Paperwork Reduction Act (PRA)

This action does not impose any new information-collection burden under the PRA. Specifically, this rule requires the electronic reporting of the one-time notification already required in 40 CFR 63.9(j) in the case where the facility is notifying of a change in major source status. OMB has previously approved the information collection activities contained in the existing regulations. These amendments would neither require additional reports nor require that additional content be added to already required reports. Therefore, this action would not impose any new information-collection burden. Furthermore, approval of an Information Collection Request (ICR) is not required in connection with these final amendments. This is because the General Provisions do not themselves require any reporting and recordkeeping activities, and no ICR was submitted in connection with their original promulgation or their subsequent amendment. Any recordkeeping and reporting requirements are imposed only through the incorporation of specific elements of the General Provisions in the individual NESHAP, which are promulgated for particular source categories that have their own ICRs.

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. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule.

Small entities that are subject to major source NESHAP requirements would not be required to take any action under this final rule; any action a source takes to reclassify as an area source would be voluntary. We expect that sources that reclassify will experience cost savings that will outweigh any additional cost of achieving area source status. The only cost that would be incurred by regulatory authorities would be the cost of reviewing a sources' application for area source status and issuing enforceable PTE limits, as appropriate. No small government jurisdictions operate their own air pollution control permitting agencies, so none would be required to incur costs under the final rule. In addition, any costs associated with the reclassification of major sources as area sources (*i.e.,* application reviews and PTE issuance) are expected to be offset by reduced reporting and recordkeeping obligations for sources that no longer must meet major source NESHAP requirements.

Based on the considerations above, we have, therefore, concluded that this action will relieve regulatory burden for all regulated small entities that reclassify to area source status. We also note that a small-entity analysis, prepared at the discretion of the EPA and reflecting the relief in regulatory burden, was prepared for this final rule and is included in the RIA, which is available in the public docket for this rulemaking. The results of this small-entity analysis show relatively small reductions in burden estimate annual costs (about 0.10 percent) as a percentage of sales using the median estimate as the average of impacts.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Since the impacts of this action are merely illustrative of potential outcomes, it precludes identifying additional costs to states as an unfunded mandate.

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 federal 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 has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. There are two tribes that currently implement title V permit programs and one that implements an approved TIP for minor source permitting, the latter of which also has a major source. As a result, these tribes may have additional permit actions if sources in their jurisdiction seek reclassification to area source status. Any tribal government that owns or operates a source subject to major

source NESHAP requirements would not be required to take action under this final rule; the reclassification provisions in the final rule would be strictly voluntary. In addition, achieving area source status would result in reduced burden on any source that no longer must meet major source NESHAP requirements. Under the final rule, a tribal government with an air pollution control agency to which we have delegated CAA section 112 authority would be required to review permit applications and to modify permits as necessary. However, any burden associated with the review and modification of permits will be offset by reduced Agency oversight obligations for sources no longer required to meet major source requirements.

For sources located within Indian country, where the EPA is the reviewing authority, unless the EPA has approved a non-federal minor source permitting program or a delegation of the Federal Indian Country Minor NSR Rule, the Federal Indian Country Minor NSR Rule at 40 CFR 49.151 through 49.165 provides a mechanism for an otherwise major source to voluntarily accept restrictions on its PTE to become a synthetic source, among other provisions. The Federal Indian Country Minor NSR Rule applies to sources located within the exterior boundaries of an Indian reservation or other lands as specified in 40 CFR part 49, collectively referred to as ''Indian country.'' See 40 CFR 49.151(c) and 49.152(d). This mechanism may also be used by an otherwise major source of HAP to voluntarily accept restrictions on its PTE to become a synthetic area HAP source. The EPA's FIP program, which includes the Federal Indian Country Minor NSR Rule, provides additional options for particular situations, such as general permits for specific source categories, to facilitate minor source emissions management in Indian country. Existing sources in Indian country may have PTE limits that preceded the EPA's FIP for minor sources and, for that reason, were issued in a 40 CFR part 71 permit or FIP permitting provision applicable to the Indian reservation.

At proposal, the EPA specifically solicited comment from tribal officials and, consistent with EPA policy, offered to consult with the potentially impacted tribes and other tribes upon their request. On June 27, 2019, the EPA sent consultation letters to four tribes that may be impacted by this action. The EPA also gave an overview of the proposed action on a call with the National Tribal Air Association on June 27, 2019, and held an informational webinar for tribes on July 24, 2019. In addition, we sent consultation letters to the 573 federally recognized tribes on September 27, 2019, and held an informational call with one tribe on October 21, 2019. The EPA did not receive any requests for tribal consultation on this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it implements the plain reading of the definitions of major source and area source as established by Congress in section 112 of the CAA.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that this final action is not likely to have any adverse energy effects.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. The final amendments to the General Provisions are procedural changes and do not impact the technology performance nor level of control of the NESHAP governed by the General Provisions.

L. Determination Under CAA Section 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of CAA section 307(d). Section 307(d)(1)(V) of the CAA provides that the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine.''

M. 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 a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Area sources, General provisions, Hazardous air pollutants, Major sources, Potential to emit.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR part 63 as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

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

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

Subpart A—General Provisions

■ 2. Amend § 63.1 by adding paragraph (c)(6) to read as follows:

§ 63.1 Applicability.

* * * * *

(c) * * *

(6) A major source may become an area source at any time upon reducing its emissions of and potential to emit hazardous air pollutants, as defined in this subpart, to below the major source thresholds established in § 63.2, subject to the provisions in paragraphs (c)(6)(i) and (ii) of this section.

(i) A major source reclassifying to area source status is subject to the applicability of standards, compliance dates and notification requirements specified in (c)(6)(i)(A) of this section. An area source that previously was a major source and becomes a major source again is subject to the applicability of standards, compliance dates, and notification requirements specified in (c)(6)(i)(B) of this section:

(A) A major source reclassifying to area source status under this part remains subject to any applicable major source requirements established under this part until the reclassification becomes effective. After the reclassification becomes effective, the source is subject to any applicable area

source requirements established under this part immediately, provided the compliance date for the area source requirements has passed. The owner or operator of a major source that becomes an area source subject to newly applicable area source requirements under this part must comply with the initial notification requirements pursuant to § 63.9(b). The owner or operator of a major source that becomes an area source must also provide to the Administrator any change in the information already provided under § 63.9(b) per § 63.9(j).

(B) An area source that previously was a major source under this part and that becomes a major source again is subject to the applicable major source requirements established under this part immediately upon becoming a major source again, provided the compliance date for the major source requirements has passed, notwithstanding any provision within the applicable subparts. The owner or operator of an area source that becomes a major source again must comply with the initial notification pursuant to § 63.9(b). The owner or operator must also provide to the Administrator any change in the information already provided under § 63.9(b) per § 63.9(j).

(ii) Becoming an area source does not absolve a source subject to an enforcement action or investigation for major source violations or infractions from the consequences of any actions occurring when the source was major. Becoming a major source does not absolve a source subject to an enforcement action or investigation for area source violations or infractions from the consequences of any actions occurring when the source was an area source.

* * * * *

■ 3. Amend § 63.2 by revising the definition ''Potential to emit'' to read as follows:

§ 63.2 Definitions.

* * * * *

Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is enforceable.

* * * * *

■ 4. Amend § 63.6 by revising paragraphs (b)(7) and (c)(1) and (5) to read as follows:

§ 63.6 Compliance with standards and maintenance requirements.

* * * * *

(b) * * *

(7) When an area source increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source, the portion of the facility that meets the definition of a new affected source must comply with all requirements of that standard applicable to new sources. The source owner or operator must comply with the relevant standard upon startup.

* * * * *

(c) * * *

(1) After the effective date of a relevant standard established under this part pursuant to section 112(d) or 112(h) of the Act, the owner or operator of an existing source shall comply with such standard by the compliance date established by the Administrator in the applicable subpart(s) of this part, except as provided in § 63.1(c)(6)(i). Except as otherwise provided for in section 112 of the Act, in no case will the compliance date established for an existing source in an applicable subpart of this part exceed 3 years after the effective date of such standard.

* * * * *

(5) Except as provided in paragraph (b)(7) of this section, the owner or operator of an area source that increases its emissions of (or its potential to emit) hazardous air pollutants such that the source becomes a major source and meets the definition of an existing source in the applicable major source standard shall be subject to relevant standards for existing sources. Except as provided in paragraph § 63.1(c)(6)(i)(B), such sources must comply by the date specified in the standards for existing area sources that become major sources. If no such compliance date is specified in the standards, the source shall have a period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in the relevant standard for existing sources in existence at the time the standard becomes effective.

* * * * *

■ 5. Amend § 63.9 by revising paragraphs (b)(1)(ii) and (j) and adding paragraph (k) to read as follows:

§ 63.9 Notification requirements.

* * * * *

(b) * * *

(1) * * *

(ii) If an area source subsequently becomes a major source that is subject to the emission standard or other requirement, such source shall be subject to the notification requirements of this section. Area sources previously subject to major source requirements that become major sources again are also subject to the notification requirements of this paragraph and must submit the notification according to the requirements of paragraph (k) of this section.

* * * * *

(j) *Change in information already provided.* Any change in the information already provided under this section shall be provided to the Administrator within 15 calendar days after the change. The owner or operator of a major source that reclassifies to area source status is also subject to the notification requirements of this paragraph. The owner or operator may use the application for reclassification with the regulatory authority (*e.g.,* permit application) to fulfill the requirements of this paragraph. A source which reclassified after January 25, 2018, and before January 19, 2021, and has not yet provided the notification of a change in information is required to provide such notification no later than February 2, 2021, according to the requirements of paragraph (k) of this section. Beginning January 19, 2021, the owner or operator of a major source that reclassifies to area source status must submit the notification according to the requirements of paragraph (k) of this section. A notification of reclassification must contain the following information:

(1) The name and address of the owner or operator;

(2) The address (*i.e.,* physical location) of the affected source;

(3) An identification of the standard being reclassified from and to (if applicable); and

(4) Date of effectiveness of the reclassification.

(k) *Electronic submission of notifications or reports.* If you are required to submit notifications or reports following the procedure specified in this paragraph (k), you must submit notifications or reports to the EPA via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The notification or report must be submitted by the deadline specified. The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Anything submitted using CEDRI cannot later be claimed to

be CBI. Although we do not expect persons to assert a claim of CBI, if persons wish to assert a CBI, submit a complete notification or report, including information claimed to be CBI, to the EPA. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (k). All CBI claims must be asserted at the time of submission. Furthermore, under section 114(c) of the Act emissions data is not entitled to confidential treatment and requires EPA to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(1) If you are required to electronically submit a notification or report by this paragraph (k) through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with the electronic submittal requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (k)(1)(i) through (vii) of this section.

(i) You must have been or will be precluded from accessing CEDRI and submitting a required notification or report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(ii) The outage must have occurred within the period of time beginning 5 business days prior to the date that the notification or report is due.

(iii) The outage may be planned or unplanned.

(iv) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(v) You must provide to the Administrator a written description identifying:

(A) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(B) A rationale for attributing the delay in submitting beyond the regulatory deadline to EPA system outage;

(C) Measures taken or to be taken to minimize the delay in submitting; and

(D) The date by which you propose to submit, or if you have already met the electronic submittal requirement in this paragraph (k) at the time of the notification, the date you submitted the notification or report.

(vi) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(vii) In any circumstance, the notification or report must be submitted electronically as soon as possible after the outage is resolved.

(2) If you are required to electronically submit a notification or report by this paragraph (k) through CEDRI in the EPA's CDX, you may assert a claim of force majeure for failure to timely comply with the electronic submittal requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (k)(2)(i) through (v) of this section.

(i) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a notification or report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(ii) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in submitting through CEDRI.

(iii) You must provide to the Administrator:

(A) A written description of the force majeure event;

(B) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(C) Measures taken or to be taken to minimize the delay in reporting; and

(D) The date by which you propose to submit the notification or report, or if you have already met the electronic submittal requirement in this paragraph (k) at the time of the notification, the date you submitted the notification or report.

(iv) The decision to accept the claim of force majeure and allow an extension to the submittal deadline is solely within the discretion of the Administrator.

(v) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

■ 6. Amend § 63.10 by revising paragraph (b)(3) to read as follows:

§ 63.10 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(3) If an owner or operator determines that his or her existing or new stationary source is in the source category regulated by a standard established pursuant to section 112 of the Act, but that source is not subject to the relevant standard (or other requirement established under this part) because of enforceable limitations on the source's potential to emit, or the source otherwise qualifies for an exclusion, the owner or operator must keep a record of the applicability determination. The applicability determination must be kept on site at the source for a period of 5 years after the determination, or until the source changes its operations to become an affected source subject to the relevant standard (or other requirement established under this part), whichever comes first if the determination is made prior to January 19, 2021. The applicability determination must be kept until the source changes its operations to become an affected source subject to the relevant standard (or other requirement established under this part) if the determination was made on or after January 19, 2021. The record of the applicability determination must be signed by the person making the determination and include an emissions analysis (or other information) that demonstrates the owner or operator's conclusion that the source is unaffected (*e.g.,* because the source is an area source). The analysis (or other information) must be sufficiently detailed to allow the Administrator to make an applicability finding for the source with regard to the relevant standard or other requirement. If applicable, the analysis must be performed in accordance with requirements established in relevant subparts of this part for this purpose for particular categories of stationary sources. If relevant, the analysis should be performed in accordance with EPA guidance materials published to assist sources in making applicability determinations under section 112 of the Act, if any. The requirements to

determine applicability of a standard under § 63.1(b)(3) and to record the results of that determination under this paragraph (b)(3) of this section shall not by themselves create an obligation for the owner or operator to obtain a title V permit.

* * * * *

■ 7. Amend § 63.12 by revising paragraph (c) to read as follows:

§ 63.12 State authority and delegations.

* * * * *

(c) All information required to be submitted to the EPA under this part also shall be submitted to the appropriate state agency of any state to which authority has been delegated under section 112(l) of the Act, provided that each specific delegation may exempt sources from a certain federal or state reporting requirement. Any information required to be submitted electronically by this part via the EPA's CEDRI may, at the discretion of the delegated authority, satisfy the requirements of this paragraph. The Administrator may permit all or some of the information to be submitted to the appropriate state agency only, instead of to the EPA and the state agency with the exception of federal electronic reporting requirements under this part. Sources may not be exempted from federal electronic reporting requirements.

■ 8. Amend § 63.13 by revising paragraph (a) introductory text to read as follows:

§ 63.13 Addresses of State air pollution control agencies and EPA Regional Offices.

(a) All requests, reports, applications, submittals, and other communications to the Administrator pursuant to this part shall be submitted to the appropriate Regional Office of the U.S. Environmental Protection Agency indicated in the following list of EPA Regional offices. If a request, report, application, submittal, or other communication is required by this part to be submitted electronically via the EPA's CEDRI then such submission satisfies the requirements of this paragraph (a).

* * * * *

Subpart F—National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry

■ 9. Amend table 3 to subpart F of part 63 by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 3 TO SUBPART F OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPARTS F, G, AND H [a] TO SUBPART F

Reference	Applies to subparts F, G, and H	Comment
* *	* *	* * *
63.1(c)(6)	Yes.	
* *	* *	* * *
63.9(j)	Yes	Only as related to change to major source status.
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	* *	* * *

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not necessarily required.

* * * * *

Subpart G—National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater

■ 10. Amend § 63.151 by revising paragraphs (b)(2)(i) through (iii) to read as follows:

§ 63.151 Initial notification.

* * * * *

(b) * * *

(2) * * *

(i) For an existing source, the Initial Notification shall be submitted within 120 calendar days after the date of promulgation, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

(ii) For a new source that has an initial start-up 90 calendar days after the date of promulgation of this subpart or later, the application for approval of construction or reconstruction required by § 63.5(d) of subpart A shall be submitted in lieu of the Initial Notification. The application shall be submitted as soon as practicable before construction or reconstruction is planned to commence (but it need not be sooner than 90 calendar days after the date of promulgation of this subpart). For a new source that reclassifies to major source status after January 19, 2021 and greater than 90 days after the initial start-up, the source shall submit the initial notification required by § 63.9(b) no later than 120 days after the source becomes subject to this subpart.

(iii) For a new source that has an initial start-up prior to 90 calendar days after the date of promulgation, the Initial Notification shall be submitted within 90 calendar days after the date of promulgation of this subpart, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The application for approval of construction or reconstruction described in § 63.5(d) of subpart A is not required for these sources.

* * * * *

■ 11. Amend table 1A to subpart G by revising the entry for § 63.9 to read as follows:

TABLE 1A TO SUBPART G OF PART 63—APPLICABLE 40 CFR PART 63 GENERAL PROVISIONS

40 CFR part 63, subpart A, provisions applicable to subpart G
* * * * * * *
§ 63.9(a)(2), (b)(4)(i),[a] (b)(4)(ii), (b)(4)(iii), (b)(5),[a] (c), (d), (j), and (k).

TABLE 1A TO SUBPART G OF PART 63—APPLICABLE 40 CFR PART 63 GENERAL PROVISIONS—Continued

40 CFR part 63, subpart A, provisions applicable to subpart G						
*	*	*	*	*	*	*

[a] The notifications specified in § 63.9(b)(4)(i) and (b)(5) shall be submitted at the times specified in 40 CFR part 65.

* * * * *

Subpart H—National Emission Standards for Organic Hazardous Air Pollutants for Equipment Leaks

■ 12. Amend § 63.182 by revising paragraphs (b)(2)(i) through (iii) to read as follows:

§ 63.182 Reporting requirements.

* * * * *

(b) * * *

(2) * * *

(i) For an existing source, the Initial Notification shall be submitted within 120 calendar days after the date of promulgation or no later than 120 calendar days after the source becomes subject to this subpart, whichever is later.

(ii) For a new source that has an initial start-up 90 days after the date of promulgation of this subpart or later, the application for approval of construction or reconstruction required by § 63.5(d) of subpart A of this part shall be submitted in lieu of the Initial Notification. The application shall be submitted as soon as practicable before the construction or reconstruction is planned to commence (but it need not be sooner than 90 days after the date of promulgation of the subpart that references this subpart). For a new source that reclassifies to major source status after January 19, 2021 and greater than 90 days after the initial start-up, the source shall submit the initial notification required by § 63.9(b) no later than 120 days after the source becomes subject to this subpart.

(iii) For a new source that has an initial start-up prior to 90 days after the date of promulgation of the applicable subpart, the Initial Notification shall be submitted within 90 days after the date of promulgation of the subpart that references this subpart, or no later than 120 calendar days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 13. Amend table 4 to subpart H by revising entry for § 63.9 to read as follows:

TABLE 4 TO SUBPART H OF PART 63—APPLICABLE 40 CFR PART 63 GENERAL PROVISIONS

40 CFR part 63, subpart A, provisions applicable to subpart H						
*	*	*	*	*	*	*
§ 63.9(a)(2), (b)(4)(i),[a] (b)(4)(ii), (b)(4)(iii), (b)(5),[a] (c), (d), (j) and (k).						
*	*	*	*	*	*	*

[a] The notifications specified in § 63.9(b)(4)(i) and (b)(5) shall be submitted at the times specified in 40 CFR part 65.

Subpart J—National Emission Standards for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production

■ 14. Amend § 63.215 by revising paragraph (b) introductory text and adding paragraph (b)(4) to read as follows:

§ 63.215 What General Provisions apply to me?

* * * * *

(b) The provisions in subpart A of this part also apply to this subpart as specified in paragraphs (b)(1) through (4) of this section.

* * * * *

(4) The specific notification procedure of § 63.9(j) and (k) relating to a change in major source status.

Subpart L—National Emission Standards for Coke Oven Batteries

■ 15. Amend § 63.311 by revising paragraph (a) to read as follows:

§ 63.311 Reporting and recordkeeping requirements.

(a) *General requirements.* After the effective date of an approved permit in a state under part 70 of this chapter, the owner or operator shall submit all notifications and reports required by this subpart to the state permitting authority except a source that reclassifies to an area source must follow the notification procedures of § 63.9(j) and (k). Use of information provided by the certified observer shall be a sufficient basis for notifications required under § 70.5(c)(9) of this chapter and the reasonable inquiry requirement of § 70.5(d) of this chapter.

* * * * *

Subpart M—National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities

■ 16. Amend § 63.324 by adding paragraph (g) to read as follows:

§ 63.324 Reporting and recordkeeping requirements.

* * * * *

(g) Each owner or operator of a dry cleaning facility that reclassifies from a major source to an area source must follow the procedures of § 63.9(j) and (k) to provide notification of the change in status.

Subpart N—National Emission Standards for Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks

■ 17. Amend § 63.347 by revising paragraph (c)(1) introductory text to read as follows:

§ 63.347 Reporting requirements.

* * * * *

(c) * * *

(1) The owner or operator of an affected source that has an initial startup before January 25, 1995, shall notify the Administrator in writing that the source is subject to this subpart. The notification shall be submitted no later than 180 calendar days after January 25, 1995, or no later than 120 days after the source becomes subject to this subpart,

whichever is later, and shall contain the following information:

* * * * *

■ 18. Amend table 1 to subpart N of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART N OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART N

General provisions reference	Applies to subpart N	Comment
* *	* *	* * *
63.1(c)(6)	Yes.	
* *	* *	* * *
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	* *	* * *

Subpart O—Ethylene Oxide Emissions Standards for Sterilization Facilities

■ 19. Amend § 63.360 in table 1 of § 63.360 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

§ 63.360 Applicability.

* * * * *

TABLE 1 OF § 63.360—GENERAL PROVISIONS APPLICABILITY TO SUBPART O

Reference	Applies to sources using 10 tons in subpart O [a]	Applies to sources using 1 to 10 tons in subpart O [a]	Comment
* *	* *	* * *	* *
63.1(c)(6)	Yes		
* *	* *	* * *	* *
63.9(k)	Yes		Only as specified in § 63.9(j).
* *	* *	* * *	* *

[a] See definition.

* * * * *

Subpart Q—National Emission Standards for Hazardous Air Pollutants for Industrial Process Cooling Towers

■ 20. Amend § 63.405 by revising paragraphs (a)(1) introductory text, (a)(2), and (b)(1) to read as follows:

§ 63.405 Notification requirements.

(a) * * *

(1) In accordance with § 63.9(b) of subpart A, owners or operators of all affected IPCT's that have an initial startup before September 8, 1994, shall notify the Administrator in writing. The notification, which shall be submitted not later than 12 months after September 8, 1994, or no later than 120 days after the source becomes subject to this subpart, whichever is later, shall provide the following information:

* * * * *

(2) In accordance with § 63.9(b) of subpart A, owners or operators of all affected IPCT's that have an initial startup on or after September 8, 1994, shall notify the Administrator in writing that the source is subject to the relevant standard no later than 12 months after initial startup or no later than 120 days after the source becomes subject to this subpart, whichever is later. The notification shall provide all the information required in paragraphs (a)(1)(i) through (iv) of this section.

(b) * * *

(1) In accordance with § 63.9(h) of subpart A, owners or operators of affected IPCT's shall submit to the Administrator a notification of compliance status within 60 days of the date on which the IPCT is brought into compliance with § 63.402 of this subpart and not later than 18 months after September 8, 1994, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 21. Amend table 1 to subpart Q of part 63 by revising the entry for § 63.9 to read as follows:

TABLE 1 TO SUBPART Q OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART Q

Reference	Applies to subpart Q	Comment
* *	* *	* * *
63.9(a), (b)(1), (b)(3), (c), (h)(1), (h)(3), (h)(6), (j), and (k).	Yes	§ 63.9(k) only as specified in 63.9(j).
* *	* *	* * *

Subpart R—National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)

■ 22. Amend table 1 to subpart R of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART R OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART R

Reference	Applies to subpart R	Comment
* * * * * * *		
63.1(c)(6)	Yes.	
* * * * * * *		
63.9(k)	Yes	Only as specified in § 63.9(j).
* * * * * * *		

Subpart S—National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry

■ 23. Amend § 63.455 by revising paragraph (a) to read as follows:

§ 63.455 Reporting requirements.

(a) Each owner or operator of a source subject to this subpart shall comply with the reporting requirements of subpart A of this part as specified in Table 1 to subpart S of part 63 and all the following requirements in this section. The initial notification report specified under § 63.9(b)(2) of subpart A of this part shall be submitted by April 15, 1999, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 24. Amend table 1 to subpart S of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART S OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART S [a]

Reference	Applies to subpart S	Comment
* * * * * * *		
63.1(c)(6)	Yes.	
* * * * * * *		
63.9(k)	Yes	Only as specified in § 63.9(j).
* * * * * * *		

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not required.

Subpart T—National Emission Standards for Halogenated Solvent Cleaning

■ 25. Amend § 63.468 by revising the introductory text of paragraphs (a), (b), (c), and (d) to read as follows:

§ 63.468 Reporting requirements.

(a) Each owner or operator of an existing solvent cleaning machine subject to the provisions of this subpart shall submit an initial notification report to the Administrator no later than August 29, 1995, or no later than 120 days after the source becomes subject to this subpart, whichever is later. This report shall include the information specified in paragraphs (a)(1) through (6) of this section.

* * * * *

(b) Each owner or operator of a new solvent cleaning machine subject to the provisions of this subpart shall submit an initial notification report to the Administrator. New sources for which construction or reconstruction had commenced and initial startup had not occurred before December 2, 1994, shall submit this report as soon as practicable before startup but no later than January 31, 1995, or no later than 120 days after the source becomes subject to this subpart, whichever is later. New sources for which the construction or reconstruction commenced after December 2, 1994, shall submit this report as soon as practicable before the construction or reconstruction is planned to commence or for sources which reclassify to major source status, no later than 120 days after the source becomes subject to this subpart. This report shall include all of the information required in § 63.5(d)(1) of subpart A (General Provisions), with the revisions and additions in paragraphs (b)(1) through (b)(3) of this section.

* * * * *

(c) Each owner or operator of a batch cold solvent cleaning machine subject to the provisions of this subpart shall submit a compliance report to the Administrator. For existing sources, this report shall be submitted to the Administrator no later than 150 days after the compliance date specified in § 63.460(d), or no later than 120 days after the source becomes subject to this subpart, whichever is later. For new sources, this report shall be submitted to the Administrator no later than 150 days after startup or May 1, 1995, or no later than 120 days after the source becomes subject to this subpart, whichever is

later. This report shall include the requirements specified in paragraphs (c)(1) through (4) of this section.

* * * * *

(d) Each owner or operator of a batch vapor or in-line solvent cleaning machine complying with the provisions of § 63.463 shall submit to the Administrator an initial statement of compliance for each solvent cleaning machine. For existing sources, this report shall be submitted to the Administrator no later than 150 days after the compliance date specified in § 63.460(d), or no later than 120 days after the source becomes subject to this subpart, whichever is later. For new sources, this report shall be submitted to the Administrator no later than 150 days after startup or May 1, 1995, or no later than 120 days after the source becomes subject to this subpart, whichever is later. This statement shall include the requirements specified in paragraphs (d)(1) through (6) of this section.

* * * * *

■ 26. Amend appendix B to subpart T of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

APPENDIX B TO SUBPART T OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART T

Reference	Applies to subpart T		Comments
	BCC	BVI	
* *	*	*	* *
63.1(c)(6)	Yes	Yes.	
* *	*	*	* *
63.9(k)	Yes	Yes	Only as specified in § 63.9(j).
* *	*	*	* *

* * * * *

Subpart U—National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins

■ 27. Amend table 1 to subpart U of part 63 by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART U OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART U AFFECTED SOURCES

Reference	Applies to subpart U	Explanation
* *	*	* *
§ 63.1(c)(6)	Yes.	
* *	*	* *
§ 63.9(j)	Yes	For change in major source status only.
§ 63.9(k)	Yes	Only as specified in § 63.9(j).

TABLE 1 TO SUBPART U OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART U AFFECTED SOURCES—Continued

Reference	Applies to subpart U	Explanation
* *	*	* *

* * * * *

Subpart W—National Emission Standards for Hazardous Air Pollutants for Epoxy Resins Production and Non-Nylon Polyamides Production

■ 28. Amend table 1 to subpart W of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART W OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART W

Reference	Applies to subpart W			Comment
	BLR	WSR	WSR alternative standard, and BLR equipment leak standard (40 CFR part 63, subpart H)	
* *	*	*	* *	*
§ 63.1(c)(6)	Yes	Yes	Yes.	
* *	*	*	* *	*
§ 63.9(k)	Yes	Yes	Yes	Only as specified in § 63.9(j).
* *	*	*	* *	*

Subpart X—National Emission Standards for Hazardous Air Pollutants From Secondary Lead Smelting

■ 29. Amend table 1 to subpart X of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART X OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART X

Reference	Applies to subpart X	Comment
* *	*	* *
63.9(k)	Yes	Only as specified in 63.9(j).
* *	*	* *

* * * * *

Subpart Y–National Emission Standards for Marine Tank Vessel Loading Operations

■ 30.Amend § 63.567 by revising paragraphs (b)(2) introductory text and (b)(3) to read as follows:

§ 63.567 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(2) *Initial notification for sources with startup before the effective date.* The owner or operator of a source with initial startup before the effective date shall notify the Administrator in writing that the source is subject to the relevant standard. The notification shall be submitted not later than 365 days after the effective date of the emissions standards or no later than 120 days after the source becomes subject to this subpart, whichever is later, and shall provide the following information:

* * * * *

(3) *Initial notification for sources with startup after the effective date.* The owner or operator of a new or reconstructed source or a source that has been reconstructed such that it is subject to the emissions standards that has an initial startup after the effective date but before the compliance date, and for which an application for approval of construction or reconstruction is not required under § 63.5(d) of subpart A of this part and § 63.566 of this subpart, or a sources which reclassifies to major source status after the effective date, shall notify the Administrator in writing that the source is subject to the standard no later than 365 days, 120 days after initial startup, or no later than 120 days after the source becomes subject to this subpart, whichever occurs before notification of the initial performance test in § 63.9(e) of subpart A of this part. The notification shall provide all the information required in paragraph (b)(2) of this section, delivered or postmarked with the notification required in paragraph (b)(4) of this section.

* * * * *

■ 31. Amend table 1 of § 63.560 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

§ 63.560 Applicability and designation of affected sources.

* * * * *

TABLE 1 TO § 63.560—GENERAL PROVISIONS APPLICABILITY TO SUBPART Y

Reference	Applies to affected sources in subpart Y	Comment
* *	*	* *
63.1(c)(6)	Yes.	
* *	*	* *
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	*	* *

Subpart AA—National Emission Standards for Hazardous Air Pollutants From Phosphoric Acid Manufacturing Plants

■ 32. Amend appendix A to subpart AA of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

APPENDIX A TO SUBPART AA OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART AA

40 CFR citation	Requirement	Applies to subpart AA	Comment
* *	*	*	* *
§ 63.1(c)(6)	.....	Yes	None.
* *	*	*	* *
§ 63.9(k)	.....	Yes	Only as specified in § 63.9(j).
* *	*	*	* *

Subpart BB—National Emission Standards for Hazardous Air Pollutants From Phosphate Fertilizers Production Plants

■ 33. Amend appendix A to subpart BB of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

APPENDIX A TO SUBPART BB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART BB

40 CFR citation	Requirement	Applies to subpart BB	Comment
* *	* *	* *	* *
§ 63.1(c)(6)		Yes	None.
* *	* *	* *	* *
§ 63.9(k)		Yes	Only as specified in § 63.9(j).
* *	* *	* *	* *

Subpart CC–National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries

■ 34. Amend appendix to subpart CC of part 63 in table 6 by adding in numerical order an entry for § 63.1(c)(6) revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

Appendix to Subpart CC of Part 63–Tables

* * * * *

TABLE 6—GENERAL PROVISIONS APPLICABILITY TO SUBPART CC [a]

Reference	Applies to subpart CC	Comment
* *	* *	* *
63.1(c)(6)	Yes.	
* *	* *	* *
63.9(j)	Yes	
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	* *	* *

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not required.

* * * * *

Subpart DD—National Emission Standards for Hazardous Air Pollutants From Off-Site Waste and Recovery Operations

■ 35. Amend § 63.697 by revising paragraph (a)(1) introductory text to read as follows:

§ 63.697 Reporting requirements.

(a) * * *

(1) The owner or operator of an affected source must submit notices to the Administrator in accordance with the applicable notification requirements in 40 CFR 63.9 as specified in Table 2 of this subpart. For the purpose of this subpart, an owner or operator subject to the initial notification requirements under 40 CFR 63.9(b)(2) must submit the required notification on or before October 19, 1999, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 36. Amend table 2 to subpart DD of part 63 by adding in numerical order an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 2 TO SUBPART DD OF PART 63—APPLICABILITY OF PARAGRAPHS IN SUBPART A OF THIS PART 63—GENERAL PROVISIONS TO SUBPART DD

Subpart A reference	Applies to subpart DD	Explanation
* *	* *	* *
63.1(c)(6)	Yes.	
* *	* *	* *
63.9(j)	Yes	For change in major source status only.
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	* *	* *

* * * * *

Subpart EE–National Emission Standards for Magnetic Tape Manufacturing Operations

■ 37. Amend table 1 to subpart EE of part 63 by revising the entry for 63.9(b)(2) and adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART EE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EE

Reference	Applies to subpart EE	Comment
* *	* *	* * *
63.1(c)(6)	Yes.	
* *	* *	* * *
63.9(b)(2)	Yes	§ 63.753(a)(1) requires submittal of the initial notification at least 1 year prior to the compliance date or as specified in § 63.9(b)(2); § 63.753(a)(2) allows a title V or part 70 permit application to be substituted for the initial notification in certain circumstances.
* *	* *	* * *
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	* *	* * *

Subpart GG–National Emission Standards for Aerospace Manufacturing and Rework Facilities

■ 38. Amend table 1 to subpart GG of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART GG OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART GG

Reference	Applies to affected sources in subpart GG	Comment
* *	* *	* * *
63.1(c)(6)	Yes.	
* *	* *	* * *
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	* *	* * *

Subpart HH—National Emission Standards for Hazardous Air Pollutants From Oil and Natural Gas Production Facilities

■ 39. Amend § 63.760 by revising paragraph (a)(1) introductory text to read as follows:

§ 63.760 Applicability and designation of affected source.

(a) * * *

(1) Facilities that are major or area sources of hazardous air pollutants (HAP) as defined in § 63.761. Emissions for major source determination purposes can be estimated using the maximum natural gas or hydrocarbon liquid throughput, as appropriate, calculated in paragraphs (a)(1)(i) through (iii) of this section. As an alternative to calculating the maximum natural gas or hydrocarbon liquid throughput, the owner or operator of a new or existing source may use the facility's design maximum natural gas or hydrocarbon liquid throughput to estimate the maximum potential emissions. Other means to determine the facility's major source status are allowed, provided the information is documented and recorded to the Administrator's satisfaction in accordance with § 63.10(b)(3). A facility that is determined to be an area source, but subsequently increases its emissions or its potential to emit above the major source levels, and becomes a major source, must comply with all provisions of this subpart applicable to a major source starting on the applicable compliance date specified in paragraph (f) of this section. Nothing in this paragraph is intended to preclude a source from limiting its potential to emit through other appropriate mechanisms that may be available through the permitting authority.

* * * * *

■ 40. Amend § 63.775 by revising paragraph (c)(1) to read as follows:

§ 63.775 Reporting requirements.

* * * * *

(c) * * *

(1) The initial notifications required under § 63.9(b)(2) not later than January 3, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later. In addition to submitting your initial notification to the addressees specified under § 63.9(a), you must also submit a copy of the initial notification to the EPA's Office of Air Quality Planning and Standards. Send your notification via email to *Oil*

and Gas Sector@epa.gov or via U.S. mail or other mail delivery service to U.S. EPA, Sector Policies and Programs Division/Fuels and Incineration Group (E143–01), Attn: Oil and Gas Project Leader, Research Triangle Park, NC 27711.

* * * * *

■ 41. Amend appendix to subpart HH of part 63 in table 2 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

Appendix to Subpart HH of Part 63—Tables

* * * * *

TABLE 2 TO SUBPART HH OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART HH

General provisions reference	Applicable to subpart HH	Explanation
* * *	*	*
§ 63.1(c)(6) ...	Yes.	
* * *	*	*
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	*	*

Subpart II—National Emission Standards for Shipbuilding and Ship Repair (Surface Coating)

■ 42. Amend table 1 to subpart II of part 63 by removing the entry for § 63.9(i)–(j) and adding in its place § 63.9(i)–(k).

The addition reads as follows:

TABLE 1 TO SUBPART II OF PART 63—GENERAL PROVISIONS OF APPLICABILITY TO SUBPART II

Reference	Applies to subpart II	Comment
* * *	*	*
63.9(i)–(k)	Yes	§ 63.9(k) only as specified in § 63.9(j).
* * *	*	*

Subpart JJ—National Emission Standards for Wood Furniture Manufacturing Operations

■ 43. Amend table 1 to subpart JJ of part 63 by revising the entry for § 63.9(b) and adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART JJ OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART JJ

Reference	Applies to subpart JJ	Comment
* * *	*	*
63.1(c)(6)	Yes.	
* * *	*	*
63.9(b)	Yes	Existing sources are required to submit initial notification report within 270 days of the effective date or no later than 120 days after the source becomes subject to this subpart, whichever is later.
* * *	*	*
63.9(k)	Yes	Only as specified in 63.9(j).
* * *	*	*

Subpart KK—National Emission Standards for the Printing and Publishing Industry

■ 44. Amend § 63.830 by revising (b)(1)(i) to read as follows:

§ 63.830 Reporting requirements.

* * * * *

(b) * * *

(1) * * *

(i) Initial notifications for existing sources shall be submitted no later than one year before the compliance date specified in § 63.826(a), or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 45. Amend table 1 to subpart KK of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART KK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KK

General provisions reference	Applicable to subpart KK	Comment
* * *	* * *	* * *
§ 63.1(c)(6)	Yes.	
* * *	* * *	* * *
§ 63.9(k)	Yes	Only as specified in 63.9(j).
* * *	* * *	* * *

Subpart LL—National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants

■ 46. Amend appendix A to subpart LL of part 63 adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

APPENDIX A TO SUBPART LL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Reference sections(s)	Requirement	Applies to subpart LL	Comment
* * *	* * *	* * *	* * *
63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart MM—National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

■ 47. Amend table 1 to subpart MM of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART MM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM

General provisions reference	Summary of requirements	Applies to subpart MM	Explanation
* * *	* * *	* * *	* * *
63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart YY—National Emission Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Achievable Control Technology Standards

■ 48. Amend § 63.1100 by revising paragraph (b) to read as follows:

§ 63.1100 Applicability.

* * * * *

(b) *Subpart A requirements.* The following provisions of subpart A of this part (General Provisions), §§ 63.1 through 63.5, and §§ 63.12 through 63.15, apply to owners or operators of affected sources subject to this subpart. For sources that reclassify from major source to area source status, the applicable provisions of § 63.9(j) and (k) apply. Beginning no later than the compliance dates specified in § 63.1102(c), for ethylene production affected sources, §§ 63.7(a)(4), (c), (e)(4), and (g)(2) and 63.10(b)(2)(vi) also apply.

* * * * *

Subpart CCC—National Emission Standards for Hazardous Air Pollutants for Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration Plants

■ 49. Amend § 63.1163 by revising paragraph (a)(3) to read as follows:

§ 63.1163 Notification requirements.

(a) * * *

(3) As required by § 63.9(b)(3) of subpart A of this part, the owner or operator of a new or reconstructed affected source, or a source that has been reconstructed such that it is an affected source, that has an initial startup after the effective date and for which an application for approval of construction or reconstruction is not required under § 63.5(d) of subpart A of this part, shall notify the Administrator in writing that the source is subject to the standards no later than 120 days after initial startup, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The notification shall contain the information specified in §§ 63.9(b)(2)(i) through (v) of subpart A of this part, delivered or postmarked with the notification required in § 63.9(b)(5) of subpart A of this part.

* * * * *

■ 50. Amend table 1 to subpart CCC of part 63 by adding in numerical order entries for §§ 63.9(j) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART CCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART CCC

Reference	Applies to subpart CCC	Explanation
* *	*	* *
63.9(j)	Yes.	
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	*	* *

TABLE 1 TO SUBPART CCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART CCC—Continued

Subpart DDD—National Emission Standards for Hazardous Air Pollutants for Mineral Wool Production

■ 51. Amend table 1 to subpart DDD of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART DDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART DDD OF PART 63

General provisions citation	Requirement	Applies to subpart DDD?	Explanation
* *	*	*	* *
§ 63.1(c)(6)	Reclassification	Yes.	
* *	*	*	* *
§ 63.9(k)		Yes	Only as specified in § 63.9(j).
* *	*	*	* *

Subpart EEE—National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors

■ 52. Amend table 1 to subpart EEE of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART EEE OF PART 63—GENERAL PROVISIONS APPLICABLE TO SUBPART EEE

Reference	Applies to subpart EEE	Explanation
* *	*	* *
63.9(k)	Yes	Only as specified in § 63.9(j).
* *	*	* *

Subpart GGG—National Emission Standards for Pharmaceuticals Production

■ 53. Amend table 1 to subpart GGG of part 63 is amended by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART GGG OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART GGG

General provisions reference	Summary of requirements	Applies to subpart GGG	Comments
* *	*	*	* *
63.1(c)(6)	Reclassification	Yes.	
* *	*	*	* *
63.9(j)	Change in information provided	Yes	For change in major source status only.
63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* *	*	*	* *

Subpart HHH—National Emission Standards for Hazardous Air Pollutants From Natural Gas Transmission and Storage Facilities

■ 54. Amend § 63.1270 by revising paragraph (a) introductory text to read as follows:

§ 63.1270 Applicability and designation of affected source.

(a) This subpart applies to owners and operators of natural gas transmission and storage facilities that transport or store natural gas prior to entering the pipeline to a local distribution company or to a final end user (if there is no local distribution company), and that are major sources of hazardous air pollutants (HAP) emissions as defined in § 63.1271. Emissions for major source determination purposes can be estimated using the maximum natural gas throughput calculated in either paragraph (a)(1) or (2) of this section and paragraphs (a)(3) and (4) of this section. As an alternative to calculating the maximum natural gas throughput, the owner or operator of a new or existing source may use the facility design maximum natural gas throughput to estimate the maximum potential emissions. Other means to determine the facility's major source status are allowed, provided the information is documented and recorded to the Administrator's satisfaction in accordance with § 63.10(b)(3). A compressor station that transports natural gas prior to the point of custody transfer or to a natural gas processing plant (if present) is not considered a part of the natural gas transmission and storage source category. A facility that is determined to be an area source, but subsequently increases its emissions or its potential to emit above the major source levels (without obtaining and complying with other limitations that keep its potential to emit HAP below major source levels), and becomes a major source, must comply with all applicable provisions of this subpart starting on the applicable compliance date specified in paragraph (d) of this section. Nothing in this paragraph is intended to preclude a source from limiting its potential to emit through other appropriate mechanisms that may be available through the permitting authority.

* * * * *

■ 55. Amend table 2 to subpart HHH of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

APPENDIX: TABLE 2 TO SUBPART HHH OF PART 63-APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART HHH

General provisions Reference	Applicable to subpart HHH	Explanation
* *	*	* *
§ 63.1(c)(6) ...	Yes.	
* *	*	* *
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* *	*	* *

Subpart III—National Emission Standards for Hazardous Air Pollutants for Flexible Polyurethane Foam Production

■ 56. Amend table 1 to subpart III of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART III OF PART 63—APPLICABILITY GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART III

Subpart A reference	Applies to Subpart III	Comment
* *	*	* *
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* *	*	* *

Subpart JJJ—National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins

■ 57. Amend table 1 to subpart JJJ of part 63 is amended by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART JJJ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJ AFFECTED SOURCES

Reference	Applies to Subpart JJJ	Explanation
* *	*	* *
§ 63.1(c)(6)	Yes.	
* *	*	* *
§ 63.9(j)	Yes	For change in major source status only.
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* *	*	* *

Subpart LLL—National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry

■ 58. Amend table 1 to subpart LLL of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Requirement	Applies to subpart LLL	Explanation
* * *	* * *	* * *	* * *
63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart MMM—National Emission Standards for Hazardous Air Pollutants for Pesticide Active Ingredient Production

■ 59. Amend table 1 to subpart MMM of part 63 by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART MMM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MMM

Reference to subpart A	Applies to subpart MMM	Explanation
* * *	* * *	* * *
§ 63.1(c)(6)	Yes.	
* * *	* * *	* * *
§ 63.9(j)	Yes	For change in major source status only, § 63.1368(h) specifies procedures for other notification of changes.
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *

Subpart NNN—National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing

■ 60. Amend table 1 to subpart NNN of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART NNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART NNN

General provisions citation	Requirement	Applies to subpart NNN?	Explanation
* * *	* * *	* * *	* * *
§ 63.1(c)(6)		Yes.	
* * *	* * *	* * *	* * *
§ 63.9(k)	Yes	Only as specified in § 63.9(j).	
* * *	* * *	* * *	* * *

Subpart OOO—National Emission Standards for Hazardous Air Pollutant Emissions: Manufacture of Amino/Phenolic Resins

■ 61. Amend table 1 to subpart OOO of part 63 by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART OOO OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART OOO AFFECTED SOURCES

Reference	Applies to subpart OOO	Explanation
* * *	* * *	* *
63.1(c)(6)	Yes.	
* * *	* * *	* *
63.9(j)	Yes	For change in major source status only.
63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	* * *	* *

Subpart PPP—National Emission Standards for Hazardous Air Pollutant Emissions for Polyether Polyols Production

■ 62. Amend § 63.1434 by revising paragraphs (d) and (e) to read as follows:

§ 63.1434 Equipment leak provisions.

* * * * *

(d) When the HON equipment leak Initial Notification requirements contained in §§ 63.182(a)(1) and 63.182(b) are referred to in 40 CFR part 63, subpart H, the owner or operator shall comply with the Initial Notification requirements contained in § 63.1439(e)(3), for the purposes of this subpart. The Initial Notification shall be submitted no later than June 1, 2000, or no later than 120 days after the source becomes subject to this subpart, whichever is later, for existing sources.

(e) The HON equipment leak Notification of Compliance Status required by §§ 63.182(a)(2) and 63.182(c) shall be submitted within 150 days (rather than 90 days) of the applicable compliance date specified in § 63.1422 for the equipment leak provisions. The Initial Notification shall be submitted no later than June 1, 2000, or no later than 120 days after the source becomes subject to this subpart, whichever is later, for existing sources.

* * * * *

■ 63. Amend § 63.1439 by revising paragraphs (e)(3)(ii)(B) and (C) to read as follows:

§ 63.1439 General recordkeeping and reporting provisions.

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(B) For a new source that has an initial start-up on or after August 30, 1999, the application for approval of construction or reconstruction required by the General Provisions in § 63.5(d) shall be submitted in lieu of the Initial Notification. The application shall be submitted as soon as practical before construction or reconstruction is planned to commence (but it need not be sooner than August 30, 1999). For a new source that reclassifies to major source status after January 19, 2021, and greater than 90 days after the initial start-up, the source shall submit the initial notification required by 63.9(b) no later than 120 days after the source becomes subject to this subpart.

(C) For a new source that has an initial start-up prior to August 30, 1999, the Initial Notification shall be submitted no later than August 30, 1999, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The application for approval of construction or reconstruction described in the General Provisions' requirements in § 63.5(d) is not required for these sources.

* * * * *

■ 64. Amend table 1 to subpart PPP of part 63 by adding in numerical order an entry for § 63.1(c)(6), revising the entry for § 63.9(j), and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART PPP OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART PPP AFFECTED SOURCES

Reference	Applies to subpart PPP	Explanation
* * *	* * *	* *
63.1(c)(6)	Yes.	
* * *	* * *	* *
63.9(j)	Yes	For change in major source status only.
63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	* * *	* *

Subpart QQQ—National Emission Standards for Hazardous Air Pollutants for Primary Copper Smelting

■ 65. Revise § 63.1441 to read as follows:

§ 63.1441 Am I subject to this subpart?

You are subject to this subpart if you own or operate a primary copper smelter that is (or is part of) a major source of hazardous air pollutant (HAP) emissions and your primary copper smelter uses batch copper converters as defined in § 63.1459. Your primary copper smelter is a major source of HAP if it emits or has the potential to emit any single HAP at the rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year.

■ 66. Amend § 63.1454 by revising paragraph (b) to read as follows:

§ 63.1454 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start your affected source before June 12,

2002, you must submit your initial notification not later than October 10, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart RRR—National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production

■ 67. Amend appendix A to subpart RRR of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

APPENDIX A TO SUBPART RRR OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART RRR

Citation	Requirement	Applies to subpart RRR	Comment
* *	*	* *	* *
§ 63.1(c)(6)	Reclassification	Yes.	
* *	*	* *	* *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* *	*	* *	* *

Subpart TTT—National Emission Standards for Hazardous Air Pollutants for Primary Lead Smelting

■ 68. Amend table 1 to subpart TTT of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART TTT OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART TTT

Reference	Applies to subpart TTT	Comment
* *	*	* * *
63.9(k)	Yes	Only as specified in 63.9(j).
* *	*	* * *

Subpart UUU—National Emission Standards for Hazardous Air Pollutants for Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units

■ 69. Amend § 63.1574 by revising paragraph (b) to read as follows:

§ 63.1574 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you startup your new affected source before April 11, 2002, you must submit the initial notification no later than August 9, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 70. Amend table 44 to subpart UUU of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

* * * * *

TABLE 44 TO SUBPART UUU OF PART 63—APPLICABILITY OF NESHAP GENERAL PROVISIONS TO SUBPART UUU

* * * * * * *

Citation	Subject	Applies to subpart UUU	Explanation
* *	*	* *	* *
§ 63.1(c)(6)	Reclassification	Yes.	
* *	*	* *	* *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* *	*	* *	* *

Subpart VVV—National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works

■ 71. Amend § 63.1591 by revising paragraphs (a)(1) and (2) to read as follows:

§ 63.1591 What are my notification requirements?

(a) * * *

(1) If you have an existing Group 1 or Group 2 POTW treatment plant, you must submit an initial notification by October 26, 2018, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

(2) If you have a new Group 1 or Group 2 POTW treatment plant, you must submit an initial notification upon startup, or when the source becomes subject to this subpart, whichever is later.

* * * * *

■ 72. Amend table 1 to subpart VVV of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 1 TO SUBPART VVV OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART VVV

General provisions reference	Applicable to subpart VVV	Explanation
* * *	* * *	* *
§ 63.1(c)(6)	Yes.	
* * *	* * *	* *
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	* * *	* *

Subpart XXX—National Emission Standards for Hazardous Air Pollutants for Ferroalloys Production: Ferromanganese and Silicomanganese

■ 73. Amend table 1 to subpart XXX of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART XXX OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART XXX

Reference	Applies to subpart XXX	Comment
* * *	* * *	* *
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	* * *	* *

Subpart DDDD—National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products

■ 74. Amend § 63.2280 by revising paragraph (b) to read as follows:

§ 63.2280 What notifications must I submit and when?

* * * * *

(b) You must submit an Initial Notification no later than 120 calendar days after September 28, 2004, 120 calendar days after initial startup, or no later than 120 days after the source becomes subject to this subpart, whichever is later, as specified in § 63.9(b)(2). Initial Notifications required to be submitted after August 13, 2020, for affected sources that commence construction or reconstruction after September 6, 2019, and on and after August 13, 2021, for all other affected sources submitting initial notifications required in § 63.9(b) must be submitted following the procedure specified in § 63.2281(h), (k), and (l).

* * * * *

■ 75. Amend table 10 to subpart DDDD of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 10 TO SUBPART DDDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDD

Citation	Subject	Brief description	Applies to this subpart before August 13, 2021, except as noted in footnote "1" to this table	Applies to this subpart on and after August 13, 2021, except as noted in footnote "1" to this table
* *	*	*	* *	*
§ 63.9(k)	Electronic reporting procedures.	Electronic reporting procedures.	Yes, only as specified in § 63.9(j).	Yes, only as specified in § 63.9(j).

TABLE 10 TO SUBPART DDDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDD—Continued

Citation	Subject	Brief description	Applies to this subpart before August 13, 2021, except as noted in footnote "1" to this table	Applies to this subpart on and after August 13, 2021, except as noted in footnote "1" to this table
*	*	*	*	*

Subpart EEEE—National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline)

■ 76. Amend § 63.2382 by revising paragraphs (b)(1) and (2) to read as follows:

§ 63.2382 What notifications must I submit and when and what information should be submitted?

* * * * *

(b) *Initial Notification.* (1) If you startup your affected source before February 3, 2004, you must submit the Initial Notification no later than 120 calendar days after February 3, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

(2) If you startup your new or reconstructed affected source on or after February 3, 2004, you must submit the Initial Notification no later than 120 days after initial startup, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 77. Amend table 12 to subpart EEEE of part 63 by revising the entry for § 63.9(j) and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 12 TO SUBPART EEEE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EEEE

Citation	Subject	Brief description	Applies to subpart EEEE
*	*	*	*
§ 63.9(j)	Change in Previous Information	Must submit within 15 days after the change.	Yes for change to major source status, other changes are reported in the first and subsequent compliance reports.
§ 63.9(k)	Electronic reporting procedures	Procedure to report electronically for notification in § 63.9(j).	Yes, only as specified in § 63.9(j).
*	*	*	*

Subpart FFFF—National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing

■ 78. Amend § 63.2515 by designating the text of paragraph (b) introductory text after the subject heading as paragraph (b)(1) and revising newly designated paragraph (b)(1) to read as follows:

§ 63.2515 What notifications must I submit and when?

* * * * *

(b) * * *

(1) As specified in § 63.9(b)(2), if you startup your affected source before November 10, 2003, you must submit an initial notification not later than 120 calendar days after November 10, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 79. Amend table 12 to subpart FFFF of part 63 by revising the entry for § 63.9(j) and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF

Citation	Subject	Explanation
*	*	*
§ 63.9(j)	Change in previous information	Yes, for change in major source status, otherwise § 63.2520(e) specifies reporting requirements for process changes.
§ 63.9(k)	Electronic reporting procedures	Yes, as specified in § 63.9(j).
*	*	*

Subpart GGGG—National Emission Standards for Hazardous Air Pollutants: Solvent Extraction for Vegetable Oil Production

■ 80. Amend § 63.2860 by revising paragraph (a) introductory text to read as follows:

§ 63.2860 What notifications must I submit and when?

* * * * *

(a) *Initial notification for existing sources.* For an existing source, submit an initial notification to the agency responsible for these NESHAP no later than 120 days after the effective date of this subpart, or no later than 120 days after the source becomes subject to this subpart, whichever is later. In the notification, include the items in paragraphs (a)(1) through (5) of this section:

* * * * *

■ 81. Amend § 63.2870 in table 1 to § 63.2870 by adding in numerical order entries for § 63.9(j) and (k) to read as follows:

§ 63.2870 What Parts of the General Provisions apply to me?

* * * * *

TABLE 1 TO § 63.2870—APPLICABILITY OF 40 CFR PART 63, SUBPART A, TO 40 CFR PART 63, SUBPART GGGG

General provisions citation	Subject of citation	Brief description of requirement	Applies to subpart	Explanation
*	*	*	*	*
§ 63.9(j)	Notification requirements	Change in previous information.	Yes.	
§ 63.9(k)	Notification requirements	Electronic reporting procedures.	Yes	Only as specified in § 63.9(j).
*	*	*	*	*

Subpart HHHH—National Emission Standards for Hazardous Air Pollutants for Wet-Formed Fiberglass Mat Production

■ 82. Amend table 2 to subpart HHHH of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART HHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART HHHH

* * * * * * *

Citation	Requirement	Applies to subpart HHHH	Explanation
§ 63.1(c)(6)	Reclassification	Yes.	
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart IIII—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks

■ 83. Amend § 63.3110 by revising paragraph (b) to read as follows:

§ 63.3110 What notifications must I submit?

* * * * *

(b) You must submit the Initial Notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, 120 days after the source becomes subject to this subpart, or 120 days after June 25, 2004, whichever is later. For an existing affected source, you must submit the Initial Notification no later than 1 year after April 26, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later. Existing sources that have previously submitted notifications of applicability of this rule pursuant to section 112(j) of the CAA are not required to submit an Initial Notification under § 63.9(b) except to identify and describe all additions to the affected source made pursuant to § 63.3082(c). If you elect to include the surface coating of new other motor vehicle bodies, body parts for new other motor vehicles, parts for new other motor vehicles, or aftermarket repair or replacement parts for other motor vehicles in your affected source pursuant to § 63.3082(c) and your affected source has an initial startup before February 20, 2007, then you must submit an Initial Notification of this election no later than 120 days after initial startup or February 20, 2007, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 84. Amend table 2 to subpart IIII of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART IIII OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART IIII OF PART 63

Citation	Subject	Applicable to subpart IIII	Explanation
* * *	* * *	* * *	* * *
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart JJJJ—National Emission Standards for Hazardous Air Pollutants: Paper and Other Web Coating

■ 85. Amend § 63.3400 by revising paragraph (b)(1) to read as follows:

§ 63.3400 What notifications and reports must I submit?

* * * * *

(b) * * *

(1) Initial notification for existing affected sources must be submitted no later than 1 year before the compliance date specified in § 63.3330(a), or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 86. Amend table 2 to subpart JJJJ of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART JJJJ OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART JJJJ

General provisions reference	Applicable to subpart JJJJ	Explanation
* * *	* * *	* * *
§ 63.1(c)(6)	Yes.	
* * *	* * *	* * *
§ 63.9(k)	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *

Subpart KKKK—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Metal Cans

■ 87. Amend § 63.3510 by revising paragraph (b) to read as follows:

§ 63.3510 What notifications must I submit?

* * * * *

(b) *Initial Notification.* You must submit the Initial Notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, no later than 120 days after the source becomes subject to this subpart, or 120 days after November 13, 2003, whichever is later. For an existing affected source, you must submit the Initial Notification no later than November 13, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 88. Amend table 5 to subpart KKKK of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 5 TO SUBPART KKKK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKK

Citation	Subject	Applicable to subpart KKKK	Explanation
* * *	* * *	* * *	* * *
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart MMMM—National Emission Standards for Hazardous Air Pollutants for Surface Coating of Miscellaneous Metal Parts and Products

■ 89. Amend § 63.3910 by revising paragraph (b) to read as follows:

§ 63.3910 What notifications must I submit?

* * * * *

(b) *Initial notification.* You must submit the initial notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, 120 days after January 2, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later. For an existing affected source, you must submit the initial notification no later than 1 year after January 2, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later. If you are using compliance with the Surface Coating of Automobiles and Light-Duty Trucks NESHAP (subpart IIII of this part) as provided for under § 63.3881(d) to constitute compliance with this subpart for any or all of your metal parts coating operations, then you must include a statement to this effect in your initial notification, and no other notifications are required under this subpart in regard to those metal parts coating operations. If you are complying with another NESHAP that constitutes the predominant activity at your facility under § 63.3881(e)(2) to constitute compliance with this subpart for your metal parts coating operations, then you must include a statement to this effect in your initial notification, and no other notifications are required under this subpart in regard to those metal parts coating operations. If you own or operate an existing loop slitter or flame lamination affected source, submit an initial notification no later than 120 days after April 14, 2003, or no later than 120 days after the source becomes subject to this subpart.

* * * * *

■ 90. Amend table 2 to subpart MMMM of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART MMMM OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART MMMM OF PART 63

Citation	Subject	Applicable to subpart MMMM	Explanation
* * *	* * *	* * *	* * *
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart NNNN—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Large Appliances

■ 91. Amend § 63.4110 by revising paragraph (a)(1) to read as follows:

§ 63.4110 What notifications must I submit.

(a) * * *

(1) You must submit the Initial Notification required by § 63.9(b) for an existing affected source no later than July 23, 2003, or no later than 120 days after the source becomes subject to this subpart. For a new or reconstructed affected source, you must submit the Initial Notification no later than 120 days after initial startup, November 20, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 92. Amend table 2 to subpart NNNN of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART NNNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART NNNN

Citation	Subject	Applicable to subpart NNNN	Explanation
* * *	* * *	* * *	* * *
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart OOOO—National Emission Standards for Hazardous Air Pollutants: Printing, Coating, and Dyeing of Fabrics and Other Textiles

■ 93. Amend § 63.4310 by revising paragraph (b) to read as follows:

§ 63.4310 What notifications must I submit?

* * * * *

(b) *Initial Notification.* You must submit the Initial Notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, 120 days after May 29, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later. For an existing affected source, you must submit the Initial Notification no later than 1 year after May 29, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 94. Amend table 3 to subpart OOOO of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 3 TO SUBPART OOOO OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART OOOO

Citation	Subject	Applicable to subpart OOOO	Explanation
*	*	*	*
§ 63.1(c)(6)	Reclassification	Yes.	
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart PPPP—National Emission Standards for Hazardous Air Pollutants for Surface Coating of Plastic Parts and Products

■ 95. Amend § 63.4510 by revising paragraph (b) to read as follows:

§ 63.4510 What notifications must I submit?

* * * * *

(b) *Initial notification.* You must submit the initial notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, 120 days after April 19, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later. For an existing affected source, you must submit the initial notification no later than 1 year after April 19, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later. If you are using compliance with the Surface Coating of Automobiles and Light-Duty Trucks NESHAP (subpart IIII of this part) as provided for under § 63.4481(d) to constitute compliance with this subpart for any or all of your plastic parts coating operations, then you must include a statement to this effect in your initial notification, and no other notifications are required under this subpart in regard to those plastic parts coating operations. If you are complying with another NESHAP that constitutes the predominant activity at your facility under § 63.4481(e)(2) to constitute compliance with this subpart for your plastic parts coating operations, then you must include a statement to this effect in your initial notification, and no other notifications are required under this subpart in regard to those plastic parts coating operations.

* * * * *

■ 96. Amend table 2 to subpart PPPP of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART PPPP OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART PPPP OF PART 63

Citation	Subject	Applicable to subpart PPPP	Explanation
*	*	*	*
§ 63.1(c)(6)	Reclassification	Yes.	
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart QQQQ—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Wood Building Products

■ 97. Amend § 63.4710 by revising paragraph (b) to read as follows:

§ 63.4710 What notifications must I submit?

* * * * *

(b) *Initial Notification.* You must submit the Initial Notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, 120 days after May 28, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later. For an existing affected source, you must submit the Initial Notification no later than 120 days after May 28, 2003, or no

later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 98. Amend table 4 to subpart QQQQ of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 4 TO SUBPART QQQQ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART QQQQ OF PART 63

Citation	Subject	Applicable to subpart QQQQ	Explanation
* * *	* * *	* * *	
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	

Subpart RRRR—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Metal Furniture

■ 99. Amend § 63.4910 by revising paragraph (b) to read as follows:

§ 63.4910 What notifications must I submit?

* * * * *

(b) *Initial Notification.* You must submit the Initial Notification required by § 63.9(b) for a new or reconstructed affected source no later than 120 days after initial startup, 120 days after May 23, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later. For an existing affected source, you must submit the Initial Notification no later than 1 year after May 23, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 100. Amend table 2 to subpart RRRR of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART RRRR OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART RRRR

Citation	Subject	Applicable to subpart	Explanation
* * *	* * *	* * *	
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	

Subpart SSSS—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Metal Coil

■ 101. Amend § 63.5180 by revising paragraph (b)(1) to read as follows:

§ 63.5180 What reports must I submit

* * * * *

(b) * * *

(1) Submit an initial notification for an existing source no later than 2 years after June 10, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 102. Amend table 2 to subpart SSSS of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 2 TO SUBPART SSSS OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART SSSS

General provisions reference	Applicable to subpart SSSS	Explanation
* * *	* * *	
§ 63.1(c)(6)	Yes.	
* * *	* * *	
§ 63.9(k)	Yes	Only as specified in § 63.9(j).

TABLE 2 TO SUBPART SSSS OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART SSSS—Continued

General provisions reference	Applicable to subpart SSSS	Explanation
* * * * * * *		

Subpart TTTT—National Emission Standards for Hazardous Air Pollutants for Leather Finishing Operations

■ 103. Amend § 63.5415 by revising paragraph (b) to read as follows:

§ 63.5415 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before February 27, 2002, you must submit an Initial Notification not later than June 27, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 104. Amend table 2 to subpart TTTT of part 63 by adding in numerical order entries for §§ 63.9(j) and (k) to read as follows:

TABLE 2 TO SUBPART TTTT OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART TTTT

General provisions citation	Subject of citation	Brief description of requirement	Applies to subpart	Explanation
* * * * * * *				
§ 63.9(j)	Notification requirements	Change in previous information.	Yes.	
§ 63.9(k)	Notification requirements	Electronic reporting procedures.	Yes	Only as specified in § 63.9(j).
* * * * * * *				

Subpart UUUU—National Emission Standards for Hazardous Air Pollutants for Cellulose Products Manufacturing

■ 105. Amend table 7 to subpart UUUU of part 63 by revising entry 4 to read as follows:

TABLE 7 TO SUBPART UUUU OF PART 63—NOTIFICATIONS

If you . . .	then you must . . .
* * * * * * *	
4. start up your affected source before June 11, 2002	submit an initial notification no later than 120 days after June 11, 2002, or no later than 120 after the source becomes subject to this subpart, whichever is later, as specified in § 63.9(b)(2).
* * * * * * *	

■ 106. Amend table 8 to subpart UUUU of part 63 by revising entry 7 to read as follows:

TABLE 8 TO SUBPART UUUU OF PART 63—REPORTING REQUIREMENTS

* * * * * * *	
You must submit a compliance report, which must contain the following information . . .	and you must submit the report . . .
* * * * * * *	
7. the report must contain any changes in information already provided, as specified in § 63.9(j), except changes in major source status must be reported per § 63.9(j);	
* * * * * * *	

■ 107. Table 10 to subpart UUUU of part 63 is amended by revising the entry for § 63.9(j) and adding an entry for § 63.9(k), in numerical order, to read as follows:

TABLE 10 TO SUBPART UUUU OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART UUUU

Citation	Subject	Brief description	Applies to subpart UUUU
* * * * * * *			
§ 63.9(j)	Change in previous information	Must submit within 15 days of the change.	Yes, except the notification for all but change in major source status must be submitted as part of the next semiannual compliance report, as specified in Table 8 to this subpart.
§ 63.9(k)	Electronic reporting procedures	Procedure for electronically reporting the notification required by § 63.9(j).	Yes, as specified in § 63.9(j).
* * * * * * *			

Subpart VVVV—National Emission Standards for Hazardous Air Pollutants for Boat Manufacturing

■ 108. Amend table 8 to subpart VVVV of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 8 TO SUBPART VVVV OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART VVVV

Citation	Requirement	Applies to subpart VVVV	Explanation
* * * * * * *			
§ 63.1(c)(6)	Reclassification	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * * * * * *			

Subpart WWWW—National Emissions Standards for Hazardous Air Pollutants: Reinforced Plastic Composites Production

■ 109. Amend table 2 to subpart WWWW of part 63 by revising entry 1 to read as follows:

TABLE 2 TO SUBPART WWWW OF PART 63—COMPLIANCE DATES FOR NEW AND EXISTING REINFORCED PLASTIC COMPOSITES FACILITIES

If your facility is . . .	And . . .	Then you must comply by this date . . .
* * *	* * *	* * *
1. An existing source	a. Is a major source on or before the publication date of this subpart	April 21, 2006.
* * *	* * *	* * *

■ 110. Amend table 15 to subpart WWWW of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 15 TO SUBPART WWWW OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (SUBPART A) TO SUBPART WWWW OF PART 63

The general provisions reference	That addresses	And applies to subpart WWWW of part 63	Subject to the following additional information
* * *	* * *	* * *	* * *
§ 63.1(c)(6)	Reclassification	Yes	
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart XXXX—National Emissions Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing

■ 111. Amend § 63.6009 by revising paragraph (b) to read as follows:

§ 63.6009 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you startup your affected source before July 9, 2002, you must submit an Initial Notification not later than November 6, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 112. Amend table 17 to subpart XXXX of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 17 TO SUBPART XXXX OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO THIS SUBPART XXXX

Citation	Subject	Brief description of applicable sections	Applicable to subpart XXXX?	
			Using a control device	Not using a control device
* * *	* * *	* * *	* * *	* * *
§ 63.9(k)	Notification	Electronic reporting procedures.	Yes, as specified in § 63.9(j).	Yes, as specified in § 63.9(j).
* * *	* * *	* * *	* * *	* * *

Subpart YYYY—National Emission Standards for Hazardous Air Pollutants for Stationary Combustion Turbines

■ 113. Amend § 63.6145 by revising paragraph (b) to read as follows:

§ 63.6145 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your new or reconstructed stationary combustion turbine before March 5, 2004, you must submit an Initial Notification not later than 120 calendar days after March 5, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 114. Amend table 7 to subpart YYYY of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 7 TO SUBPART YYYY OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART YYYY

Citation	Requirement	Applies to subpart YYYY	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * * * * * *			

Subpart ZZZZ—National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines

■ 115. Amend § 63.6645 by revising paragraphs (b) and (d) to read as follows:

§ 63.6645 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions before the effective date of this subpart, you must submit an Initial Notification not later than December 13, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

(d) As specified in § 63.9(b)(2), if you start up your stationary RICE with a site rating of equal to or less than 500 brake HP located at a major source of HAP emissions before the effective date of this subpart and you are required to submit an initial notification, you must submit an Initial Notification not later than July 16, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 116. Amend table 8 to subpart ZZZZ of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

* * * * *

TABLE 8 TO SUBPART ZZZZ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART ZZZZ

General provisions citation	Subject of citation	Applies to subpart	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * * * * * *			

Subpart AAAAA—National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants

■ 117. Amend § 63.7130 by revising paragraphs (b) and (c) to read as follows:

§ 63.7130 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before January 5, 2004, you must submit an initial notification not later than 120 calendar days after January 5, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

(c) If you startup your new or reconstructed affected source on or after January 5, 2004, you must submit an initial notification not later than 120 calendar days after you start up your affected source, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 118. Amend table 8 to subpart AAAAA of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

TABLE 8 TO SUBPART AAAAA OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART AAAAA

Citation	Summary of requirement	Am I subject to this requirement?	Explanations
* * * * * * *			
§ 63.1(c)(6)	Reclassification	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * * * * * *			

Subpart BBBBB—National Emission Standards for Hazardous Air Pollutants for Semiconductor Manufacturing

■ 119. Amend § 63.7189 by revising paragraph (b) to read as follows:

§ 63.7189 What applications and notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before May 22, 2003, you must submit an Initial Notification not later than 120 calendar days after May 22, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart CCCCC—National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks

■ 120. Amend § 63.7340 by revising paragraph (b) to read as follows:

§ 63.7340 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you startup your affected source before April 14, 2003, you must submit your initial notification no later than August 12, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart DDDDD—National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters

■ 121. Amend § 63.7545 by revising paragraphs (b) and (c) to read as follows:

§ 63.7189 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you startup your affected source before January 31, 2013, you must submit an Initial Notification not later than 120 days after January 31, 2013, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

(c) As specified in § 63.9(b)(4) and (5), if you startup your new or reconstructed affected source on or after January 31, 2013, you must submit an Initial Notification not later than 15 days after the actual date of startup of the affected source. For a new or reconstructed affected source that has reclassified to major source status, you must submit an Initial Notification not later 120 days after the source becomes subject to this subpart.

* * * * *

Subpart EEEEE—National Emission Standards for Hazardous Air Pollutants for Iron and Steel Foundries

■ 122. Amend § 63.7750 by revising paragraph (b) to read as follows:

§ 63.7750 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your iron and steel foundry before April 22, 2004, you must submit your initial notification no later than August 20, 2004, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart FFFFF—National Emission Standards for Hazardous Air Pollutants for Integrated Iron and Steel Manufacturing Facilities

■ 123. Amend § 63.7840 by revising paragraph (b) to read as follows:

§ 63.7840 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you startup your affected source before May 20, 2003, you must submit your initial notification no later than September 17, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart GGGGG—National Emission Standards for Hazardous Air Pollutants: Site Remediation

■ 124. Amend § 63.7950 by revising paragraphs (b) and (c) to read as follows:

§ 63.7950 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before October 8, 2003, you must submit an Initial Notification not later than 120 calendar days after October 8, 2003, or no later than 120 calendar days after the source becomes subject to this subpart, whichever is later.

(c) As specified in § 63.9(b)(3), if you start up your new or reconstructed affected source on or after the effective date, you must submit an Initial Notification no later than 120 calendar days after initial startup, or no later than 120 calendar days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 125. Amend table 3 to subpart GGGGG of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 3 TO SUBPART GGGGG OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART GGGGG

* * * * * * *

Citation	Subject	Brief description	Applies to subpart GGGGG
* *	*	* *	* *
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures for notifications per § 63.9(j).	Yes.
* *	*	* *	* *

Subpart HHHHH—National Emission Standards for Hazardous Air Pollutants: Miscellaneous Coating Manufacturing

■ 126. Amend § 63.8070 by revising paragraph (b)(1) to read as follows:

§ 63.8070 What notifications must I submit and when?

* * * * *

(b) * * *

(1) As specified in § 63.9(b)(2), if you have an existing affected source on December 11, 2003, you must submit an initial notification not later than 120 calendar days after December 11, 2003, or no later than 120 calendar days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 127. Amend table 10 to subpart HHHHH of part 63 by revising the entry for § 63.9(j) and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 10 TO SUBPART HHHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART HHHHH

* * * * * * *

Citation	Subject	Explanation
* * *	* * *	* * *
§ 63.9(j)	Change in previous information	Yes, for change in major source status, otherwise § 63.8075(e)(8) specifies reporting requirements for process changes.
§ 63.9(k)	Electronic reporting procedures	Yes, as specified in § 63.9(j).
* * *	* * *	* * *

Subpart IIIII—National Emission Standards for Hazardous Air Pollutants: Mercury Emissions From Mercury Cell Chlor-Alkali Plants

■ 128. Amend § 63.8252 by revising paragraph (b) to read as follows:

§ 63.825 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before December 19, 2003, you must submit an Initial Notification no later than 120 calendar days after December 19, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 129. Amend table 10 to subpart IIIII of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 10 TO SUBPART IIIII OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART IIIII

* * * * * * *

Citation	Subject	Applies to subpart IIIII	Explanation
* * *	* * *	* * *	* * *
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart JJJJJ—National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing

■ 130. Amend table 8 to subpart JJJJJ of part 63 by revising entry 1 to read as follows:

TABLE 8 TO SUBPART JJJJJ OF PART 63—DEADLINES FOR SUBMITTING NOTIFICATIONS

If you . . .	You must . . .	No later than . . .	As specified in . . .
* * * * * * *			
1. Start up your affected source before December 28, 2015.	Submit an Initial Notification.	June 22, 2016, or no later than 120 days after the source becomes subject to this subpart, whichever is later.	§ 63.9(b)(2).
* * * * * * *			

■ 131. Amend table 10 to subpart JJJJJ of part 63 adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 10 TO SUBPART JJJJJ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJJJ

Citation	Subject	Brief description	Applies to subpart JJJJJ?
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures.	Electronic reporting procedures for notifications per § 63.9(j).	Yes.
* * * * * * *			

Subpart KKKKK—National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing

■ 132. Amend table 9 to subpart KKKKK of part 63 by revising entry 1 to read as follows:

TABLE 9 TO SUBPART KKKKK OF PART 63—DEADLINES FOR SUBMITTING NOTIFICATIONS

If you . . .	You must . . .	No later than . . .	As specified in . . .
* * * * * * *			
1. Start up your affected source before December 28, 2015.	Submit an Initial Notification	June 22, 2016, or no later than 120 days after the source becomes subject to this subpart, whichever is later.	§ 63.9(b)(2).
* * * * * * *			

■ 133. Amend table 11 to subpart KKKKK of part 63 adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 11 TO SUBPART KKKKK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKKK

Citation	Subject	Brief description	Applies to subpart KKKKK?
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures for notifications per § 63.9(j).	Yes.
* * * * * * *			

Subpart LLLLL—National Emission Standards for Hazardous Air Pollutants: Asphalt Processing and Asphalt Roofing Manufacturing

■ 134. Amend § 63.8692 by revising paragraph (b) to read as follows:

§ 63.8692 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before April 29, 2003, you must submit an Initial Notification not later than 120 calendar days after April 29, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 135. Amend table 7 to subpart LLLLL of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 7 TO SUBPART LLLLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART LLLLL

Citation	Subject	Brief description	Applies to subpart LLLLL
*	*	*	*
§ 63.9(k)	Electronic reporting procedures.	Electronic reporting procedures for notifications per § 63.9(j).	Yes.
*	*	*	*

Subpart MMMMM—National Emission Standards for Hazardous Air Pollutants: Flexible Polyurethane Foam Fabrication Operations

■ 136. Amend § 63.8816 by revising paragraph (b) to read as follows:

§ 63.8816 What notifications must I submit and when?

* * * * *

(b) If you own or operate an existing loop slitter or flame lamination affected source, submit an initial notification no later than 120 days after April 14, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 137. Amend table 7 to subpart MMMMM of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 7 TO SUBPART MMMMM OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART MMMMM

* * * * * * *

Citation	Requirement	Applies to subpart MMMMM	Explanation
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart NNNNN—National Emission Standards for Hazardous Air Pollutants: Hydrochloric Acid Production

■ 138. Amend § 63.9045 by revising paragraph (b) to read as follows:

§ 63.9045 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before April 17, 2003, you must submit an Initial Notification not later than 120 calendar days after April 17, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 139. Amend table 7 to subpart NNNNN of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 7 TO SUBPART NNNNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART NNNNN

* * * * * * *

Citation	Requirement	Applies to subpart NNNNN	Explanation
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart PPPPP—National Emission Standards for Hazardous Air Pollutants for Engine Test Cells/Stands

■ 140. Amend § 63.9345 by revising paragraph (b)(1) to read as follows:

§ 63.9345 What notifications must I submit and when?

* * * * *

(b) * * *

(1) As specified in § 63.9(b)(2), if you start up your new or reconstructed affected source before the effective date of this subpart, you must submit an Initial Notification not later than 120 calendar days after May 27, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 141. Amend table 7 to subpart PPPPP of part 63 by adding in numerical order entries for §§ 63.1(c)(6) and 63.9(k) to read as follows:

* * * * *

TABLE 7 TO SUBPART PPPPP OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART PPPPP

* * * * * * *

Citation	Subject	Brief description	Applies to subpart PPPPP
*	*	*	*
§ 63.1(c)(6)	Applicability	Reclassification	Yes.
*	*	*	*
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes, only as specified in § 63.9(j).
*	*	*	*

Subpart QQQQQ—National Emission Standards for Hazardous Air Pollutants for Friction Materials Manufacturing Facilities

■ 142. Amend § 63.9485 by revising paragraph (a) to read as follows:

§ 63.9485 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a friction materials manufacturing facility (as defined in § 63.9565) that is (or is part of) a major source of hazardous air pollutants (HAP) emissions. Your friction materials manufacturing facility is a major source of HAP if it emits or has the potential to emit any single HAP at a rate of 9.07 megagrams (10 tons) or more per year or any combination of HAP at a rate of 22.68 megagrams (25 tons) or more per year.

* * * * *

■ 143. Amend § 63.9535 by revising paragraph (c) to read as follows:

§ 63.9535 What notifications must I submit and when?

* * * * *

(c) As specified in § 63.9(b)(2), if you start up your affected source before October 18, 2002, you must submit your initial notification no later than 120 calendar days after October 18, 2002, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 144. Amend table 1 to subpart QQQQQ of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

* * * * *

TABLE 1 TO SUBPART QQQQQ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART QQQQQ

* * * * * * *

Citation	Subject	Applies to subpart QQQQQ?	Explanation
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart RRRRR—National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing

■ 145. Revise § 63.9581 to read as follows:

§ 63.9581 Am I subject to this subpart?

You are subject to this subpart if you own or operate a taconite iron ore processing plant that is (or is part of) a major source of hazardous air pollutant (HAP) emissions. Your taconite iron ore processing plant is a major source of HAP if it emits or has the potential to emit any single HAP at a rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year.

■ 146. Amend § 63.9640 by revising paragraph (b) to read as follows:

§ 63.9640 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before October 30, 2003, you must submit your initial notification no later than 120 calendar days after October 30, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 147. Amend table 2 to subpart RRRRR of part 63 by adding in numerical order entries for § 63.1(c)(6) and § 63.9(k) to read as follows:

* * * * *

TABLE 2 TO SUBPART RRRRR OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART RRRRR OF PART 63

Citation	Subject	Applies to subpart RRRRR	Explanation
* * *	* * *	* * *	* * *
§ 63.1(c)(6)	Reclassification	Yes.	
* * *	* * *	* * *	* * *
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart SSSSS—National Emission Standards for Hazardous Air Pollutants for Refractory Products Manufacturing

■ 148. Amend § 63.9812 by revising paragraph (b) to read as follows:

§ 63.9812 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before April 16, 2003, you must submit an Initial Notification no later than 120 calendar days after April 16, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

■ 149. Amend table 11 to subpart SSSSS of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

* * * * *

TABLE 11 TO SUBPART SSSSS OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART SSSSS

Citation	Subject	Brief description	Applies to subpart SSSSS
* * *	* * *	* * *	* * *
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes, only as specified in § 63.9(j).
* * *	* * *	* * *	* * *

Subpart TTTTT—National Emissions Standards for Hazardous Air Pollutants for Primary Magnesium Refining

■ 150. Amend § 63.9930 by revising paragraph (b) to read as follows:

§ 63.9930 What notifications must I submit and when?

* * * * *

(b) As specified in § 63.9(b)(2), if you start up your affected source before October 10, 2003, you must submit your initial notification no later than 120 calendar days after October 10, 2003, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart WWWWW—National Emission Standards for Hospital Ethylene Oxide Sterilizers

■ 151. Amend table 1 to subpart WWWWW of part 63 by removing the entry for § 63.9(d)–(j) and adding in numerical order entries for §§ 63.9(d)–(i) and 63.9(j)–(k).

The additions read as follows:

* * * * *

TABLE 1 TO SUBPART WWWWW OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART WWWWW

Citation	Subject	Applies to subpart WWWWW	Explanation
* * *	* * *	* * *	* * *
§ 63.9(d)–(i)	Other notifications	No.	
§ 63.9(j)–(k)	Change in information already submitted Electronic reporting.	Yes.	
* * *	* * *	* * *	* * *

Subpart BBBBBB—National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities

■ 152. Amend § 63.11086 by revising paragraph (e) introductory text to read as follows:

§ 63.11086 What requirements must I meet of my facility is a bulk gasoline plant?

* * * * *

(e) You must submit an Initial Notification that you are subject to this subpart by May 9, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later unless you meet the requirements in paragraph (g) of this section. The Initial Notification must contain the information specified in paragraphs (e)(1) through (4) of this section. The notification must be submitted to the applicable EPA Regional Office and the delegated state authority, as specified in § 63.13.

* * * * *

■ 153. Amend table 3 to subpart BBBBBB of part 63 by revising the entry for § 63.9(b) and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 3 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Subject	Brief description	Applies to subpart BBBBBB
*	*	*	*
§ 63.9(b) (1)–(2), (4)–(5)	Initial Notifications	Submit notification within 120 days after effective date, or no later than 120 days after the source becomes subject to this subpart, whichever is later; notification of intent to construct/reconstruct, notification of commencement of construction/reconstruction, notification of startup; contents of each.	Yes.
*	*	*	*
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes, only as specified by § 63.9(j).
*	*	*	*

Subpart CCCCCC—National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities

■ 154. Amend § 63.11124 by revising paragraphs (a)(1) introductory text and (b)(1) introductory text to read as follows:

§ 63.11124 What notifications must I submit and when?

(a) * * *

(1) You must submit an Initial Notification that you are subject to this subpart by May 9, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later, or at the time you become subject to the control requirements in § 63.11117, unless you meet the requirements in paragraph (a)(3) of this section. If your affected source is subject to the control requirements in § 63.11117 only because it loads gasoline into fuel tanks other than those in motor vehicles, as defined in § 63.11132, you must submit the Initial Notification by May 24, 2011, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The Initial Notification must contain the information specified in paragraphs (a)(1)(i) through (iii) of this section. The notification must be submitted to the applicable EPA Regional office and delegated state authority as specified in § 63.13.

* * * * *

(b) * * *

(1) You must submit an Initial Notification that you are subject to this subpart by May 9, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later, or at the time you become subject to the control requirements in § 63.11118. If your affected source is subject to the control requirements in § 63.11118 only because it loads gasoline into fuel tanks other than those in motor vehicles, as defined in § 63.11132, you must submit the Initial Notification by May 24, 2011, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The Initial Notification must contain the information specified in paragraphs (b)(1)(i) through (iii) of this section. The notification must be submitted to the applicable EPA Regional office and delegated state authority as specified in § 63.13.

* * * * *

■ 155. Amend table 3 to subpart CCCCCC of part 63 by revising the entry for § 63.9(b) and adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 3 TO SUBPART CCCCCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Subject	Brief description	Applies to subpart CCCCCC
*	*	*	*
§ 63.9(b)(1)–(2), (4)–(5)	Initial Notifications	Submit notification within 120 days after effective date, or no later than 120 days after the source becomes subject to this subpart, whichever is later; notification of intent to construct/reconstruct, notification of commencement of construction/reconstruction, notification of startup; contents of each.	Yes.

TABLE 3 TO SUBPART CCCCCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Subject	Brief description	Applies to subpart CCCCCC
*	*	*	*
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes, only as specified in § 63.9(j).
*	*	*	*

Subpart HHHHHH—National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources

■ 156. Amend § 63.11175 by revising paragraph (a) introductory text to read as follows:

§ 63.11175 What notifications must I submit?

(a) Initial Notification. If you are the owner or operator of a paint stripping operation using paint strippers containing MeCl and/or a surface coating operation subject to this subpart, you must submit the initial notification required by § 63.9(b). For a new affected source, you must submit the Initial Notification no later than 180 days after initial startup, or no later than 120 days after the source becomes subject to this subpart, or July 7, 2008, whichever is later. For an existing affected source, you must submit the initial notification no later than January 11, 2010, or no later than 120 days after the source becomes subject to this subpart. The initial notification must provide the information specified in paragraphs (a)(1) through (8) of this section.

* * * * *

■ 157. Amend table 1 to subpart HHHHHH of part 63 by adding in numerical order an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART HHHHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART HHHHHH OF PART 63

Citation	Subject	Applicable to subpart HHHHHH	Explanation
*	*	*	*
§ 63.9(k)	Electronic reporting procedures	Yes	Only as specified in § 63.9(j).
*	*	*	*

Subpart PPPPPP—National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources

■ 158. Amend § 63.11425 by revising paragraphs (b) and (c) to read as follows:

§ 63.11425 What General Provisions apply to this subpart?

* * * * *

(b) For existing sources, the initial notification required by § 63.9(b) must be submitted not later than November 13, 2007, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

(c) For existing sources, the initial notification of compliance required by § 63.9(h) must be submitted not later than March 13, 2009, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

Subpart QQQQQQ—National Emission Standards for Hazardous Air Pollutants for Wood Preserving Area Sources

■ 159. Amend § 63.11432 by revising paragraphs (b) introductory text and (c) to read as follows:

§ 63.11432 What General Provisions apply to this subpart?

* * * * *

(b) If you own or operate a new or existing affected source that uses any wood preservative containing chromium, arsenic, dioxins, or methylene chloride, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 90 days after the applicable compliance date specified in § 63.11429, or no later than 90 days after the source becomes subject to this subpart, whichever is later. The initial notification may be combined with the notification of compliance status required in paragraph (c) of this section. The notification of applicability must include the following information:

* * * * *

(c) If you own or operate a new or existing affected source that uses any wood preservative containing chromium, arsenic, dioxins, or methylene chloride, you must submit a notification of compliance status required by § 63.9(h) no later than 90 days after the applicable compliance date specified in § 63.11429, or no later than 90 days after the source becomes subject to this subpart, whichever is later. Your notification of compliance status must include this certification of compliance, signed by a responsible official, for the standards in § 63.11430: ''This facility complies with the management practices to minimize air emissions from the preservative treatment of wood in accordance with § 63.11430.''

* * * * *

Subpart RRRRRR—National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing Area Sources

■ 160. Amend § 63.11441 by revising paragraph (a) to read as follows:

§ 63.11441 What are the notification requirements?

(a) You must submit an Initial Notification required by § 63.9(b)(2) no later than 120 days after the applicable compliance date specified in § 63.11437, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The Initial Notification must include the

information specified in §§ 63.9(b)(2)(i) through (iv) and may be combined with the Notification of Compliance Status required in paragraph (b) of this section.

* * * * *

Subpart TTTTTT—National Emission Standards for Hazardous Air Pollutants for Secondary Nonferrous Metals Processing Area Sources

■ 161. Amend § 63.11469 by revising paragraph (a) to read as follows:

§ 63.11469 What are the notification requirements?

(a) You must submit the Initial Notification required by § 63.9(b)(2) no later than 120 days after the applicable compliance date specified in § 63.11464, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The Initial Notification must include the information specified in § 63.9(b)(2)(i) through (iv) and may be combined with the Notification of Compliance Status required in § 63.11467 and paragraph (b) of this section if you choose to submit both notifications within 120 days.

* * * * *

Subpart WWWWWW—National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Plating and Polishing Operations

■ 162. Amend § 63.11509 by revising paragraph (a)(3) to read as follows:

§ 63.11509 What are my notification, reporting, and recordkeeping requirements?

(a) * * *

(3) If you start up your affected source on or before July 1, 2008, you must submit an Initial Notification not later than 120 calendar days after July 1, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart XXXXXX—National Emission Standards for Hazardous Air Pollutants Area Source Standards for Nine Metal Fabrication and Finishing Source Categories

■ 163. Amend § 63.11519 by revising paragraph (a)(1) introductory text to read as follows:

§ 63.11519 What are my notifications, recordkeeping, and reporting requirements?

(a) * * *

(1) *Initial notification.* If you are the owner or operator of an area source in one of the nine metal fabrication and finishing source categories, as defined in § 63.11514, you must submit the initial notification required by § 63.9(b), for a new affected source no later than 120 days after initial startup, or no later than 120 days after the source becomes subject to this subpart, or November 20, 2008, whichever is later. For an existing affected source, you must submit the initial notification no later than July 25, 2011, or 120 days after the source becomes subject to this subpart, whichever is later. Your initial notification must provide the information specified in paragraphs (a)(1)(i) through (iv) of this section.

* * * * *

Subpart YYYYYY—National Emission Standards for Hazardous Air Pollutants for Area Sources: Ferroalloys Production Facilities

■ 164. Amend § 63.11529 by revising paragraph (a) to read as follows:

§ 63.11529 What are the notification, reporting, and recordkeeping requirements?

(a) *Initial Notification.* You must submit the Initial Notification required by § 63.9(b)(2) no later than 120 days after December 23, 2008, or no later than 120 days after the source becomes subject to this subpart, whichever is later. The Initial Notification must include the information specified in § 63.9(b)(2)(i) through (iv).

* * * * *

Subpart AAAAAAA—National Emission Standards for Hazardous Air Pollutants for Area Sources: Asphalt Processing and Asphalt Roofing Manufacturing

■ 165. Amend § 63.11564 by revising paragraph (a)(2) to read as follows:

§ 63.11564 What are my notification, recordkeeping, and reporting requirements?

(a) * * *

(2) As specified in § 63.9(b)(2), if you have an existing affected source, you must submit an Initial Notification not later than 120 calendar days after December 2, 2009, or no later than 120 days after the source becomes subject to this subpart, whichever is later.

* * * * *

Subpart BBBBBBB—National Emission Standards for Hazardous Air Pollutants for Area Sources: Chemical Preparations Industry

■ 166. Amend § 63.11585 by revising paragraph (b)(1) to read as follows:

§ 63.11585 What are my notification, recordkeeping, and reporting requirements?

* * * * *

(b) * * *

(1) *Initial Notification of Applicability.* If you own or operate an existing affected source, you must submit an initial notification of applicability as required by § 63.9(b)(2) no later than April 29, 2010, or no later than 120 days after the source becomes subject to this subpart, whichever is later. If you own or operate a new affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 120 days after initial start-up of operation, or no later than 120 days after the source becomes subject to this subpart, or April 29, 2010, whichever is later. The initial notification of applicability must include the information specified in §§ 63.9(b)(2)(i) through (iii).

* * * * *

Subpart CCCCCCC—National Emission Standards for Hazardous Air Pollutants for Area Sources: Paints and Allied Products Manufacturing

■ 167. Amend § 63.11603 by revising paragraph (a)(1) introductory text to read as follows:

§ 63.11603 What are the notification, recordkeeping, and reporting requirements?

(a) * * *

(1) *Initial Notification of Applicability.* If you own or operate an existing affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than June 1, 2010, or no later than 120 days after the source becomes subject to this subpart, whichever is later. If you own or operate a new affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 180 days after initial start-up of the operations, or no later than 120 days after the source becomes subject to this subpart, or June 1, 2010, whichever is later. The notification of applicability must include the information specified in paragraphs (a)(1)(i) through (iii) of this section.

* * * * *

Subpart HHHHHHH—National Emission Standards for Hazardous Air Pollutant Emissions for Polyvinyl Chloride and Copolymers Production

■ 168. Amend table 4 to subpart HHHHHHH of part 63 by revising the entry for § 63.1 and adding in numerical

order an entry for § 63.9(k) to read as follows:

TABLE 4 TO SUBPART HHHHHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO PART 63

Citation	Subject	Applies to subpart HHHHHHH	Comment
§ 63.1(a)(1)–(a)(4), (a)(6), (a)(10)–(a)(12), (b)(1), (b)(3), (c)(1), (c)(2), (c)(5), (c)(6), (e).	Applicability	Yes.	
* * *	*	* *	*
§ 63.9(k)	Electronic reporting procedures.	Yes	Only as specified in § 63.9(j).
* * *	*	* *	*

[FR Doc. 2020–22044 Filed 11–10–20; 4:15 pm]

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Part III

Securities and Exchange Commission

17 CFR Parts 270 and 274

Fund of Funds Arrangements; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 274

[Release Nos. 33–10871; IC–34045; File No. S7–27–18]

RIN 3235–AM29

Fund of Funds Arrangements

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is adopting a new rule under the Investment Company Act of 1940 (''Investment Company Act'' or ''Act'') to streamline and enhance the regulatory framework applicable to funds that invest in other funds (''fund of funds'' arrangements). In connection with the new rule, the Commission is rescinding rule 12d1–2 under the Act and certain exemptive relief that has been granted from sections 12(d)(1)(A), (B), (C), and (G) of the Act permitting certain fund of funds arrangements. Finally, the Commission is adopting related amendments to rule 12d1–1 under the Act and to Form N–CEN.

DATES: *Effective Date:* This rule is effective January 19, 2021.

Compliance Dates: The applicable compliance dates are discussed in sections II.D, II.F and III of this final rule.

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SUPPLEMENTARY INFORMATION: The Commission is adopting 17 CFR 270.12d1–4 (new rule 12d1–4) under the Investment Company Act [15 U.S.C. 80a–1 *et seq.*]; [1] amendments to 17 CFR 270.12d1–1 (rule 12d1–1) under the Investment Company Act; amendments to Form N–CEN [referenced in 17 CFR 274.101] under the Investment Company Act; and rescission of 17 CFR 270.12d1–2 (rule 12d1–2) under the Investment Company Act.

[1] Unless otherwise noted, all references to statutory sections are to the Investment Company Act, and all references to rules under the Investment Company Act are to title 17, part 270 of the Code of Federal Regulations [17 CFR part 270].

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I. Introduction

We are adopting new rule 12d1–4 under the Investment Company Act and several related amendments to streamline and enhance the regulatory framework applicable to fund of funds arrangements. This framework reflects the Commission's decades of experience with fund of funds arrangements and will create a consistent and efficient rules-based regime for the formation, operation, and oversight of fund of funds arrangements.[2] We believe that this framework will provide investors with the benefits of fund of funds arrangements, and will provide funds with investment flexibility to meet their investment objectives efficiently, in a manner consistent with the public interest and the protection of investors.

Funds increasingly invest in other funds as a way to achieve asset allocation, diversification, or other investment objectives. According to staff estimates, approximately 40% of all registered funds hold an investment in at least one fund,[3] and total net assets in mutual funds that invest primarily in other mutual funds have grown from $469 billion in 2008 to $2.54 trillion in 2019.[4] Retail investors similarly use fund of funds arrangements as a convenient way to allocate and diversify their investments through a single, professionally managed portfolio. For example, a fund of funds may provide an investor with the same benefits as separate direct investments in several underlying funds, without the increased monitoring and recordkeeping that could accompany investments in each underlying fund.[5]

In December 2018, we proposed rule 12d1–4, which would permit a fund to acquire shares of another fund in excess of the limits of section 12(d)(1) without obtaining an exemptive order from the Commission, subject to certain conditions.[6] Because the proposed rule would provide a comprehensive exemption for funds of funds to operate, the Commission also proposed to rescind rule 12d1–2 under the Act and individual exemptive orders permitting certain fund of funds arrangements. In connection with the proposed rescission of rule 12d1–2, we proposed amendments to rule 12d1–1 under the

[2] As discussed in more detail below, section 12(d)(1) of the Investment Company Act limits the ability of a fund to invest substantially in securities issued by another fund. *See* 15 U.S.C. 80a–12(d)(1).

[3] *See infra* Table 2. Of those funds investing in other funds, 48% invest at least 5% of their assets in other funds, and 26% hold more than 90% of their assets in other funds. *See infra* Table 4. For more data on fund of funds arrangements, *see infra* section VI.

[4] During this period the number of mutual funds utilizing this arrangement grew from 838 to 1,469. *See* Investment Company Institute, 2020 Fact Book: A Review of Trends and Activities in the Investment Company Industry (''2020 ICI Fact Book''), at 244, *available at https://www.ici.org/pdf/2020_factbook.pdf.*

[5] Target-date funds are a common type of fund of funds arrangement and are designed to make it easier for investors to hold a diversified portfolio of assets that is rebalanced over time without the need for investors to rebalance their own portfolio. *See* Investment Company Advertising: Target Date Retirement Fund Names and Marketing, Investment Company Act Release No. 29301 (June 16, 2010) [75 FR 35920 (June 23, 2010)] (proposing disclosure requirements for target date retirement funds' marketing materials).

[6] *See* Fund of Funds Arrangements, Investment Company Act Release No. 10590 (Dec. 19, 2018) [84 FR 1286 (Feb 1, 2019)] (''2018 FOF Proposing Release''). For purposes of this release and rule 12d1–4, we generally use the term ''funds'' to refer to registered investment companies and business development companies (''BDCs'') unless the context otherwise requires. A BDC is a closed-end fund that: (i) Is organized under the laws of, and has its principal place of business in, any state or states; (ii) is operated for the purpose of investing in securities described in section 55(a)(1)–(3) of the Act and makes available ''significant managerial assistance'' to the issuers of those securities, subject to certain conditions; and (iii) has elected under section 54(a) of the Act to be subject to the sections addressing activities of BDCs under the Act. *See* 15 U.S.C. 80a–2(a)(48). Section 6(f) of the Act exempts BDCs that have made the election under section 54 of the Act from registration provisions of the Act.

Act to allow funds that rely on section 12(d)(1)(G) of the Act to invest in money market funds that are not part of the same group of investment companies. Finally, the Commission proposed certain disclosure amendments to Form N–CEN to provide the Commission additional census-type information regarding fund of funds arrangements.

We received more than 100 comment letters on the proposal.[7] Many commenters supported the Commission's goal of simplifying the regulatory framework for fund of funds arrangements.[8] However, commenters recommended modifications to the proposed rule.[9] For example, several commenters suggested changing the scope of arrangements permitted by the rule or expanding the scope of certain exemptions.[10] Many commenters also recommended alternatives to the proposed rule's conditions. For instance, commenters strongly opposed the proposed redemption limit and recommended instead codifying certain conditions in existing exemptive orders or applying the limitation only to unaffiliated fund of funds arrangements.[11] Several commenters recommended modifications to the proposed rule's control and voting provisions, while some commenters proposed changes to the proposed rule's disclosure and board reporting requirements.[12] Some commenters expressed concern about the potential impact of the proposed rule's conditions on existing fund of funds arrangements, particularly in light of the proposed rescission of rule 12d1–2 and existing exemptive orders.[13]

After consideration of the comments we received, we are adopting rule 12d1–4 with several modifications designed to increase the workability of the rule's requirements, while enhancing protections for investors in fund of funds arrangements. We are also rescinding rule 12d1–2 and exemptive relief that permitted certain fund of funds arrangements, amending rule 12d1–1 under the Act, and amending Form N–CEN.

A. Regulatory Context

Section 12(d)(1) of the Act limits the ability of a fund to invest substantially in securities issued by another fund. Section 12(d)(1)(A) of the Act prohibits a registered fund (and companies, including funds, it controls) from:

- Acquiring more than 3% of another fund's outstanding voting securities;
- investing more than 5% of its total assets in any one fund; or
- investing more than 10% of its total assets in funds generally.[14]

Section 12(d)(1)(B) of the Act addresses the other side of the transaction by prohibiting a registered open-end fund,[15] and any principal underwriter thereof or broker-dealer registered under the Securities Exchange Act of 1934 (the ''Exchange Act''), from knowingly selling securities to any other investment company if, after the sale, the acquiring fund would:

- Together with companies it controls, own more than 3% of the acquired fund's outstanding voting securities; or
- together with other funds (and companies they control), own more than 10% of the acquired fund's outstanding voting securities.[16]

These restrictions are designed to prevent fund of funds arrangements that allow the acquiring fund to control the assets of the acquired fund and use those assets to enrich the acquiring fund at the expense of acquired fund shareholders.[17] Congress also was concerned about the potential for duplicative and excessive fees when one fund invested in another and the formation of overly complex structures that could be confusing to investors.[18]

As discussed in the 2018 FOF Proposing Release, our views and those of Congress have evolved over the years as fund of funds structures developed that include investor protections and serve purposes that benefit investors.[19] As a result, Congress created three statutory exceptions that permit different types of fund of funds arrangements subject to certain conditions.[20] Congress also gave the Commission authority in section

[7] The comment letters on the 2018 FOF Proposing Release (File No. S7–27–18) are available at *https://www.sec.gov/comments/s7-27-18/s72718.htm.*

[8] *See, e.g.,* Comment Letter of Managed Funds Association (April 30, 2019) (''MFA Comment Letter''); Comment Letter of Investment Company Institute (April 30, 2019) (''ICI Comment Letter''); Comment Letter of Investment Adviser Association (May 2, 2019) (''IAA Comment Letter''); Comment Letter of Consumer Federation of America (May 2, 2019) (''CFA Comment Letter''); Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (May 2, 2019) (''SIFMA AMG Comment Letter''); Comment Letter of Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (June 11, 2019) (''ABA Comment Letter'').

[9] *See, e.g.,* ICI Comment Letter; ABA Comment Letter; SIFMA AMG Comment Letter; Comment Letter of the Committee on Investment Management Regulation of the New York City Bar Association (May 2, 2019) (''NYC Bar Comment Letter''); Comment Letter of Institute for Portfolio Alternatives (May 1, 2019) (''IPA Comment Letter''); Comment Letter of Fidelity Investments (May 2, 2019) (''Fidelity Comment Letter'').

[10] *See, e.g.,* MFA Comment Letter; NYC Bar Comment Letter; CFA Comment Letter; Comment Letter of T. Rowe Price (May 2, 2019) (''TRP Comment Letter'').

[11] *See, e.g.,* Comment Letter of Guggenheim Investments (May 2, 2019) (''Guggenheim Comment Letter''); Comment Letter of Dimensional Funds (May 2, 2019) (''Dimensional Comment Letter''); Comment Letter of Wells Fargo Funds Management, LLC (May 2, 2019) (''Wells Fargo Comment Letter''); Comment Letter of Federated Investors, Inc. (May 2, 2019) (''Federated Comment Letter''); SIFMA AMG Comment Letter; Fidelity Comment Letter; NYC Bar Comment Letter.

[12] *See, e.g.,* MFA Comment Letter; ICI Comment Letter; IPA Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter; Comment Letter of PGIM Investments LLC (May 2, 2019) (''PGIM Comment Letter''); TRP Comment Letter.

[13] *See, e.g.,* Comment Letter of Pacific Investment Management Company LLC (May 1, 2019) (''PIMCO Comment Letter''); Federated Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter; NYC Bar Comment Letter.

[14] *See* 15 U.S.C. 80a–12(d)(1)(A). Both registered and unregistered investment companies are subject to these limits with respect to their investments in a registered investment company. Registered investment companies are also subject to these same limits with respect to their investment in an unregistered investment company. Sections 3(c)(1) and 3(c)(7) subject private funds to the 3% limitation on investments in registered funds. 15 U.S.C. 80a–3(c)(1) and 3(c)(7)(D). A ''private fund'' is an issuer that would be an investment company, as defined in section 3 of the Act, but for section 3(c)(1) or 3(c)(7) of the Act. 15 U.S.C. 80b–2(a)(29). In addition, section 60 of the Act makes section 12(d) applicable to a BDC to the same extent as it if were a registered closed-end fund. 15 U.S.C. 80a–60.

[15] A registered open-end fund is a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer. 15 U.S.C. 80a–5(a)(1) (defining ''open-end company''). A registered closed-end fund is any management company other than an open-end fund. 15 U.S.C. 80a–5(a)(2) (defining ''closed-end company''). Section 12(d)(1)(C) of the Act also includes specific limitations on investments in registered closed-end funds. *See* 15 U.S.C. 80a–12(d)(1)(C).

[16] *See* 15 U.S.C. 80a–12(d)(1)(B).

[17] This practice is described as ''pyramiding.'' *See* 2018 FOF Proposing Release, *supra* footnote 6, at 1287. Control could be exercised either directly (such as through the voting power of a controlling interest) or indirectly (such as coercion through the threat of large-scale redemptions). *See id.*

[18] Controlling persons profited when acquiring fund shareholders paid excessive fees due to duplicative charges at both the acquiring and acquired fund levels. *See* Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, H.R. Doc. No. 136, 77th Cong., 1st Sess., at ch. 7, 2725–39, 2760–75, 2778–93, (1941) (''Investment Trust Study'') and Exchange-Traded Funds, Investment Company Act Release No. 28193 (Mar. 11, 2008) [73 FR 14618 (Mar. 18, 2008)] (''2008 ETF Proposing Release''), at n. 195. *See also* 2018 FOF Proposing Release, *supra* footnote 6, at 9.

[19] *See* Fund of Funds Investments, Investment Company Act Release No. 27399 (June 20, 2006) [71 FR 36640 (June 27, 2006)] (''2006 FOF Adopting Release'') at n.7 and accompanying text; 2008 ETF Proposing Release, *supra* footnote 18. *See also* 2018 FOF Proposing Release, *supra* footnote 6, at 10–13.

[20] *See* 15 U.S.C. 80a–12(d)(1)(E) (permitting master-feeder arrangements whereby an acquiring fund invests all of its assets in a single fund), 15 U.S.C. 80a–12(d)(1)(F) (permitting a fund to take small positions (up to 3% of another fund's securities) in an unlimited number of other funds), and 15 U.S.C. 80a–12(d)(1)(G) (permitting an open-end fund or unit investment trust (''UIT'') to invest in other open-end funds and UITs that are in the ''same group of investment companies'').

12(d)(1)(J) of the Act to exempt any person, security, or transaction, or any class or classes of transactions, from the restrictions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.[21]

We previously exercised this exemptive authority to adopt three rules of general applicability that were based on relief we provided to specific market participants in exemptive orders.[22] We also have used our authority under section 12(d)(1)(J) to issue exemptive orders permitting fund of funds arrangements that the Act or our rules would otherwise prohibit when we found those arrangements to be consistent with the public interest and the protection of investors.[23] These exemptive orders permit fund investments in other funds, subject to specified conditions that are designed to prevent the abuses that led Congress to enact section 12(d)(1).[24] Relief from sections 12(d)(1)(A) and (B) was included in exemptive orders permitting exchange-traded funds (''ETFs'') and exchange-traded managed funds (''ETMFs'') to operate.[25]

The combination of statutory exemptions, Commission rules, and exemptive orders has created a regulatory regime where substantially similar fund of funds arrangements are subject to different conditions. For example, an acquiring fund could rely on section 12(d)(1)(G) and rule 12d1–2 when investing in an acquired fund within the same group of investment companies.[26] Alternatively, the acquiring fund could rely on relief provided by an exemptive order, which would allow it to invest in substantially the same investments, but could require the fund to comply with different conditions. Over time, industry participants have experimented with new fund of funds structures, relying on combinations of statutory exemptions and Commission exemptive orders, and considering staff no-action letters, to create novel fund of funds arrangements. For example, some commenters described funds that have combined various forms of section 12(d)(1) relief to create fund structures that include three or more layers of funds.[27]

B. Rule 12d1–4 Overview

In order to create a more consistent and efficient regulatory framework for fund of funds arrangements, rule 12d1–4 will permit a registered investment company or business development company (''BDC'') (collectively, ''acquiring funds'') to acquire the securities of any other registered investment company or BDC (collectively, ''acquired funds'') in excess of the limits in section 12(d)(1), subject to the following conditions:

- *Control.* Rule 12d1–4 will prohibit an acquiring fund and its ''advisory group'' from controlling an acquired fund, except in certain limited circumstances.
- *Voting.* Rule 12d1–4 will require an acquiring fund and its advisory group to use mirror voting if it holds more than 25% of an acquired open-end fund or UIT due to a decrease in the outstanding securities of the acquired fund and if it holds more than 10% of a closed-end fund, with the ability to use pass-through voting when acquiring funds are the only shareholders of an acquired fund.[28]
- *Required Findings.* Rule 12d1–4 will require investment advisers to acquiring and acquired funds that are management companies to make certain findings regarding the fund of funds arrangement, after considering specific factors. The final rule also will require certain findings with respect to UITs and separate accounts funding variable insurance contracts, taking into account the unique structural characteristics of such entities.
- *Fund of Funds Investment Agreement.* Rule 12d1–4 will require funds that do not have the same investment adviser to enter into an agreement prior to the purchase of acquired fund shares in excess of section 12(d)(1)'s limits (a ''fund of funds investment agreement'').
- *Complex Structures.* Rule 12d1–4 will impose a general three-tier prohibition with certain enumerated exceptions. However, in addition to these exceptions, the rule will allow an acquired fund to invest up to 10% of its total assets in other funds (including private funds), without regard to the purpose of the investment or types of underlying funds.

As proposed, we are rescinding rule 12d1–2 under the Act, and amending rule 12d1–1 to allow funds that rely on section 12(d)(1)(G) to invest in money market funds that are not part of the same group of investment companies in reliance on that rule.[29] In addition, certain staff no-action letters relating to section 12(d)(1) will be withdrawn.[30] The resulting regulatory framework will reduce confusion and subject similar fund of funds arrangements to tailored conditions that will enhance investor protection, while continuing to provide funds with investment flexibility to meet their investment objectives. In addition, the rule will allow the Commission, as well as funds and

[21] *See* National Securities Markets Improvement Act of 1996 (''NSMIA''), Public Law 104–290, 110 Stat. 3416 (1996), at § 202(4) (codified at 15 U.S.C. 80a–12(d)(1)(J)); Comm. On Commerce, Securities Amendments of 1996, H.R. Rep. No. 104–622 (1996), 104th Cong., 2nd Sess., at 43–44 (''H.R. Rep. No. 622''). Congress added section 12(d)(1)(J) to resolve questions regarding the scope of the Commission's authority under section 6(c) of the Act.

[22] *See* 2006 FOF Adopting Release, *supra* footnote 19. Rule 12d1–1 allows funds to invest in shares of money market funds in excess of the limits of section 12(d)(1). Rule 12d1–2 provides funds relying on section 12(d)(1)(G) with greater flexibility to invest in other types of securities. Rule 12d1–3 allows acquiring funds relying on section 12(d)(1)(F) to charge sales loads greater than 1.5%.

[23] As the orders are subject to terms and conditions set forth in the applications requesting exemptive relief, references in this release to ''exemptive relief'' or ''exemptive orders'' include the terms and conditions described in the related applications. *See, e.g.,* Schwab Capital Trust, *et al.,* Investment Company Act Release Nos. 24067 (Oct. 1, 1999) [64 FR 54939 (Oct. 8, 1999)] (notice) and 24113 (Oct. 27, 1999) (order) and related application (''Schwab''). In addition to our section 12(d)(1)(J) authority, we have issued these orders pursuant to our exemptive authority under sections 17(a) and 6(c) of the Act.

[24] The conditions include: (i) Limits on the control and influence an acquiring fund can exert on the acquired fund; (ii) limits on certain fees charged to the acquiring fund and its shareholders; and (iii) limits on the acquired fund's ability to invest in other funds. *See* Schwab, *supra* footnote 23.

[25] We recently adopted rule 6c–11, which permits certain ETFs to operate without obtaining an exemptive order. 17 CFR 270.6c–11. In adopting rule 6c–11, we did not rescind the portions of existing ETF exemptive orders that provided relief from sections 12(d)(1)(A) and (B) and stated that ETFs relying on rule 6c–11 that do not have exemptive relief from sections 12(d)(1)(A) and (B) may enter into fund of funds arrangements as set forth in recent ETF exemptive orders, provided that such ETFs satisfy the terms and conditions for fund of funds relief in those orders. Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sep. 25, 2019) [84 FR 57162 (Oct. 24, 2019)] (''2019 ETF Adopting Release''), at 57199. For purposes of this release, we generally use the term ''ETFs'' to refer to exchange-traded funds and exchange-traded managed funds unless the context otherwise requires.

[26] Such a fund would rely on section 12(d)(1)(G) to invest in acquired funds within the same group of investment companies, government securities, and short term paper. In addition, the fund could rely on rule 12d1–2 to invest in: (i) Securities of funds that are not in the same group of investment companies up to the limits in section 12(d)(1)(A) or (F); (ii) securities of money market funds in reliance on rule 12d1–1; and (iii) stocks, bonds, and other securities.

[27] *See, e.g.,* Fidelity Comment Letter; Federated Comment Letter; Comment Letter of Federated Investors, Inc. (June 7, 2019) (''Federated 2 Comment Letter'').

[28] *See infra* section II.C.1.b.ii.

[29] With the rescission of rule 12d1–2, a fund relying on section 12(d)(1)(G) will no longer have flexibility to: (i) Acquire the securities of other funds that are not part of the same group of investment companies; or (ii) invest directly in stocks, bonds, and other securities, except in compliance with rule 12d1–4.

[30] The list of no-action letters to be withdrawn will be available on the Commission's website.

advisers seeking exemptions, to focus exemptive order review resources on novel products or arrangements.

II. Discussion

A. Scope

1. Registered Funds and BDCs

As proposed, rule 12d1–4 will permit registered investment companies and BDCs to acquire the securities of other registered investment companies or BDCs in excess of the limits in section 12(d)(1). As a result, open-end funds (including ETFs), UITs (including ETFs organized as UITs), and closed-end funds (including BDCs), can operate in accordance with rule 12d1–4, as both acquiring and acquired funds.[31] The scope of permissible acquiring and acquired funds under rule 12d1–4 is greater than the scope of funds that was permitted by the Commission's exemptive orders. For example, the rule will allow open-end funds, UITs, and ETFs to invest in unlisted closed-end funds and unlisted BDCs beyond the limits in section 12(d)(1).[32] The rule similarly will increase permissible investments for closed-end funds beyond ETFs to allow them to invest in open-end funds, UITs, other closed-end funds, and BDCs, in excess of the section 12(d)(1) limits. BDCs, which currently may invest in ETFs in excess of the section 12(d)(1) limits, also will be permitted to invest in open-end funds, UITs, other BDCs, other closed-end funds and ETMFs. Finally, the rule will allow ETMFs to invest in open-end funds, UITs, BDCs and other closed-end funds. Rule 12d1–4, therefore, will create a consistent framework for all registered funds and BDCs and eliminate unnecessary and potentially confusing distinctions among permissible investments for different types of acquiring funds.

Several commenters supported including all open-end funds, UITs, BDCs and other closed-end funds within the scope of permissible fund of funds arrangements under the rule.[33] The commenters noted that proposed rule 12d1–4 would provide funds covered by the rule with flexibility to meet their investment objectives and level the playing field among registered funds and BDCs operating in accordance with the rule. However, one commenter raised concerns with arrangements that the Commission has not previously permitted in exemptive orders.[34] This commenter stated that the Commission lacks experience with funds of funds arrangements that include unlisted closed-end funds and BDCs and suggested that permitting these funds to rely on the rule as acquired funds would increase retail investor exposure to higher cost investments. The commenter also questioned whether one rule should apply to all types of fund of funds arrangements, noting that several of the statutory requirements of section 12(d)(1) apply differently to open-end funds and closed-end funds, and the Commission's historical exemptive relief also treated these types of funds differently. The commenter additionally questioned whether the Commission has appropriately analyzed the risks of fund of funds arrangements involving ETMFs or ''non-transparent'' ETFs.

After considering these comments, we continue to believe that the universe of permissible fund of funds arrangements generally should not turn on the type of funds in the arrangement. Instead, the rule should address differences in fund structures with tailored conditions that protect investors in all types of covered investment companies against the abuses historically associated with funds of funds. We believe the conditions of rule 12d1–4 provide appropriate flexibility for innovative fund of funds structures while creating a consistent and streamlined regulatory framework that protects investors in all types of funds. For example, for a management company to rely on the rule, the investment advisers to both the acquiring and acquired fund must make certain determinations before entering into the fund of funds arrangement.[35] Similarly, the rule will also require principal underwriters or depositors of UITs and insurance companies offering certain separate accounts to make findings tailored to their characteristics.[36] The rule also imposes a requirement that certain acquiring funds and acquired funds enter into a fund of funds investment agreement, and imposes voting requirements on acquiring funds' holdings of acquired funds above certain ownership thresholds that differ depending on the type of acquired fund, as described more fully below.[37]

With respect to BDCs, we believe that the rule's conditions and existing statutory provisions will protect investors from concerns related to undue influence, fees that are excessive due to being duplicative, or complex structures. For example, as we noted in the proposal, an acquiring fund board already has a responsibility to see that the fund is not overcharged for advisory services regardless of any findings we require.[38] Additionally, the rule will require fund of funds arrangements involving BDCs to satisfy the other conditions of rule 12d1–4, including the requirement to make certain findings as described in section II.C.2.b. below. One element of these findings is a determination that the fees and expenses associated with an investment in an acquired fund, including an investment in an acquired BDC, do not duplicate the fees and expenses of the acquiring fund. Further, a BDC operating in accordance with the rule as an acquiring fund is subject to other existing limitations on its ability to invest in acquired funds.[39]

[31] As proposed, the final rule will not be available to face-amount certificate companies. Face-amount certificate companies are registered investment companies that are engaged or propose to engage in the business of issuing face-amount certificates of the installment type, or which have been engaged in such businesses and have any such certificates outstanding. *See* section 4(1) of the Investment Company Act. There is only one face-amount certificate company currently operating as an investment company and making current filings pursuant to section 13 [15 U.S.C. 80a–13] or section 15(d) of the Exchange Act [15 U.S.C. 80a–15]. Given the very limited universe of face-amount certificate companies and the nature of their investments, face-amount certificate companies are not within the scope of final rule 12d1–4 as either acquiring funds or acquired funds. No commenters addressed this aspect of the proposal.

[32] We use the terms ''listed closed-end funds'' and ''listed BDCs'' to refer to closed-end funds and BDCs that are listed and traded on national securities exchanges. Our exemptive orders have included a representation that acquiring funds will not invest in reliance on the order in closed-end funds or BDCs that are not listed and traded on a national securities exchange. *See, e.g.,* Innovator ETFs Trust, et al., Investment Company Act Release Nos. 33214 (Aug. 24, 2018) [83 FR 44374 (Aug. 30, 2018)] (notice) and 33238 (Sept. 19, 2018) (order) and related application (''Innovator ETFs'').

[33] *See, e.g.,* ICI Comment Letter; Comment Letter of Morningstar, Inc. (May 2, 2019) (''Morningstar Comment Letter'').

[34] *See* CFA Comment Letter.

[35] *See infra* section II.C.2.b.i.

[36] *See infra* section II.C.2.b.ii. For example, UITs do not have a board of directors and do not engage in active management of a portfolio. The rule therefore will require different determinations for UITs.

[37] *See infra* sections II.C.1 and 2.

[38] Specifically, section 15(c) of the Act requires the acquiring fund's board of directors to evaluate any information reasonably necessary to evaluate the terms of the acquiring fund's advisory contracts (which information would include fees, or the elimination of fees, for services provided by an acquired fund's adviser). Section 36(b) of the Act imposes on fund advisers a fiduciary duty with respect to their receipt of compensation. We believe that to the extent advisory services are being performed by another person, such as the adviser to an acquired fund, this fiduciary duty would require an acquiring fund's adviser to charge a fee that bears a reasonable relationship only to the services that the acquiring fund's adviser is providing, and not to any services performed by an adviser to an acquired fund. *See* 2018 FOF Proposing Release, *supra* footnote 6, at 63–64.

[39] *See* 15 U.S.C. 80a–54(a) (prohibiting a BDC from making any investment unless, at the time of the investment, at least 70% of the BDC's total assets are invested in securities of certain specific types of companies, which do not include funds).

Similarly, we do not believe that including ETMFs or non-transparent ETFs within the scope of the rule will present unique investor protection concerns that we have not already extensively considered and addressed with respect to traditional registered open-end funds and fully transparent ETFs. Along with fully transparent ETFs, ETMFs and non-transparent ETFs generally are subject to the protections of the Act applicable to all registered open-end funds, including governance and other requirements. Accordingly, we believe that the conditions of rule 12d1–4, when combined with the protections imposed by the Act on all investment companies, appropriately address concerns of duplicative fees, undue influence, and complex structures with respect to these products.

Finally, one commenter suggested that the concerns underlying section 12(d)(1) of the Act largely do not apply to ETFs as acquired funds in a fund of funds structure.[40] This commenter stated that passive investments in ETFs do not implicate Congress' concerns regarding duplicative fees and undue influence, particularly when an investor holds an ETF to gain exposure to a particular market or asset class in an efficient manner, to allocate and diversify investments, or efficiently hedge a portion of a portfolio or balance sheet. The commenter stated that ETFs have not been subject to influence from activist investors despite ETF shares trading in the secondary market, perhaps because ETF shares have not historically traded at a significant discount to net asset value. Accordingly, the commenter urged the Commission to exempt the sale of ETFs as acquired funds from the limitations in section 12(d)(1)(B) of the Act.

After considering comments, we continue to believe that investments in ETFs should be subject to the limitations set forth in section 12(d)(1), and that any investments in excess of the 12(d)(1) limits should be subject to protective conditions. As a threshold matter, ETFs issue redeemable securities and are generally classified as open-end funds under the Act.[41] As we discussed in our 2008 ETF Proposing Release, we believe that investments in ETFs, similar to investments in traditional open-end funds, raise the same concerns of pyramiding and the threat of large-scale redemptions as other types of open-end funds.[42] For example, an acquiring fund might seek to use its ownership interest in an ETF to exercise a controlling influence over the ETF's management or policies, or to enter into a transaction with an affiliate of the acquiring fund. These concerns are most pronounced when a fund invests in an ETF in a primary market transaction through an authorized participant.[43]

ETFs, like other open-end funds, also operate pursuant to the prohibition in section 12(d)(1)(B), which provides that it is unlawful knowingly to sell or otherwise dispose of any securities of which the ETF is an issuer to any other investment company in excess of the limits in subsection (i) and (ii). Therefore, ETFs that receive inquiries and other communications from persons identifying themselves as potential purchasers of the ETF's shares as or through an authorized participant may want to consider adopting and implementing policies and procedures to determine whether those persons intend to purchase ETF shares for investment companies.[44] Further, principal underwriters and broker-dealers that transact in an ETF's shares (including an ETF's authorized participants), are subject to the requirements of section 12(d)(1)(B) of the Act. Accordingly, the final rule will treat ETFs consistently with other open-end funds and will permit investments in ETFs as acquired funds subject to the rule's conditions designed to protect acquired funds and their shareholders.

2. Private Funds and Unregistered Investment Companies

As proposed, the final rule will not permit private funds and unregistered investment companies, such as foreign funds, to rely on the rule as acquiring funds.[45] As a result, private funds and unregistered investment companies may acquire no more than 3% of a U.S. registered fund under the Act.[46]

Several commenters suggested that the Commission broaden the scope of rule 12d1–4 to permit investments by private funds or unregistered investment companies in acquired funds beyond the limits in section 12(d)(1).[47] Some of these commenters highlighted the potential for private and unregistered investment companies to invest in registered funds for efficient allocation, diversification, and hedging purposes and stated that such investments could benefit registered fund shareholders by increasing the scale and liquidity of the registered fund.[48] Commenters that supported broadening the scope of the rule to include private funds and unregistered investment companies stated that such funds do not operate in a materially different manner from registered funds and therefore the concerns underlying section 12(d)(1) are not any more pronounced for private and unregistered investment companies nor are different conditions warranted.[49]

[40] Comment Letter of WisdomTree Asset Management, Inc. (Dec. 12, 2019) (''WisdomTree Comment Letter'').

[41] While most ETFs are classified as open-end funds, some ETFs are structured as UITs. Regardless of structure, we do not believe that the redemption of ETF shares in creation unit-sized aggregations by authorized participants insulates ETFs from the abuses that section 12(d)(1) was designed to prevent.

[42] *See* 2008 ETF Proposing Release, *supra* footnote 18, at 69.

[43] *See generally* 2019 ETF Adopting Release, *supra* footnote 25, at section I.B (explaining that an authorized participant that has a contractual arrangement with the ETF (or its distributor) purchases and redeems ETF shares directly from the ETF in blocks called ''creation units'' as a principal for its own account or as agent for others, including institutional investors (such as funds)).

[44] For example, an ETF that explains its obligations pursuant to section 12(d)(1)(B) to potential purchasers who reach out directly to the ETF, and documents that exchange with the potential purchaser, generally would satisfy its obligation not to knowingly sell or otherwise dispose of any of its securities in excess of 12(d)(1)(B) limits. Further, if an ETF intends to rely on rule 12d1–4 to exceed the section 12(d)(1) limits, such ETF would be required to comply with the conditions of the rule, including entering into a fund of funds investment agreement with the acquiring investment company.

[45] We use the term ''foreign fund'' to refer to an ''investment company'' as defined in section 3(a)(1)(A) of the Act that is organized outside the United States and that does not offer or sell its securities in the United States in connection with a public offering. *See* section 7(d) of the Act (prohibiting a foreign fund from using the U.S. mails or any means or instrumentality of interstate commerce to offer or sell its securities in connection with a public offering unless the Commission issues an order permitting the foreign fund to register under the Act). A foreign fund may conduct a private U.S. offering in the United States without violating section 7(d) of the Act if the foreign fund conducts its activities with respect to U.S. investors in compliance with either section 3(c)(1) or 3(c)(7) of the Act (or some other available exemption or exclusion). *See* 2018 FOF Proposing Release, *supra* footnote 6, at 18–20.

[46] Sections 3(c)(1) and 3(c)(7) of the Act subject private funds to the 3% limitation on investments in registered funds. 15 U.S.C. 80a–3(c)(1) and 3(c)(7)(D).

[47] *See, e.g.,* ICI Comment Letter; Comment Letter of American Investment Council (May 2, 2019) (''AIC Comment Letter''); Comment Letter of Dechert LLP (May 2, 2019) (''Dechert Comment Letter''); Comment Letter of Clifford Chance US LLP (May 2, 2019) (''Clifford Chance Comment Letter''); NYC Bar Comment Letter; IAA Comment Letter; ABA Comment Letter.

[48] *See* MFA Comment Letter; Comment Letter of BlackRock, Inc. (May 3, 2019) (''BlackRock Comment Letter'') (stating ''ETFs are also frequently used as an alternative to futures and other market beta instruments such as forwards and swaps, especially in markets where derivatives may be less liquid or nonexistent, because ETFs offer intraday liquidity''); WisdomTree Comment Letter; NYC Bar Comment Letter.

[49] Comment Letter of Invesco Ltd. (Apr. 30, 2019) (''Invesco Comment Letter''); MFA Comment Letter; ICI Comment Letter; Dechert Comment Letter; Comment Letter of Parallax Volatility Advisers, L.P. (May 1, 2019) (''Parallax Comment Letter'');

While commenters generally suggested subjecting private funds and unregistered investment companies to the same conditions as other acquiring funds, some commenters recommended additional conditions that could apply to private funds and unregistered investment companies under the rule.[50] For example, commenters suggested that the rule could include recordkeeping and reporting requirements tailored to private funds and unregistered investment companies or limit the availability of the rule to private funds and unregistered investment companies with an adviser that is registered with the Commission.[51] Some commenters suggested that the final rule allow private funds and unregistered investment companies to invest in only certain types of funds, such as ETFs, subject to appropriate conditions.[52]

Other commenters recommended that the rule exclude unregistered investment companies as acquiring funds because the Commission has not yet extended exemptive relief allowing such funds to acquire other investment companies in excess of the section 12(d)(1) limits.[53] These commenters stated that the Commission does not have experience with this type of fund of funds arrangement, and recommended that the Commission first provide relief to unregistered investment companies through the exemptive application process. These commenters suggested that this process would allow the Commission to weigh the facts and circumstances of each particular applicant, and the type of underlying fund in the proposed fund of funds arrangement. Two commenters recommended that the rule exclude private funds as acquiring funds because of concerns of undue influence over closed-end funds.[54]

After considering comments, we continue to believe that the rule should not include private funds and unregistered investment companies as acquiring funds. We acknowledge that permitting private funds and unregistered investment companies to rely on the rule as acquiring funds would provide these funds greater investment flexibility, and would increase the scale of U.S. registered funds that were acquired by private funds and unregistered investment companies. However, we do not have sufficient experience tailoring conditions for private funds' and unregistered investment companies' investments in registered funds to address in a rule of general applicability the concerns such funds present as acquiring funds, as described below. To date, few applicants have requested relief to permit private funds or unregistered investment companies to invest in registered funds beyond the limits in section 12(d)(1) of the Act.[55]

We believe it would be more appropriate to consider designing protective conditions through the exemptive application process because including private funds and unregistered investment companies as acquiring funds raises different concerns. Private funds and unregistered investment companies are not registered with the Commission, and their investments in registered funds would not be subject to the reporting requirements under the Act. In particular, private funds and unregistered investment companies are not subject to periodic reporting on Form N–PORT or the new reporting requirements that we are adopting on Form N–CEN regarding reliance on rule 12d1–4.[56]

Additionally, while several commenters noted that many advisers to private funds are required to disclose census-type information about their private funds on Form PF, Form PF does not require advisers to disclose the position-level information that would allow us to monitor compliance with rule 12d1–4 and its impact on the fund industry.[57] In addition, smaller private fund advisers are not required to file Form PF. Accordingly, under the existing regulatory framework, the Commission does not receive routine reporting on the amount and duration of private fund or unregistered investment company investments in registered funds. As noted in the 2018 FOF Proposing Release, even if private funds and unregistered investment companies provided basic reporting on investments in underlying funds, that reporting alone may not provide an adequate basis to protect against undue influence and monitor compliance with the rule's conditions.[58]

Private funds and unregistered investment companies are not subject to many of the governance and compliance requirements of the Act that are designed to protect investors and reduce conflicts of interest that are inherent in a fund structure. Such requirements are integral to the oversight and monitoring provisions of rule 12d1–4 for registered funds. For example, private funds and unregistered investment companies are not subject to the board governance requirements of sections 10 and 16 of the Act and the chief compliance officer requirements of rule 38a–1.[59] We are

Comment Letter of Gracie Asset Management (May 2, 2019) (''Gracie Comment Letter''); AIC Comment Letter; IAA Comment Letter; Comment Letter of Ropes & Gray LLP (May 2, 2019) (''Ropes Comment Letter''). One commenter stated that fee layering and complex structure concerns are not as significant in the private fund context as they are in the registered fund context because private fund investors must meet sophistication standards and typically perform due diligence on a private fund's structure and fees. Comment Letter of Massachusetts Mutual Life Insurance Company (May 2, 2019).

[50] Some commenters stated that certain private funds have sought to control closed-end funds that trade at a discount to their NAV and suggested tailored control and voting conditions if private funds could rely on the rule to invest in closed-end funds and BDCs. *See* AIC Comment Letter; SIFMA AMG Comment Letter. *See also infra* section II.C.1.a.ii.

[51] Invesco Comment Letter; MFA Comment Letter; ICI Comment Letter; Gracie Comment Letter; AIC Comment Letter; BlackRock Comment Letter; Clifford Chance Comment Letter; NYC Bar Comment Letter; IAA Comment Letter; ABA Comment Letter.

[52] *See, e.g.,* BlackRock Comment Letter; Parallax Comment Letter; MFA Comment Letter (stating that the Commission has already allowed private funds to invest in money market funds beyond the limits of section 12(d)(1) of the Investment Company Act in rule 12d1–1, and that secondary market transactions in ETFs may be less likely to raise certain abuses that section 12(d)(1) was designed to prevent).

[53] *See* Comment Letter of Kauff Laton Miller LLP (May 13, 2019) (''Kauff Comment Letter''); Comment Letter of Law Office of William Coudert Rand (May 14, 2019) (''Rand Comment Letter''); Comment Letter of Cooper LLC (May 24, 2019) (''Cooper Comment Letter'').

[54] Comment Letter of Advent Capital Management, LLC (May 1, 2019 (''Advent Comment Letter''); Comment Letter of FS Investments (May 2, 2019) (''FS Comment Letter'').

[55] The exemptive application process provides an opportunity to consider tailored conditions and limitations for a specific applicant that seeks relief to permit private funds or unregistered investment companies to invest in registered funds beyond the limits in section 12(d)(1) of the Act. If granted, the Commission and its staff could monitor fund of funds arrangements that operate pursuant to such exemptive relief, determine whether the conditions and limitations of the relief operate as intended, and consider whether further rulemaking may be appropriate.

[56] Form N–PORT requires certain registered funds to report information about their monthly portfolio holdings to the Commission in a structured data format. *See* Investment Company Reporting Modernization, Investment Company Act Release No. 32314 (Oct. 13, 2016) [81 FR 81870 (Nov. 18, 2016)] (''Reporting Modernization Adopting Release''). Rule 31a–1 under the Act sets forth certain other recordkeeping requirements for registered investment companies.

[57] *See* AIC Comment Letter (noting that the Commission could consider amending Form PF to require an adviser to report if any of the private funds they advise relied on the rule during the reporting period); Clifford Chance Comment Letter; NYC Bar Comment Letter; ABA Comment Letter; Invesco Comment Letter; Parallax Comment Letter; Gracie Comment Letter. *See also* 17 CFR 275.204(b)–1 (requiring certain registered investment advisers to private funds to file Form PF to report information about the private funds they manage).

[58] 2018 FOF Proposing Release, *supra* footnote 6, at 20.

[59] To protect shareholders and address conflicts of interest that can arise from the management of investment companies, the Act requires that a

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adopting rule 12d1–4 against the background of these existing requirements and the protections they provide for shareholders in a fund of funds arrangement. Without incorporating additional governance and compliance obligations for private funds and unregistered investment companies as acquiring funds, we do not believe rule 12d1–4 would have sufficiently protective conditions to address the undue influence concerns that Congress raised with respect to fund of funds arrangements.

We believe designing such protective conditions through the exemptive application process would allow the Commission to weigh the policy considerations described above in the context of the facts and circumstances of the specific fund of funds arrangement described in the application. The exemptive application process would allow the Commission to consider appropriate investor protection provisions, including governance and reporting requirements, applicable to any such arrangement.[60] The exemptive application process also would provide the Commission with an opportunity to analyze the operation and effects of these fund of funds arrangements before determining whether and how to address such arrangements in a rule of general applicability. We encourage interested parties to share their views on such arrangements by contacting staff in the Division of Investment Management.

In addition to the challenges applicable to unregistered funds generally, foreign fund investments in registered funds present additional concerns.[61] Specifically, the Commission understands that some foreign laws and regulations may limit or prevent disclosure of information to the Commission.[62] These types of restrictions may include privacy laws and so-called ''blocking statutes'' (including secrecy laws) that prevent the disclosure of information relating to third parties and/or disclosure to the U.S. government.[63] Additionally, abusive practices by unregistered investment companies that were associated with such investments were a concern underlying Congress's amendments to section 12(d)(1) in 1970.[64] For example, a Commission report stated that unregistered investment companies could seek to redeem large holdings in acquired funds due to the instability of certain foreign economies, political upheaval, or currency reform.[65] The Commission also noted that an unregistered investment company could seek to exert undue influence through the shareholder voting process.[66] For these reasons, we also do not believe it is appropriate at this time to include foreign funds in the scope of acquiring funds under rule 12d1–4.

B. Exemptions From the Act's Prohibition on Certain Affiliated Transactions

As proposed, rule 12d1–4 will provide an exemption from section 17(a) of the Act.[67] In addition, the final rule will provide a limited exemption from that section for in-kind transactions for certain affiliated persons of ETFs. Section 17(a) of the Act generally prohibits an affiliated person of a fund, or any affiliated person of such person, from selling any security or other property to, or purchasing any security or other property from, the fund.[68] It is designed to prevent affiliated persons from managing the fund's assets for their own benefit, rather than for the benefit of the fund's shareholders.[69]

Absent an exemption, section 17(a) would prohibit a fund that holds 5% or more of the acquired fund's securities from making any additional investments in the acquired fund, limiting the

registered management investment company be governed by a board of directors that has a general oversight role, with certain exceptions. Rule 12d1–4 requires the adviser to an acquiring fund or acquired fund to submit reports to such fund's board of directors so that the board can review the adviser's analysis of the fund of funds arrangement. While UITs are not subject to these governance and oversight requirements, a UIT does not engage in active management of its investment portfolio. Accordingly, we believe that a UIT's investment in an acquired fund presents different concerns than an investment by a private fund or unregistered fund. Rule 38a–1 requires a fund (including a UIT) to adopt and implement written policies and procedures reasonably designed to prevent a violation of the federal securities laws by the fund and designate one individual responsible for administering the fund's policies and procedures as a chief compliance officer. *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (''Compliance Rule Adopting Release''). Under rule 38a–1, a fund would adopt policies and procedures reasonably designed to prevent a violation of rule 12d1–4.

[60] One commenter pointed to rule 12d1–1 as a model for private fund investments in registered funds. Prior to the adoption of that rule, the Commission considered specific proposals for exemptive relief for certain private funds to invest in affiliated money market funds. *See, e.g.,* Scudder Global Fund, Inc., *et al.,* Investment Company Act Release Nos. 24276 (Feb. 3, 2000) [65 FR 6420 (Feb. 9, 2000)] (notice) and 24322 (Feb. 29, 2000) (order) and related application; Pioneer America Income Trust, *et al.,* Investment Company Act Release Nos. 25607 (Jun. 7, 2002) [97 FR 40757 (Jun. 13, 2002)] (notice) and 25647 (Jul. 3, 2002) (order) and related application. However, the Commission has not yet granted relief for private funds to invest in registered funds in excess of the limits of section 12(d)(1) of the Act.

[61] The Commission has stated that a foreign fund that uses U.S. jurisdictional means in the offering of the securities it issues and that relies on section 3(c)(1) or 3(c)(7) of the Investment Company Act would be a private fund. *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.52 (citing Dechert LLP, Staff No-Action Letter (Aug. 24, 2009) at n.8 (noting that under certain circumstances, a foreign fund may make a private U.S. offer in reliance on the exclusion from the definition of ''investment company'' in sections 3(c)(1) or 3(c)(7) of the Act, and such a foreign fund is subject to section 12(d)(1) to the same extent as a U.S. 3(c)(1) or 3(c)(7) fund)).

[62] *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers, Exchange Act Release No. 87005 (Sep. 19, 2019) [84 FR 68550 (Dec. 16, 2019)], at 68557.

[63] *Id.* Data protection, privacy, confidentiality, bank secrecy, state secrecy, and national security laws frequently create obstacles to cross-border flows of information between regulators and foreign-domiciled registrants. Some of these laws, for example, prohibit foreign-domiciled registrants in certain jurisdictions from responding directly to SEC requests for information and documents or prevent the SEC from being able to conduct any type of examination, either onsite or by correspondence. *See* Statement on the Vital Role of Audit Quality and Regulatory Access to Audit and Other Information Internationally—Discussion of Current Information Access Challenges with Respect to U.S.-listed Companies with Significant Operations in China, SEC Chairman Jay Clayton, SEC Chief Accountant Wes Bricker, and PCAOB Chairman William D. Duhnke III (Dec. 7, 2018) *available at https://www.sec.gov/news/public-statement/statement-vital-role-audit-quality-and-regulatory-access-audit-and-other.*

[64] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 21, *citing Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth,* H. Rep. No. 2337, 89th Cong., 2d Sess. (1966) (''PPI Report'') at 318.

[65] PPI Report, *supra* footnote 64, at 315.

[66] *Id.* at 324.

[67] *See* rule 12d1–4(a); 15 U.S.C. 80a–17(a). With respect to BDCs, the rule provides an exemption from sections 57(a)(1)–(2) and 57(d)(1)–(2) of the Act for arrangements that comply with rule 12d1–4. *See* 15 U.S.C. 80a–56(a)(1)–(2) and 80a–56(d)(1)–(2). The Commission proposed rule 12d1–4(a) to provide an exemption from section 57 for BDCs complying with the rule, but did not specify the relevant subsections in section 57 that are analogous to section 17(a). *See generally* proposed rule 12d1–4(a) (providing an exemption from section 57 of the Act). We did not receive comments on this aspect of the proposal. We are adopting rule 12d1–4(a) with changes to clarify and specify the relevant subsections of section 57.

[68] An affiliated person of a fund includes: (i) Any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the fund; and (ii) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the fund. *See* 15 U.S.C. 80a–2(a)(3)(A), (B). Section 17(a) also restricts certain transactions involving funds that are affiliated because both funds have a common investment adviser or other person exercising a controlling influence over the management or policies of the funds. *See* 15 U.S.C. 80a–2(a)(3)(C). The determination of whether a fund is under the control of its advisers, officers, or directors depends on all the relevant facts and circumstances. *See infra* section II.C.1.

[69] *See* Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. On Banking and Currency, 76th Cong., 3rd Sess. 37 (1940) (Statement of Commissioner Healy).

efficacy of rule 12d1–4.[70] Fund of funds arrangements involving funds that are part of the same group of investment companies or that have the same investment adviser (or affiliated investment advisers) also implicate the Act's protections against affiliated transactions, regardless of whether an acquiring fund exceeds the 5% threshold, though the rule as adopted will not address all of these situations.[71]

Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from the provisions of section 17(a) if the terms of the transaction, including the consideration to be paid or received, are fair and reasonable and do not involve overreaching on the part of any person concerned, and the transaction is consistent with the policy of the investment company as recited in the fund's registration statement and the general purposes of the Act.[72] We continue to believe, as discussed in the 2018 FOF Proposing Release, that these exemptions from section 17(a) meet the standards set forth in sections 17(b) and 6(c) and the rule's conditions make unlikely the prospect of overreaching by an affiliated fund. For example, the rule prohibits the acquiring fund and its advisory group from controlling the acquired fund, which is designed to prevent a fund of funds arrangement that involves overreaching.

An acquired fund that is an open-end fund or UIT also is protected from overreaching due to the Act's requirement that all purchasers receive the same price.[73] This ensures that the affiliated person pays the same consideration for fund shares as non-affiliated persons, consistent with the standards set out in section 17(b). We believe that this would be true in the context of closed-end funds because the acquired fund's repurchase of its shares would provide little opportunity for the acquiring fund to overreach since all holders would receive the same price.[74]

As a result, we believe that this exemption is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.[75] We also believe that the exemption from section 17(a) is necessary in light of the goals of rule 12d1–4, subject to the conditions set forth in the rule. Existing orders have provided exemptive relief from the affiliated transaction provisions in section 17(a) under similar conditions for many years.[76]

Commenters generally supported the proposed exemptions from section 17(a), agreeing with our view that the utility of the proposed rule would be limited if it did not exempt fund of funds arrangements from the affiliated transaction prohibitions in that section.[77] These commenters requested, however, that the Commission clarify the availability of the exemption from section 17(a) when an acquired ETF transacts on an in-kind basis with an affiliated acquiring fund. The commenters noted that the 2018 FOF Proposing Release suggests, consistent with fund of funds exemptive orders, that the rule would provide relief for the delivery or deposit of basket assets on an in-kind basis by an affiliated fund (that is, by exchanging certain assets from the ETF's portfolio, rather than in cash), but the proposed rule text referred only to relief to permit the purchase and sale of fund shares between the acquiring fund and acquired fund.

After considering comments, we are adopting a modified exemption from section 17(a) to clarify the rule provides relief from section 17(a) for in-kind transactions when an acquiring fund is purchasing and redeeming shares of an acquired ETF under certain circumstances. As adopted, the rule will provide exemptions from section 17(a) with regard to the deposit and receipt of baskets by an acquiring fund that is an affiliated person of an ETF (or who is an affiliated person of such a person) solely by reason of holding with the power to vote 5% or more of the ETF's shares or holding with the power to vote 5% or more of any investment company that is an affiliated person of the ETF.[78] Consistent with exemptive orders regarding ETF applicants, the exemption will not be available where the ETF is in turn an affiliated person of the acquiring fund, or an affiliated person of such person, for a reason other than such power to vote.[79]

We are adopting the rule with this exemption because we agree with commenters that this rule text clarification is appropriate to permit ETFs to engage in in-kind purchase or redemption transactions with certain affiliated acquiring funds on the same basis that they would be permitted to engage in a cash purchase or redemption transactions with such affiliated acquiring fund under the rule.[80] The provision is similar to rule

[70] If an acquiring fund holds 5% or more of the outstanding voting shares of an acquired fund, the acquiring fund is an affiliated person of the acquired fund and the acquired fund is an affiliated person of the acquiring fund. In general, to the extent that purchases and sales of acquired fund shares occur on the secondary market and not through principal transactions directly between an acquiring fund and an acquired fund, an exemption from section 17(a) would not be necessary. But, generally, without an exemption from section 17(a), an acquired fund could not sell its shares to, or redeem or repurchase those shares from, an affiliated acquiring fund, and an acquiring fund could not purchase from, redeem, or resell shares from an affiliated acquired fund.

[71] As discussed below, the rule will allow fund of funds arrangements when: (i) The acquiring fund is in the same group of investment companies as the acquired fund; or (ii) the acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as the acquired fund's investment adviser. *See infra* section II.C.1. However, as discussed further below, the final rule will not exempt from section 17(a) ETF in-kind creations and redemptions involving certain affiliates.

[72] Section 6(c) of the Act permits the Commission to exempt any person, security, or transaction or any class or classes of persons, securities or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. *See* 15 U.S.C. 6(c). The Commission has interpreted its authority under section 17(b) as extending only to a single transaction and not a series of transactions. *See* In re Keystone Custodian Funds, Inc., 21 SEC. 295 (1945) (exempting, under section 6(c) of the Act, a series of transactions that otherwise would be prohibited by section 17(a)). The Commission's exemptive authority under section 6(c), however, is not constrained to a single transaction. The Commission looks to the standards set forth in section 17(b) when issuing exemptions by rule from section 17(a).

[73] *See* section 22(c) of the Act and 17 CFR 270.22c–1 (rule 22c–1). Primary transactions with an ETF would also be done at a price based on NAV. 2018 FOF Proposing Release, *supra* footnote 6, at n.67.

[74] *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.68.

[75] *See supra* footnote 72.

[76] *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.70.

[77] *See, e.g.,* ICI Comment Letter; Comment Letter of Voya Investment Management LLC (May 2, 2019) (''Voya Comment Letter'').

[78] Rule 12d1–4(a)(3). ''Baskets'' for purposes of rule 12d1–4 will have the same meaning as in rule 6c–11(a)(1). *See* rule 12d1–4(d).

[79] *See, e.g.,* AQR Trust and AQR Capital Management, LLC, Investment Company Act Release Nos. 33343 (Dec. 21, 2018) [83 FR 67441 (Dec. 28, 2018)] (notice) and 33346 (Jan. 28, 2019) (order) and related application.

[80] An ETF would be prohibited under section 17(a)(2) from purchasing securities and other property (*i.e.,* securities and other property in the ETF's basket assets) from the affiliated acquiring fund in exchange for ETF shares. An acquiring fund would be prohibited under section 17(a)(1) from selling any securities and other property (*i.e.,* securities and other property in the ETF's basket assets) to an affiliated ETF in exchange for the ETF's shares. The orders we have granted permitting investments in ETFs provide relief from section 17(a) to permit these transactions. *See* Barclays Global Fund Advisors, *et al.,* Investment Company Act Release Nos. 24394 (Apr. 17, 2000) [65 FR 21215 (Apr. 20, 2000)] (notice) and 24451 (May 12, 2000) (order) and related application. In addition, rule 6c–11 under the Investment Company Act and our ETF exemptive orders provide separate affiliated transaction relief for the acquisition or sale of an ETF's basket assets as part of the creation or redemption of ETF creation units, but that relief would not be sufficient to allow an ETF's in-kind transaction with another fund. *See* 17

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6c–11(b)(3).[81] Purchases and redemptions of ETF creation units are typically effected in kind, and section 17(a) would prohibit these in-kind purchases and redemptions by a fund affiliated with the ETF. We believe that such an exemption is appropriate because all purchases and redemptions of creation units with such an affiliated fund are at an ETF's next-calculated NAV, and an ETF would value the securities deposited or delivered upon redemption in the same manner, using the same standards, as the ETF values those securities for purposes of calculating the ETF's NAV. We do not believe that these transactions will give rise to the policy concerns that section 17(a) is designed to prevent.[82]

Further, similar to other fund of funds arrangements, without an exemption from section 17(a), the rule would be limited in its utility. In this case, section 17(a) would prohibit the delivery or deposit of basket assets on an in-kind basis by certain affiliated funds (that is, by exchanging certain assets from the ETF's portfolio, rather than in cash). As a result, we also believe that the exemption from section 17(a) regarding this limited exception for ETF in-kind baskets is necessary in light of the goals of rule 12d1–4, subject to the conditions set forth in the rule.

Some commenters also suggested the Commission clarify, or provide exemptive relief from, section 17(a) for other affiliated transactions that are within the statutory limits of section 12(d)(1) or fund of funds arrangements that rely on a statutory exemption.[83] A few commenters stated that it would frustrate Congressional intent if the Commission does not extend section 17(a) exemptive relief to these types of fund of funds arrangements.[84]

Section 12 and section 17 address different concerns under the Act. Section 12 addresses concerns regarding ''pyramiding,'' where investors in the acquiring fund could control the assets of the acquired fund and use those assets to enrich themselves at the expense of acquired fund shareholders by virtue of their stake in the acquired fund. Section 17(a) addresses self-dealing and other types of overreaching of a fund by its affiliates. Although an arrangement may not raise pyramiding concerns, it may still give rise to self-dealing concerns. As a result, we do not believe it would frustrate congressional intent, as asserted by commenters, for some fund of funds arrangements that are within the limits of, or exempt from section 12(d)(1) to be subject to the prohibitions of section 17(a).

However, we recognize that certain fund of funds arrangements are nearly impossible to utilize absent relief from section 17(a). In the past, we have considered relief to be implied in these circumstances. We believe that it is appropriate to imply relief under sections 12(d)(1)(E) and 12(d)(1)(G) because, without this relief, these statutory provisions would be inoperable.[85] Transactions permitted by sections 12(d)(1)(E) and 12(d)(1)(G) are typically affiliated transactions prohibited by section 17(a).[86]

We are not issuing an interpretation that there is an implied exemption from section 17(a) for fund of funds arrangements that involve affiliated persons but do not exceed the limits of sections 12(d)(1)(A), (B), or (C), or that meet the statutory exemption in section (F) of the Act. The section 17(a) exemptions provided in this rule are limited in scope to those necessary for a fund of funds structure to operate under the rule and are consistent with the exemptive relief that we have provided under our exemptive orders. The types of arrangements that are otherwise permissible under section 12(d)(1) could include arrangements where funds are affiliated persons for reasons other than holding 5% or more of the acquired fund's securities. For example, under section 12(d)(1)(A) of the Act, an acquiring fund that acquires only 3% of the total outstanding voting stock of an acquired fund generally would not be an affiliated person by virtue of its holdings.[87] Expanding section 17(a) relief to all transactions that are permitted by section 12(d)(1), without the transaction being subject to protections addressing the relevant concerns underlying section 17(a), raises issues that would require a careful consideration of whether additional conditions are necessary to sufficiently address any risks posed by these transactions.

Also, unlike transactions permitted by sections 12(d)(1)(E) and 12(d)(1)(G), transactions under these other provisions are possible without an implied exemption from section 17(a). We have historically considered whether an exemption from section 17(a) is appropriate (and subject to appropriately protective conditions) separately. Thus, while we are not providing the requested interpretation, affiliated arrangements within the statutory limits of section 12(d)(1) or that rely on section 12(d)(1)(F) may continue to apply separately for an exemptive order pursuant to section 17(b).[88] In addition, funds that comply with the conditions in rule 12d1–4 may rely upon the rule's exemption from section 17(a) even if they are not relying upon it for an exemption from section 12(d)(1).

Two commenters requested that we provide an exemption from section 17(d) and rule 17d–1 for affiliated arrangements that rely upon rule 12d1–4, or otherwise comply with section 12(d).[89] We decline to do so. Section

CFR 270.6c–11; 2019 ETF Adopting Release, *supra* footnote 25.

[81] Rule 6c–11(b)(3). *See supra* footnote 73 and accompanying text. *See also* 2019 ETF Adopting Release, *supra* footnote 25 at section II.B.3.

[82] *See also* 2019 ETF Adopting Release, *supra* footnote 25, at nn.130–134 and accompanying text.

[83] *See* Voya Comment Letter; ICI Comment Letter; PIMCO Comment Letter; SIFMA AMG Comment Letter. Some commenters focused on suggesting relief from sections 12(d)(1)(A) and 12(d)(1)(F). *See* ICI Comment Letter. Other commenters stated relief should include sections 12(d)(1)(A), (B), (C), (E), (F), and (G). *See* SIFMA AMG Comment Letter; PIMCO Comment Letter.

[84] *See* SIFMA AMG Comment Letter; PIMCO Comment Letter; ICI Comment Letter.

[85] *See, e.g.,* 2018 FOF Proposing Release, *supra* footnote 6, at n.70.

[86] *See, e.g.,* Section 12(d)(1)(E)(ii) (limiting the exception to situations where the acquiring fund only owns the acquired fund) and section 12(d)(1)(G)(i)(I) (limiting the exception to situations where the two funds are part of the same group of investment companies). For fund of funds arrangements relying on section 12(d)(1)(E), Commission staff has taken the position that application of section 17(a) of the Act to a registered feeder fund's cash redemption from a registered master fund would not be consistent with the basic relationship that section 12(d)(1)(E) is intended to permit. *See* Signature Financial Group, Inc., SEC Staff No-Action Letter (Dec. 28, 1999) (''Signature Financial No-Action Letter''). Section 12(d)(1)(G) of the Act codified certain exemptive orders that the Commission had issued permitting funds to purchase other funds in the same group of funds beyond the limits in section 12(d)(1). The Commission issued those orders generally to funds of funds where the acquiring and acquired funds were related because they shared a common investment adviser or the advisers were affiliated persons within the meaning of section 2(a)(3)(C) of the Act. Those orders provided relief from section 17(a) of the Act. *See, e.g.,* T. Rowe Price Spectrum Fund, Inc., Investment Company Act Release Nos. 21371 (Sept. 22, 1995) [60 FR 50654 (Sep. 22, 1995)] (notice) and 21425 (Oct. 18, 1995) (order) (''T. Rowe Spectrum Order''); Vanguard Star Fund, Investment Company Act Release Nos. 21372 (Sept. 22, 1995) (notice) and 21426 (Oct. 18, 1995) (order); *see also* MassMutual Institutional Funds, SEC Staff No-Action Letter (Oct. 19, 1998).

[87] An acquiring fund's percentage of outstanding shares of the acquired fund owned could increase without further acquisition, such as when there is a decrease in the outstanding securities of the acquired fund, resulting in the acquiring fund exceeding the 5% threshold.

[88] For example, some arrangements investing in both affiliated and unaffiliated underlying funds in amounts not exceeding the limits in section 12(d)(1)(F) have received an exemption from section 17(a) for investments in affiliated funds. *See, e.g.,* Hennion & Walsh, Inc., *et al.,* Investment Company Act Release Nos. 26207 (Oct. 14, 2003) [68 FR 59954 (Oct. 20, 2003)] (notice) and 26251 (Nov. 10, 2003) (order).

[89] *See* SIFMA AMG Comment Letter; PIMCO Comment Letter. Section 17(d) of the Act makes it unlawful for first- and second-tier affiliates of a fund, the fund's principal underwriters, and

17(d) and rule 17d–1 prohibit first- and second-tier affiliates of a fund, the fund's principal underwriters, and affiliated persons of the fund's principal underwriters, acting as principal, from effecting any transaction in which the fund or a company controlled by the fund is a joint or a joint and several participant.[90] They are designed to prevent these persons from managing the fund for their own benefit, rather than for the benefit of the fund's shareholders. Unlike section 17(a) relief, our fund of funds orders do not currently include exemptions from section 17(d) and rule 17d–1.[91] Further, given the fact-specific nature of many rule 17d–1 applications, and the fact that we do not normally provide such relief as part of our fund of funds exemptive orders, we believe it is appropriate to address requests for relief from section 17(d) and rule 17d–1 separately from rule 12d1–4. Fund of funds arrangements within the statutory limits of section 12(d)(1) may apply separately for relief through an application for an order under rule 17d–1 under the Act.

C. Conditions

Consistent with the public interest and the protection of investors, rule 12d1–4 includes conditions designed to prevent the abuses that historically were associated with fund of funds arrangements and that led Congress to enact section 12(d)(1). These conditions are based on the conditions in prior fund of funds exemptive orders[92] and commenters' suggestions. The rule establishes a framework that will subject fund of funds arrangements to a tailored set of conditions that address differences in fund structures.[93] The following table sets forth a general overview of the differences among the conditions under our current exemptive relief, proposed rule 12d1–4, and the final rule:

Concern addressed	Condition under existing exemptive orders	Proposed rule condition	Final rule condition
Undue Influence	Voting conditions (including the point at which the voting condition is triggered) differ based on the type of acquired fund. Once an acquiring fund (and any other funds within the advisory group) holds more than 3% of the acquired closed-end fund's outstanding voting securities, the acquiring fund must vote shares of acquired closed-end funds in the manner required by section 12(d)(1)(E) (*i.e.,* either pass-through or mirror voting), while non-fund entities within the advisory group must use mirror voting. For acquired open-end funds or UITs, an acquiring fund (and its advisory group) must vote their shares using mirror voting only if the acquiring fund and its advisory group become holders of more than 25% of the acquired fund's outstanding voting securities due to a decrease in the outstanding securities of the acquired fund.	Voting conditions do not differ based on the type of acquired fund and would require an acquiring fund and its advisory group to use pass-through or mirror voting when they hold more than 3% of the acquired fund's outstanding voting securities.	Voting conditions (including the point at which the voting condition is triggered) differ based on the type of acquired fund. Voting conditions will require an acquiring fund and its advisory group to use mirror voting when they hold more than: (i) 25% of the outstanding voting securities of an open-end fund or UIT due to a decrease in the outstanding securities of the acquired fund; or (ii) 10% of the outstanding voting securities of a closed-end fund. In circumstances where acquiring funds are the only shareholders of an acquired fund, however, pass-through voting may be used.
	Fund boards must make certain findings and adopt procedures to prevent overreaching and undue influence by the acquiring fund and its affiliates. Requires an agreement between acquiring and acquired funds agreeing to fulfill their responsibilities under the exemptive order (a ''participation agreement'').	An acquiring fund's ability to quickly redeem or tender a large volume of acquired fund shares is restricted (replacing the requirements for participation agreements and board findings/procedures).	Requires a fund of funds investment agreement between acquiring and acquired funds unless they have the same investment adviser that includes any material terms necessary for each adviser to make the appropriate finding under the rule, a termination provision, and a requirement that the acquired fund provide fee and expense information to the acquiring fund.
Complex Structures	Limits the ability of an acquired fund to invest in underlying funds (that is, it limits structures with three or more tiers of funds), subject to certain enumerated exceptions.	Limits the ability of funds relying on certain exemptions to invest in an acquiring fund and limits the ability of an acquired fund to invest in other funds, subject to certain enumerated exceptions. Requires an evaluation of the complexity of the fund of funds structure and aggregate fees. Specific considerations vary by acquiring fund structure.	Adviser(s) of acquiring and acquired funds that are management companies must make certain findings regarding the fund of funds structure. The principal underwriter or depositor of a UIT must analyze the fund of funds structure and determine that the arrangement does not result in duplicative fees. Allows an acquired fund to invest up to an additional 10% of its assets in other funds.

affiliated persons of the fund's principal underwriters, acting as principal, to effect any transaction in which the fund or a company controlled by the fund is a joint or a joint and several participant in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. *See* 15 U.S.C. 80a–17(d). Rule 17d–1(a) prohibits first- and second-tier affiliates of a fund, the fund's principal underwriter, and affiliated persons of the fund's principal underwriter, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or other joint arrangement or profit-sharing plan in which any such fund or company controlled by a fund is a participant ''unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted.''

[90] First-tier affiliates are investment companies and their affiliated persons. Second-tier affiliates are affiliated persons of their affiliated persons.

[91] In the past, some fund of funds exemptive orders included relief from section 17(d) and rule 17d–1 for certain service arrangements. *See, e.g.,* T. Rowe Spectrum Order, *supra* footnote 86.

[92] Schwab, *supra* footnote 23; Innovator ETFs, *supra* footnote 32.

[93] For example, the conditions regarding layering of fees vary based on the structure of acquiring fund. *See infra* section II.C.2.b.i.

Concern addressed	Condition under existing exemptive orders	Proposed rule condition	Final rule condition
Layering of Fees	Caps sales charges and service fees at limits under current FINRA sales rule (rule 2341) even in circumstances where the rule would not otherwise apply. Requires an acquiring fund's adviser to waive advisory fees in certain circumstances or requires the acquiring fund's board to make certain findings regarding advisory fees.	Requires an evaluation of the complexity of the fund of funds structure and aggregate fees. For management companies, the adviser must determine that it is in the best interest for the acquiring fund to invest.	Generally the same as proposed, but the investment adviser to an acquiring management company must find that the aggregate fees and expenses are not duplicative.

The conditions in rule 12d1–4 as adopted are substantially similar to the conditions that have been included in our exemptive orders since 1999.[94] We discuss each of the conditions below.

1. Control and Voting

a. Control

In order to address concerns that a fund could exert undue influence over another fund, as proposed, rule 12d1–4 will prohibit an acquiring fund and its advisory group from controlling, individually or in the aggregate, an acquired fund, except in the circumstances discussed below.[95] This condition generally comports with the conditions of the exemptive relief the Commission has previously issued.[96]

The Act defines control to mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.[97] The Act also creates a rebuttable presumption that any person who, directly or indirectly, beneficially owns more than 25% of the voting securities of a company controls the company and that any person who does not own that amount does not control it.[98] A determination of control is not based solely on ownership of voting securities of a company and depends on the facts and circumstances of the particular situation.[99] We have long held that ''controlling influence'' includes, in addition to voting power, a dominating persuasiveness of one or more persons, the act or process that is effective in checking or directing action or exercising restraint or preventing free action, and the latent existence of power to exert a controlling influence.[100]

We proposed that an acquiring fund and its advisory group could not control (individually or in the aggregate) an acquired fund. Accordingly, an acquiring fund and its advisory group's beneficial ownership of up to 25% of the voting securities of an acquired fund would be presumed not to constitute control over the acquired fund. The acquiring fund, therefore, generally could make a substantial investment in an acquired fund (*i.e.,* up to 25% of the acquired fund's shares). If, however, facts and circumstances gave an acquiring fund and its advisory group the power to exercise a controlling influence over the acquired fund's management or policies (other than as discussed below), the acquiring fund and other funds in its advisory group would not be able to rely on the rule even if the fund and its advisory group owned 25% or less of the acquired fund's voting securities.

Commenters generally supported using the concept of ''control'' as defined under the Act to guard against potential coercive behavior by an acquiring fund, and agreed that this condition is consistent with the conditions of existing exemptive relief.[101] One commenter stated that the proposed control provision protects acquired funds from undue influence concerns without disrupting investment strategies or creating difficult compliance requirements.[102] We also received more particularized comments relating to control of closed-end funds, as discussed below.

Reflecting these comments, rule 12d1–4 will prohibit an acquiring fund and its advisory group from acquiring, and therefore exercising, control over an acquired fund as proposed.[103] We believe this condition will limit a fund's ability to exert undue influence over another fund.[104] As discussed in more detail below, we addressed commenters' concerns regarding undue influence of acquired closed-end funds by imposing a lower ownership threshold that triggers the rule's voting conditions for such funds, and by requiring mirror voting when an acquiring fund exceeds the threshold.

i. Advisory Group Definition

The rule will require an acquiring fund to aggregate its investment in an acquired fund with the investment of the acquiring fund's advisory group to assess control as proposed.[105] This aggregation requirement is consistent with past exemptive orders and is designed to prevent a fund or adviser from circumventing the control condition by investing in an acquired fund through multiple controlled

[94] *See, e.g.,* Schwab, *supra* footnote 23.

[95] *See* rule 12d1–4(b)(1)(i); rule 12d1–4(d) (defining ''advisory group''). *See also infra* section II.C.1.b.iii. (discussing exceptions to the control condition)].

[96] *See, e.g.,* Wells Fargo Funds Trust, *et al.,* Investment Company Act Release Nos. 30201 (Sept. 12, 2012) [77 FR 57597 (Sept. 18, 2012)] (notice) and 30231 (Oct. 10, 2012) (order) and related application (prohibiting an acquiring fund (and its advisory group and sub-advisory group) from controlling an acquired fund).

[97] 15 U.S.C. 80a–2(a)(9).

[98] *Id.* These presumptions continue until the Commission makes a final determination to the contrary by order either on its own motion or on application by an interested person.

[99] ''[N]o person may rely on the presumption that less than 25% ownership is not control when, in fact, a control relationship exists under all the facts and circumstances.'' Exemption of Transactions by Investment Companies with Certain Affiliated Persons, Investment Company Act Release No. 10698 (May 16, 1979) [44 FR 29908 (May 23, 1979)], at n.2.

[100] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 32–33, nn.81–82 (discussing facts and circumstances that may constitute controlling influence).

[101] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter.

[102] Invesco Comment Letter.

[103] Like the limits under section 12(d)(1) of the Act, rule 12d1–4's control limitation is an acquisition test. In some circumstances, an acquiring fund's holdings may trigger the Act's control presumption through no action of its own. For example, if the acquiring fund and its advisory group become a holder of more than 25% of the outstanding voting securities of an acquired fund as a result of net redemptions and a decrease in the outstanding voting securities of the acquired fund, the rule does not require the acquiring fund to dispose of acquired fund shares. However, the acquiring fund and other entities within its advisory group may not rely on the rule to acquire additional securities of the acquired fund when the acquiring fund and other entities within its advisory group, in the aggregate, hold more than 25% of the acquired fund's voting securities.

[104] If an acquiring fund has a controlling influence over an acquired fund's management or policies, the acquiring fund would not be able to rely on the proposed rule even if the fund and its advisory group owned 25% or less of the acquired fund's voting securities.

[105] *See* rule 12d1–4(d) defining ''advisory group'' to mean either: (1) An acquiring fund's investment adviser or depositor, and any person controlling, controlled by, or under common control with such investment adviser or depositor; or (2) an acquiring fund's investment sub-adviser and any person controlling, controlled by, or under common control with such investment sub-adviser. Under the rule, an acquiring fund would not combine the entities listed in clause (1) with those in clause (2).

entities, *e.g.,* other funds in the fund complex.

Commenters recommended that the Commission alter its definition of ''advisory group'' or revisit the requirement to aggregate affiliated entities for purposes of determining control.[106] For example, several commenters suggested that we adopt a narrower definition of ''advisory group,'' stating that an acquiring fund's investment adviser or depositor may not direct the investments of the affiliates that fall within the proposed definition of ''advisory group,'' and in fact could be unaware of investments by such affiliates.[107] One of these commenters stated that this definition of advisory group could be particularly problematic for large financial services organizations that have many affiliates under common control, but that operate independently.[108] Some commenters recommended that the aggregation requirement exclude affiliates that are not subject to actual control by the investment adviser or exclude certain control affiliates where there are information barriers or other limits.[109] One commenter stated that section 12(d)(1)(A) of the Act does not require an investment adviser to aggregate holdings across its private funds for purposes of determining control and suggested that rule 12d1–4 follow a similar approach.[110] This commenter suggested that the Commission instead prevent an acquiring fund from seeking to exert control over an acquired fund by including a general provision in the rule prohibiting an entity from doing anything indirectly which, if done directly, would violate the rule.

On the other hand, some commenters suggested that the Commission should adopt a broader definition of advisory group than proposed.[111] Specifically, these commenters recommended that the Commission expand the aggregation requirement to include all accounts managed by the acquiring fund's adviser, subadviser or their respective affiliates.

Upon considering the comments received, we continue to believe requiring an acquiring fund to aggregate its holdings with its advisory group will help prevent a fund or adviser from circumventing the control condition. Because the control condition effectively allows an acquiring fund and its advisory group to obtain a significant ownership stake in an acquired fund by investing through multiple related entities, we believe it is appropriate to subject all of the affiliates in an advisory group to this condition. Our exemptive orders include a similar condition, and funds relying on those orders likely already have established policies and procedures to monitor compliance with the aggregation requirement embedded in the definition of the term ''advisory group.'' [112]

We acknowledge that the definition of ''advisory group'' may capture many affiliates of an acquiring fund and its investment adviser in a complex financial services firm, and will result in monitoring and compliance burdens that are greater than if the definition only looked to the holdings of an acquiring fund and its adviser. To the extent that a particular advisory group has not already established policies and procedures pursuant to an exemptive order, we also acknowledge that the advisory group may need to restructure information barriers to permit entities within the advisory group to share the necessary information to comply with the rule. However, other provisions of the Act and our rules also extend to affiliated persons of an investment adviser.[113] These provisions apply to affiliated persons, regardless of the complexity that may arise because of the way in which a financial services firm has determined to structure itself. Funds (and their advisers) have experience developing compliance policies and procedures in those circumstances.[114] We believe that requiring the entities that fall within this definition to aggregate their holdings in an acquired fund for purposes of the control condition will more effectively address the risk of undue influence over an acquired fund.

The breadth of entities that are included within an advisory group will reduce the risk that an acquiring fund and its advisory group will exert undue influence over an acquired fund by accumulating a controlling ownership position across the advisory group's accounts. We believe that the condition's definition of advisory group strikes an appropriate balance between the flexibility for efficient market activity and protection of acquired funds and their shareholders.

Additionally, we continue to believe that the advisory group definition should not encompass funds managed by unaffiliated sub-advisers. Absent common control, there is little risk that an advisory group and sub-advisory group would coordinate to exert undue influence on an acquired fund.[115] Consistent with past exemptive orders, therefore, rule 12d1–4 will not require an acquiring fund to aggregate the ownership of an acquiring fund advisory group with an acquiring fund sub-advisory group. Instead, each of these groups will consider its ownership percentage separately and will be subject to the voting provisions as discussed below.[116]

ii. Closed-End Funds

Rule 12d1–4 will include voting requirements specific to acquired closed-end funds in response to concerns raised by commenters with respect to undue influence over closed-end funds.[117] The proposed rule included voting requirements, as described in section II.C.1.b below, and would have required that an acquiring

[106] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter. Another commenter generally supported a requirement that funds advised by the same adviser cannot in the aggregate hold in excess of 3% of the outstanding voting securities of a given acquired fund. Comment Letter of General American Investors Company, Inc. (May 2, 2019).

[107] ICI Comment Letter; ABA Comment Letter; Voya Comment Letter.

[108] ICI Comment Letter (noting that many affiliates may have firewall restrictions that prevent the affiliates from coordinating their investments).

[109] *See, e.g.,* ABA Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter. One commenter further suggested that the Commission clarify that a feeder fund that invests in an acquired fund in reliance on Section 12(d)(1)(E) should not be included in the advisory group's ownership calculation, noting that a feeder fund is already required to use pass-through or mirror voting pursuant to 12(d)(1)(E)(iii)(aa). Comment Letter of Capital Research and Management Company (May 2, 2019) (''Capital Group Comment Letter'').

[110] MFA Comment Letter.

[111] Advent Comment Letter; Comment Letter of Skadden, Arps, Slate, Meagher & Flom LLP (May 2, 2019) (''Skadden Comment Letter'').

[112] *See, e.g.,* Symmetry Panoramic Trust and Symmetry Partners, LLC, Investment Company Act Release Nos. 33317 (Dec. 6, 2018) [83 FR 63918 (Dec. 12, 2018)] (notice) and 33364 (Feb. 1, 2019) (order) and related application.

[113] *See, e.g.,* section 17(a) of the Act (prohibiting first- and second-tier affiliates of a fund from borrowing money or other property, or selling or buying securities or other property to or from the fund, or any company that the fund controls). *See also supra* footnote 68 and accompanying text.

[114] *See* 17 CFR 270.38a–1 (rule 38a–1 under the Act) (requiring registered investment companies to adopt, implement and periodically review written policies and procedures reasonably designed to prevent violations of the federal securities laws). *See also* Compliance Rule Adopting Release, *supra* footnote 59 (noting that funds or their advisers should have policies and procedures in place to identify affiliated persons and to prevent unlawful transactions with them).

[115] However, if the sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as an acquired fund's investment adviser or depositor, then the sub-advisory group and advisory group will be required to aggregate their ownership for purposes of determining control pursuant to rule 12d1–4(b)(1)(i).

[116] *See* rule 12d1–4(b)(1)(ii).

[117] These voting conditions will also apply to voting of shares of acquired BDCs. *See* rule 12d1–4(b)(1)(ii).

fund and its advisory group not control (individually or in the aggregate) any acquired fund, whether open-end or closed-end.[118] As discussed above, the rule 12d1–4 control prohibition also applies if facts and circumstances exist that give an acquiring fund and its advisory group the power to exercise a controlling influence over an acquired closed-end fund's management or policies, even if the acquiring fund and its advisory group owned 25% or less of the acquired closed-end fund's voting securities.[119]

In the 2018 FOF Proposing Release, we requested comment on whether the rule's control and voting requirements should vary depending on the type of acquired fund, including whether there should be a lower or higher threshold for closed-end funds, and whether the threshold should differ for listed and unlisted closed-end funds.[120] As adopted, the rule does not impose a lower investment limit on investments in a closed-end fund by an acquiring fund and its advisory group; however, the rule will impose a mirror-voting requirement at a lower ownership threshold than the voting requirements applicable to open-end funds and UITs. Specifically, the rule will require mirror voting if an acquiring fund and its advisory group hold more than 10% of the voting securities of a closed-end fund. This voting requirement is designed to protect an acquired closed-end fund from undue influence through the shareholder vote mechanism. In addition, the rule will require an acquiring fund to enter into a fund of funds investment agreement with an acquired fund prior to exceeding the investment limits set forth in section 12(d)(1). Together, these provisions are designed to protect acquired closed-end funds from undue influence by acquiring funds and their advisory groups.

Several commenters recommended alternatives to the proposed control condition for fund of funds arrangements with acquired closed-end funds. For example, commenters recommended that, instead of relying on the concept of ''control'' for acquired closed-end funds, rule 12d1–4 should limit the aggregate ownership by an acquiring fund and its advisory group to 10% of an acquired closed-end fund's voting securities in order to protect these funds from undue influence.[121] One commenter stated that an acquiring fund that holds approximately 15% of an acquired closed-end fund could dictate certain actions of the acquired closed-end fund.[122] The commenter also recommended expanding the definition of advisory group and requiring an acquiring fund (and the expanded advisory group) to reduce its holdings in an acquired fund to less than 25% within a defined period of time in order to discourage activist investors from increasing their holdings in target funds just prior to effectiveness of the rule.[123]

Two commenters encouraged the Commission to allow acquired funds and their boards, at their option, to set their own limit for an acquiring fund's investments.[124] These commenters suggested that an agreement between an acquiring and acquired fund (similar to a participation agreement under current fund of funds exemptive relief) could allow the acquired fund and its board to evaluate the effects of the acquiring fund's investment, including any risks of undue influence, and set an appropriate limit.[125] Similarly, commenters suggested that the rule should provide acquired funds with the ability to grant consent to potential investments by acquiring funds, effectively permitting acquired funds to screen their investors and refuse investments by acquiring funds based on undue influence concerns.[126]

Other commenters suggested the Commission adopt a passive investor certification and reporting regime similar to that under Section 13 of the Securities Exchange Act of 1934 and Schedules 13D and 13G to protect acquired closed-end funds against undue influence.[127] Under such a regime, an acquiring fund would certify to the Commission, or would only be able to operate in accordance with rule 12d1–4, if it holds the acquired fund's securities in the ordinary course of business and not for the purpose of or with the effect of changing or influencing the management or policies of the acquired fund. Commenters representing closed-end funds or their investors also recommended that, if rule 12d1–4 were to permit private funds to acquire closed-end funds, it should incorporate additional protections specific to closed-end funds.[128]

Rule 12d1–4, as adopted, will prohibit an acquiring fund and its advisory group from exercising control over an acquired closed-end fund and will impose a mirror-voting requirement if an acquiring fund and its advisory group hold more than 10% of the voting securities of a closed-end fund.[129] We believe these conditions will more effectively address undue influence concerns regarding acquired closed-end funds than a reporting or certification requirement on acquiring funds, and they will avoid potential duplicative reporting requirements on certain acquiring funds.[130]

As an additional protective condition, discussed below in section II.C.2, the rule will require an acquiring fund and an acquired closed-end fund that do not share an investment adviser to enter into a fund of funds investment agreement prior to the acquiring fund exceeding the investment limits of section 12(d)(1)(A). This agreement will

[118] Proposed rule 12d1–4(b)(1).

[119] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 32–33.

[120] *Id.* at 45. We requested comment on whether the proposed control and voting conditions sufficiently protect acquired funds, and whether there may be other conditions that would address the potential for undue influence by an acquiring fund and its controlling persons, including a lower limit on investments by an acquiring fund and its advisory group in an acquired fund. *Id.* at 43.

[121] Advent Comment Letter; Comment Letter of TPG Specialty Lending, Inc. (May 2, 2019) (''TPG Comment Letter.'').

[122] Advent Comment Letter (stating that holdings below the 25% level result in the type of undue influence the Commission is seeking to prevent, such as a large holder being able to dictate various events including the initiation of a proxy contest). *See also* PIMCO Comment Letter (recommending that, if private funds and foreign funds are permitted to rely on the rule, such funds must act within the limits of section 12(d)(1)(C) as if they were registered funds); Skadden Comment Letter; ICI Comment Letter. Section 12(d)(1)(C) prohibits funds (together with companies or funds they control and funds that have the same adviser) from acquiring more than 10% of the outstanding voting stock of a closed-end fund. 15 U.S.C. 80a–12(d)(1)(C).

[123] Advent Comment Letter.

[124] Dimensional Comment Letter (noting that a higher discretionary investment limit might be beneficial for a newly formed or smaller fund that seeks large investments by acquiring funds in order to achieve economies of scale); Advent Comment Letter (explaining that an acquired fund might use a participation agreement to permit an acquiring fund to purchase more than 10% of its voting securities, and the participation agreement can require passive investment).

[125] Dimensional Comment Letter, Advent Comment Letter.

[126] ABA Comment Letter; AIC Comment Letter; Dimensional Comment Letter (explaining that the participation agreement requirement of existing exemptive relief has been helpful for a potential acquired fund to refuse large investments by an acquiring fund that may present a risk of undue influence, and recommending the preservation of such a control).

[127] Skadden Comment Letter; BlackRock Comment Letter.

[128] *See, e.g.,* Comment Letter of Nuveen, LLC (May 2, 2019) (''Nuveen Comment Letter''); SIFMA AMG Comment Letter; PIMCO Comment Letter; Skadden Comment Letter; Voya Comment Letter; Guggenheim Comment Letter; Advent Comment Letter.

[129] *See* rule 12d1–4(b)(1). This voting requirement applies at a 10% ownership threshold, while the Act creates a rebuttable presumption that any person who directly or indirectly beneficially owns more than 25% of the voting securities of a company controls the company.

[130] *See, e.g.,* Part C of Form N–PORT (requiring monthly disclosure of certain registered management investment companies' portfolio holdings, including disclosure of investments in other investment companies).

enable an acquired closed-end fund to screen potential acquiring fund investors and set conditions on investments in the acquired fund, if desired. The agreement also will allow an acquired closed-end fund to terminate the agreement with an acquiring fund without penalty, which would then prohibit the acquiring fund from making additional purchases of the acquired fund beyond the section 12(d)(1)(A) limits.

Rule 12d1–4 also includes voting requirements specific to closed-end funds that preserve voting discretion for investment advisers below a specified threshold of ownership, while seeking to avoid amplifying the voting power of any particular investor.[131] These voting requirements are described in the section below. Finally, because private funds will not be permitted to rely on the rule as acquiring funds, we are not adopting any specific conditions associated with private fund investments in closed-end funds under rule 12d1–4.

In addition to comments on closed-end fund issues under the rule, several commenters raised general concerns about private fund investments in closed-end funds that are outside the scope of rule 12d1–4.[132] These commenters stated that there have been instances in which an investment adviser to several private funds (each with less than 3% of the outstanding voting shares of a closed-end fund) acquired a significant aggregate interest in an acquired closed-end fund and sought to unduly influence the fund to the detriment of long-term shareholders through proxy contests or other means.[133] The commenters recommended various ways to address these private fund investments in closed-end funds under section 12(d)(1). For example, these commenters recommended that the Commission: (i) Recommend legislation to deem any private fund an ''investment company'' for purposes of section 12(d)(1)(C) of the Act;[134] (ii) extend the 3% limit of section 12(d)(1)(A)(i) to any separate accounts for which an advisory group has sole or shared voting or disposition authority;[135] (iii) deem ownership of more than 3% of a registered fund by a private fund advisory group to be a violation of section 12(d)(1)(A)(i) pursuant to section 48(a) of the Act;[136] or (iv) treat affiliated private funds that ''are not materially different in investment operations or investment policies'' as a single fund for purposes of section 12(d)(l).[137]

On the other hand, some commenters opposed restrictions on private fund investments in closed-end funds under section 12(d)(1).[138] These commenters stated that private funds invest in closed-end funds in accordance with the relevant provisions of the Act. In addition, one commenter stated that Congress did not impose more restrictive limits on the ability of private funds to acquire equity stakes in regulated funds when it amended the Act to subject private funds to the restrictions of sections 12(d)(1)(A)(i) and 12(d)(1)(B)(i).[139]

After considering comments, we believe commenters' additional recommendations with respect to investments in closed-end funds that are within the statutory limitations of section 12(d)(1) are beyond the scope of this rulemaking.[140]

b. Voting Provisions

The final rule will require an acquiring fund and its advisory group to vote their shares of an acquired fund: (i) Using mirror voting if the acquiring fund and its advisory group (in the aggregate) hold more than 25% of the outstanding voting securities of an acquired open-end fund or UIT due to a decrease in the outstanding securities of the acquired fund;[141] and (ii) using mirror voting if the acquiring fund and its advisory group (in the aggregate) hold more than 10% of the outstanding voting securities of an acquired closed-end fund or BDC.[142] Similar to our exemptive orders, the final rule's voting conditions will differ based on the type of acquired fund.

Proposed rule 12d1–4 would have required an acquiring fund and its advisory group to vote their securities in the manner prescribed by section 12(d)(1)(E)(iii)(aa) of the Act if the acquiring fund and its advisory group (in the aggregate) hold more than 3% of the outstanding voting securities of an acquired fund.[143] The proposed rule would have applied a uniform condition across all types of acquired funds to simplify and streamline the requirement. Commenters generally supported the proposed voting conditions, stating that they protect acquired funds without disrupting current investment strategies or creating new or difficult compliance requirements.[144] As discussed in more detail below, however, some commenters suggested modifications to the ownership threshold that would trigger the voting condition or the required manner of voting, based on the type of acquired fund.[145]

We believe that the voting conditions of the final rule, which we modified to respond to the concerns expressed in these comments, will help to facilitate compliance monitoring and are better

[131] *See infra* section II.C.1.b.

[132] *See, e.g.,* Comment Letter of Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (May 2, 2019) (''Chamber of Commerce Comment Letter'') (recommending that the Commission review existing rules to address ''regulatory loopholes'' related to fund of funds structures and ownership thresholds); Comment Letter of Anthony S. Colavita (Apr. 30, 2019); Comment Letter of Anthonie van Ekris (Apr. 30, 2019); Comment Letter of Kinchen C. Bizzel (May 2, 2019); Comment Letter of Salvatore Subblells (May 2, 2019); Comment Letter of Peter Baldino (May 2, 2019); Comment Letter of Clarence A. Davis (May 2, 2019). *See* 2018 FOF Proposing Release, *supra* footnote 6, at n. 95 and accompanying text.

[133] *See, e.g.,* Advent Comment Letter; Skadden Comment Letter; ICI Comment Letter; Comment Letter of Gabelli Funds, LLC (Apr. 30, 2019) (''Gabelli Comment Letter''); Nuveen Comment Letter. One commenter requested that the Commission analyze private funds' actual capacity for exercising voting control, as well as indirect forms of influence, over an acquired closed-end fund. Great American Comment Letter.

[134] ICI Comment Letter; Comment Letter of Calamos Investments LLC (May 2, 2019) (''Calamos Comment Letter''); Nuveen Comment Letter; Dechert Comment Letter; Voya Comment Letter; Guggenheim Comment Letter. *See also* Gabelli Comment Letter (recommending that the Commission seek legislative changes to create a private right of action to enforce rules relating to activist investment in closed-end funds).

[135] Gabelli Comment Letter.

[136] Advent Trustees Comment Letter; Gabelli Comment Letter; Advent Comment Letter; Skadden Comment Letter.

[137] Skadden Comment Letter.

[138] Comment Letter of Saba Capital Management, L.P. (May 1, 2019) (''Saba Comment Letter''); Comment Letter of City of London Investment Management Co Ltd (May 2, 2019) (''City of London Comment Letter''); Comment Letter of Bulldog Investors, LLC (May 6, 2019) (''Bulldog Comment Letter''); TPG Comment Letter.

[139] Saba Comment Letter, citing NSMIA at sections 209(a)(1) and 209(a)(4)(D) (codified at Sections 3(c)(1) and Section 3(c)(7) of the Investment Company Act).

[140] *See supra* footnotes 133–137 and accompanying text.

[141] In circumstances where acquiring funds are the only shareholders of an acquired fund, however, pass-through voting may be used.

[142] Mirror voting requires the fund to vote the shares held by it (and, under rule 12d1–4, an acquiring fund's advisory group) in the same proportion as the vote of all other holders of the acquired fund. In mirror voting, the tabulation agent for the shareholder meeting will first tabulate the votes for a proposal and then apply the resulting ratio (for/against/abstain) to the shares instructing that they are to be mirror voted.

[143] Proposed rule 12d1–4(b)(1)(ii). Section 12(d)(1)(E)(iii)(aa) of the Act requires an acquiring fund to either: (i) Seek voting instructions from its security holders and vote such proxies in accordance with their instructions (''pass-through voting''); or (ii) use mirror voting.

[144] Invesco Comment Letter; CFA Comment Letter (specifically supporting the application of the voting condition to an acquiring fund and its advisory group).

[145] *See* Invesco Comment Letter; CFA Comment Letter, WisdomTree Comment Letter; IPA Comment Letter; Advent Comment Letter; Skadden Comment Letter; FS Comment Letter; ABA Comment Letter.

tailored to address the potential for undue influence through voting power based on the types of acquired fund.

i. Ownership Threshold

The final rule will impose voting conditions if an acquiring fund and its advisory group hold more than 25% of the voting securities of an acquired open-end fund or UIT due to a decrease in the outstanding voting securities of the acquired fund.[146] For acquired BDCs and other closed-end funds, the rule will impose voting conditions at a 10% ownership threshold. The proposed rule included a 3% ownership threshold that would trigger the rule's voting conditions, and we requested comment on whether that ownership threshold should be higher or lower, and whether it should differ depending on the type of acquired fund.[147]

A number of commenters recommended raising the 3% ownership threshold that would trigger the voting conditions in the proposed rule, stating that a 3% threshold would substantially increase the administrative burden on an advisory group to monitor and vote shares.[148] For example, some commenters recommended the rule raise the ownership threshold from the proposed 3% to 10% to better reflect an ownership level at which an acquiring fund would be able to influence a shareholder vote.[149] One commenter argued that the rule should allow acquiring funds to hold larger positions in closed-end funds without forfeiting the right to exercise their independent judgment regarding shareholder proposals to ameliorate certain unintended consequences associated with a lower threshold.[150]

Several commenters recommended that the rule adopt the voting triggers set forth in exemptive orders.[151] These commenters stated that current exemptive orders only impose voting requirements when a fund and its advisory group hold, in aggregate, more than 25% of the outstanding voting securities of an acquired open-end fund or UIT. They also noted that open-end funds and UITs may not be particularly susceptible to influence by shareholder votes because they do not hold routine shareholder meetings. Accordingly, these commenters stated that there was little practical or policy justification to impose voting requirements at a 3% ownership threshold on shares of acquired open-end funds and UITs.[152] In contrast, these commenters stated that closed-end funds may be required to hold annual shareholder meetings and can be the target of proxy contests, which may make such funds more susceptible to influence by shareholder vote. Commenters addressing the closed-end fund market segment generally recommended that the Commission adopt a lower voting threshold for acquiring funds' holdings in closed-end funds than the threshold for acquiring funds' holdings in open-end funds and UITs.[153]

After considering the comments received, we believe that it is appropriate that the final rule include voting requirements for investments in open-end funds and UITs that are consistent with the voting requirements imposed by prior exemptive orders in this area. We are persuaded that the 25% ownership threshold is appropriate for open-end funds and UITs given that these funds hold shareholder meetings infrequently, and because commenters did not raise concerns about undue influence of these funds through shareholder voting. The rule's voting conditions therefore will apply to the same scope of entities in an acquiring fund's advisory group as the voting conditions in our existing fund of funds exemptive orders. A 25% ownership threshold will also minimize the administrative burden associated with the voting requirement for these funds.[154] Accordingly, the final rule will require mirror voting if an acquiring fund and its advisory group hold more than 25% of the voting securities of an open-end fund or UIT. We expect an acquiring fund would only exceed 25% of the securities of an open-end fund or UIT due to a decrease in the outstanding voting securities of the acquired fund because the rule prohibits an acquiring fund from controlling an acquired fund and because of the rebuttable presumption regarding control under the Act.[155]

However, the rule will impose a 10% ownership threshold on acquired closed-end funds. We believe a 10% ownership threshold (an increase from the proposed 3% threshold) will permit an acquiring fund and its advisory group to gain substantial exposure to such funds with full voting discretion, but will reduce undue influence concerns associated with shareholder votes, which are greater for acquired closed-end funds than for other types of acquired funds given the more frequent shareholder meetings.[156] We are concerned that a higher threshold for acquiring fund investments in closed-end funds, such as 15% or 25%, could give an acquiring fund's advisory group the ability to dictate certain fund actions and unduly influence the acquired closed-end fund.

ii. Mirror Voting

The final rule will require mirror voting if an acquiring fund and its advisory group hold more than (i) 25% of the outstanding voting securities of an open-end fund or UIT due to a decrease in the outstanding voting securities of the acquired fund or (ii)

[146] Rule 12d1–4(b)(1)(ii).

[147] 2018 FOF Proposing Release, *supra* footnote 6, at 45.

[148] Comment Letter of Charles Schwab Investment Management (May 2, 2019) (''Schwab Comment Letter''); Voya Comment Letter. *But see* SIFMA AMG Comment Letter (''[T]he voting and control provisions do not create significant operational challenges for funds and . . . they may prove to be an unobtrusive means to address some of Congress's concerns relating to voting control . . .'').

[149] MFA Comment Letter; Nuveen Comment Letter. *But see* Advent Comment Letter (stating that an acquiring fund that holds approximately 15% of an acquired fund can dictate certain actions of the acquired fund).

[150] SIFMA AMG Comment Letter (''AMG has observed that activist firms are utilizing multiple private funds to acquire significant positions in CEFs, but such private funds would not be subject to the Proposed Rule. In contrast, registered funds investing in CEFs would be subject to this voting condition. Therefore, such registered funds would likely mirror vote shares held in any CEF subject to the voting condition. This would have the effect of increasing the voting power of activist firms . . . We believe the Commission could mitigate this concern by increasing the percentage beyond which an acquiring fund and its advisory group are required to mirror or pass-through vote.'').

[151] Schwab Comment Letter; SIFMA AMG Comment Letter; ICI Comment Letter; ABA Comment Letter.

[152] ICI Comment Letter; Voya Comment Letter; Schwab Comment Letter.

[153] *See, e.g.,* Nuveen Comment Letter, SIFMA AMG Comment Letter.

[154] Since our existing fund of funds exemptive orders currently impose voting requirements on an advisory group's holdings in an acquired fund, we understand from commenters that some advisory groups may already have systems in place to monitor holdings at the ''advisory group level'' and engage in mirror voting when appropriate or required. *See, e.g.,* Invesco Comment Letter; SIFMA AMG Comment Letter. To the extent that an advisory group utilizes information barriers and determines to rely on this rule, the advisory group may need to update its policies and procedures to allow entities across the advisory group to monitor compliance with the aggregate ownership thresholds set forth in rule 12d1–4. *See, e.g.,* Dechert Comment Letter.

[155] The Act creates a rebuttable presumption that any person who directly or indirectly beneficially owns more than 25% of the voting securities of a company controls the company. The presumption of control continues until the Commission makes a final determination to the contrary by order either on its own motion or on application by an interested person. *See* 15 U.S.C. 80a–2(a)(9).

[156] *See, e.g.,* Nuveen Comment Letter (stating that a 10% threshold is a reasonable ownership threshold to limit undue influence concerns while allowing acquiring funds to hold larger positions in closed-end funds without forfeiting the right to exercise their independent judgment regarding shareholder proposals); MFA Comment Letter (stating that a 10% ownership threshold would appropriately balance the need to prevent influence of shareholder votes with allowing acquiring funds that do not have the ability to influence acquired funds to participate in shareholder votes).

10% of the outstanding voting securities of an acquired BDC or other closed-end fund. As described above, the proposed rule would have required acquiring funds to use either pass-through or mirror voting if the acquiring fund and its advisory group exceeded a set ownership threshold, regardless of the type of acquired fund. In the 2018 FOF Proposing Release, we requested comment on whether we should adopt the voting requirements of the proposed rule, or whether the final rule should codify the voting provisions set forth in existing exemptive orders.[157]

Several commenters suggested modifications to the proposed voting requirement. For example, one commenter generally opposed pass-through voting for closed-end fund voting securities because an activist acquiring fund and its advisory group would likely vote according to the recommendations of its activist investment manager.[158] This commenter suggested that the rule permit pass-through voting of investments in an acquired closed-end fund only if required by the terms of an adviser's investment advisory contract. Another commenter recommended that the rule require an acquiring fund to mirror vote its shares of an acquired open-end fund if it controls the acquired fund.[159] The commenter explained that, at a beneficial ownership of more than 25% of the voting securities of an acquired open-end fund, there is a greater risk that an acquiring fund can exert undue influence on the acquired fund and thus the burden of mirror voting acquired fund shares is a reasonable trade-off.

Some commenters stated that the rule's proposed voting requirements could conflict with an acquiring fund adviser's fiduciary duty to vote underlying fund shares in the best interest of the acquiring fund.[160] These commenters stated that large advisory firms may serve many clients with different investment strategies and shareholder voting interests, and a voting requirement that applies across an advisory group could cause an affiliate of an acquiring fund to be in violation of its fiduciary duties under Sections 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974 if forced to adhere to the rule's voting requirements. Further, commenters stated that a mirror-voting requirement may require an adviser to vote fund holdings in a manner that is contrary to its proxy voting policies.[161]

Some commenters expressed concern regarding the effect of the required voting procedures for acquired closed-end funds. These commenters stated that requiring acquiring funds to use mirror voting if they hold more than 3% of an acquired closed-end fund may increase the relative voting power of private funds or separate account structures that would not rely on rule 12d1–4, and therefore would not be subject to the voting requirements of the rule.[162] These commenters noted that mirror voting by an acquiring fund and its advisory group at a low ownership threshold could effectively amplify the voting position of these types of investors.

After considering comments, we believe it is appropriate to require acquiring funds and their advisory group to use mirror voting. However, in circumstances where rule 12d1–4 or section 12(d)(1) requires all of the security holders of an acquired fund to engage in mirror voting, and it would not be possible for every shareholder to engage in mirror voting, such acquiring funds must use pass-through voting. For example, if an acquired fund is offered solely to acquiring funds that rely on rule 12d1–4, there may be no other investors to vote the acquired fund shares; therefore, under these circumstances, the acquiring fund's shares must be ''passed-through'' to the acquiring funds' shareholders for voting purposes. We believe requiring an acquiring fund and its advisory group to use mirror voting in most cases, with an ownership threshold set at 25% for open-end funds and UITs and at 10% for closed-end funds, will help address the commenters' concerns regarding undue influence over acquired funds through shareholder voting.[163] We further believe that requiring an acquiring fund and its advisory group to use mirror voting in most cases, without generally providing the option for pass-through voting, will simplify operational and compliance burdens for acquiring funds and their advisory groups. For example, this approach will facilitate compliance monitoring for fund groups that have multiple types of acquiring funds. As under our existing exemptive orders, we believe an adviser would need to consider these voting requirements as a component of its fiduciary duty when determining whether and how much an acquiring fund should invest in an acquired fund under the rule.

iii. Exceptions to the Control and Voting Conditions

We are adopting, as proposed, exceptions to the control and voting conditions when: (i) An acquiring fund is within the same group of investment companies as an acquired fund; or (ii) the acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as the acquired fund's investment adviser or depositor.[164] The exceptions are designed to include arrangements that are permissible under section 12(d)(1)(G) and our exemptive orders within the regulatory framework of rule 12d1–4.[165] We define the term ''group of investment companies'' as any two or more registered investment companies or business development companies that hold themselves out to investors as related companies for investment and investor services.[166]

Commenters supported these exceptions.[167] Commenters agreed with the Commission that, in circumstances where an affiliated investment manager manages the acquiring fund, it is unlikely that the investors in the acquiring fund would exert undue influence and use their vote to pursue initiatives that are inconsistent with the long-term interests of investors in the

[157] 2018 FOF Proposing Release, *supra* footnote 6 at 45–46.

[158] Advent Comment Letter.

[159] Voya Comment Letter.

[160] ICI Comment Letter (stating that there may be shareholder proposals, such as merger approvals or changes to fundamental investment strategy, for which an adviser believes that neither mirror voting nor pass-through voting is in the acquiring fund's or shareholders' best interest); Voya Comment Letter. The voting conditions are similar to those included in our existing exemptive orders.

[161] Schwab Comment Letter.

[162] SIFMA AMG Comment Letter (noting that activist investors have historically accumulated ownership of closed-end funds through separate investments by private funds and separately managed accounts); Nuveen Comment Letter.

[163] One commenter recommended that the rule prescribe a mirror voting procedure whereby the acquiring fund must provide legal proxy to the proxy agent for the shareholder vote and request that the acquiring fund's shares be voted in the same proportion as the vote of all other shareholders. Bulldog Comment Letter. We do not believe it is necessary to include such a prescription in this rule because we understand that proxy agents are able to tabulate and process shareholder votes that are subject to a mirror-voting requirement and such agents would not require a legal proxy to be set forth in the rule text.

[164] Rule 12d1–4(b)(1)(iii). The exception to the control and voting conditions for sub-advisory arrangements will cover arrangements that may not qualify for the exclusion otherwise available to funds within the same group of investment companies if the acquiring fund and acquired fund do not hold themselves out as related funds for purposes of investment and investor services. *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.106 and accompanying text.

[165] *See* 2018 FOF Proposing Release, *supra* footnote 6, at section II.C.1.b.

[166] Rule 12d1–4(d).

[167] *See, e.g.,* Invesco Comment Letter; ABA Comment Letter.

acquired fund.[168] Based on our experience overseeing fund of funds arrangements, we believe these exceptions from the control and voting conditions are appropriately tailored to except only those fund of funds arrangements that do not raise the concerns of undue influence that underlie section 12(d)(1).

The definition of ''group of investment companies'' is similar to the definition used in many of our exemptive orders permitting investments in listed closed-end funds and listed BDCs. It is intended to clarify that BDCs and other closed-end funds are within the scope of this exception. The determination of whether advisers are control affiliates, however, depends on the relevant facts and circumstances.[169]

We believe that whether a group of funds sharing a common adviser or having advisers that are all control affiliates could satisfy the ''holding out'' prong of the definition would depend on the totality of communications with investors by or on behalf of the funds. For example, the acquiring fund's prospectus could identify the acquired funds in which the acquiring fund expects to invest, and disclose the control relationship among the advisers to the acquiring and acquired funds. In our view, it is not necessary for acquired funds to include comparable disclosure in their prospectuses or for acquired funds and acquiring funds to market themselves as related companies for all purposes and to all potential investors.[170] Rather, the requirement in this definition that the funds must hold themselves out to ''investors'' as related companies for purposes of investment and investor services refers only to potential investors in the acquiring fund because the relevant inquiry is how these funds are holding themselves out to their potential investors. Disclosure in the acquiring fund's prospectus of the identity of the acquired funds in which the acquiring fund expects to invest, and of the control relationship among the advisers to the acquired and acquiring funds, therefore, is one way to satisfy the ''holding out'' requirement of the definition. As we stated in the 2018 FOF Proposing Release, we believe that it would be false or misleading for a group of investment companies to hold themselves out as related companies as that term is used in rule 12d1–4 unless they are related investment companies.

As proposed, the rule will subject fund of funds arrangements within these exclusions to a more limited set of conditions than other fund of funds arrangements. In circumstances where the acquiring fund and acquired fund share the same adviser, the adviser would owe a fiduciary duty to both funds, serving to protect the best interests of each fund.[171] In addition, where the arrangement involves funds that are advised by advisers that are control affiliates, we do not believe that the acquiring fund adviser generally would seek to benefit the acquiring fund at the expense of the acquired fund. Nor do we believe that the acquiring fund would seek to influence the acquired fund through its ownership interest in the acquired fund.[172] We believe that the rule's other conditions, such as the fund of funds investment agreement and adviser findings described below, would mitigate the risks of undue influence when the arrangement involves funds that have advisers that are control affiliates.

2. Redemption Limits, Fund Findings, and Fund of Funds Investment Agreements

In lieu of the proposed limitation on redemptions by an acquiring fund, we are adopting a requirement, expanded from the proposal, for an investment adviser to a management company operating in accordance with the rule to evaluate and make certain findings regarding the arrangement.[173] The rule will also require tailored findings regarding acquiring UITs and a certification regarding separate accounts funding variable insurance contracts (these findings and certifications, collectively with the management company evaluations and findings, ''Fund Findings''). In addition, unless they have the same adviser, the acquiring fund and acquired fund will be required to enter into a fund of funds investment agreement effective for the duration of the funds' reliance on the rule, which must include certain specific terms. These provisions are, as discussed below, designed to address concerns over the exercise of undue influence through excessive redemptions that the proposed redemption limit provision was designed to address, while also addressing the duplicative fee and complex structure concerns that underlie section 12(d)(1)(A).

a. Proposed Redemption Limit and Disclosure Requirements

The proposed rule would have prohibited an acquiring fund that acquires more than 3% of an acquired fund's outstanding shares (*i.e.,* the statutory limit) from redeeming or submitting for redemption, or tendering for repurchase, more than 3% of an acquired fund's total outstanding shares in any 30-day period (the ''redemption limit'').[174] The proposed redemption limit was designed to address concerns that an acquiring fund could threaten large-scale redemptions as a means of exercising undue influence over an acquired fund and would have limited an acquiring fund's ability to quickly redeem or tender a large volume of acquired fund shares.[175] The Commission proposed the redemption limit believing it would (along with the proposed control and voting conditions) address the same concerns regarding undue influence and overreaching that the conditions currently found in the exemptive orders sought to address, without requiring procedures and related board findings covering particular instances where undue influence and overreaching could exist. The Commission stated that replacing these conditions with the proposed redemption, control, and voting conditions could lower compliance

[168] Commenters suggested excluding funds within the same group of investment companies from other conditions of the proposed rule, including the proposed redemption limit. While we are not adopting the proposed redemption limit, we have tailored the rule's conditions to account for the different undue influence concerns of funds within the same group of investment companies as compared to funds that are not part of the same group of investment companies.

[169] We believe, for example, that funds that are advised by the same investment adviser, or by advisers that are control affiliates of each other, would be ''related'' companies for purposes of the rule. The definition of ''affiliated person'' includes any person directly or indirectly controlling, controlled by, or under common control with, such other person. *See* section 2(a)(3)(C) of the Act. *See also* Investment Company Mergers, Investment Company Act Release No. 25259 (Nov. 8, 2001) [66 FR 57602 (Nov. 15, 2001)] (proposing rule amendments to permit mergers and other business combinations between certain affiliated investment companies), at n.11.

[170] If the acquired funds' marketing materials and/or prospectuses include any statements that are inconsistent with the representations made in the prospectuses for the acquiring funds regarding how the acquired fund and acquiring funds are related companies because of the affiliation of their investment advisers, such statements could call into question whether the funds are holding themselves out as related companies and potentially render the control exception unavailable to the fund of funds arrangement.

[171] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 41 and associated footnotes.

[172] *Id.*

[173] *See infra* footnotes 259 through 276 and accompanying text.

[174] Proposed rule 12d1–4(b)(2).

[175] *See* 2018 FOF Proposing Release, *supra* footnote 6, at section II.C.2 (explaining that we proposed to permit funds to purchase up to 25% of an acquired fund (or more when the funds are part of the same group of investment companies) in reliance on the rule, in part, because of the protections afforded by limiting the acquiring fund's ability to influence the fund through the threat of large-scale redemptions).

costs and burdens and enhance investor protection for acquired funds.

Many commenters opposed the proposed redemption limit.[176] These commenters raised a number of concerns, including: (1) Operational or administrative challenges; (2) the redemption limit's potential effects on the acquiring fund's investment objectives and its ability to respond timely to changing economic or market conditions; (3) the impact on competition and innovation; (4) whether funds in the same group of investment companies should be subject to the requirements; (5) concerns relating to liquidity; and (6) the cost of the proposed limits.[177] These commenters offered a number of alternatives in lieu of the proposed redemption limit.[178] We also received a number of comments on a proposed disclosure requirement relating to the redemption limit.[179]

Operational and administrative challenges. Commenters stated that the proposed redemption limit would present a number of operational or administrative challenges, including disrupting existing fund of funds arrangements.[180] Many commenters provided evidence that the proposed redemption limit would have a large effect on funds.[181] For example, one commenter provided survey results showing that, in the past three years, 228 fund of funds arrangements conducted 1,399 redemption transactions in excess of 3%.[182] One commenter stated that, in the case of large-scale redemptions, an acquiring fund may have difficulty meeting redemption requests from its own shareholders in light of this limit, in part because making in-kind distributions to its shareholders would be difficult on such a large scale.[183] Other commenters questioned whether this requirement was consistent with the requirements of the Act, including section 22(e) which generally prohibits registered investment companies from suspending the right of redemption of redeemable securities.[184]

Some commenters discussed the challenges associated with tracking the outstanding voting securities of numerous third-party funds for investment threshold and redemption limit percentages over rolling 30-day periods, noting that this information is not readily available to the investing public.[185] Another commenter stated that it may be challenging to build compliance system enhancements that can account for multiple redemptions within any rolling 30-day period and apply those calculations to outstanding share balances that change daily.[186] Some commenters stated that these challenges would cause portfolio management teams to reduce exposures to acquired funds as their holdings approach the 3% limit as a means to mitigate these challenges.[187] Other commenters stated that the proposed redemption limit could prevent an acquiring fund from timely participating in certain transactions, such as liquidations or mergers of the acquiring fund, even where the acquiring fund's board and/or its shareholders have approved such transactions.[188]

Potential impacts on investment strategies. Several commenters expressed the view that the proposed redemption limit could impede acquiring funds' ability to follow their investment strategy.[189] Commenters stated that portfolio managers routinely change allocations among underlying funds in response to economic or market conditions, or in keeping with the stated investment strategy of the fund of funds, and that redemption limits could prevent portfolio managers from making such changes in a timely fashion.[190] For example, some commenters noted that the proposed redemption limit would prevent or limit portfolio managers' ability to make investment changes when they identify an underlying fund as underperforming or no longer meeting the needs of the investment strategy of the fund of funds.[191] One commenter stated that the proposed redemption limit could force acquiring funds and their shareholders to hold onto underlying funds that underperform, have higher costs than alternatives that become available, or no longer achieve the fund's strategy.[192] Another commenter suggested that to comply with the proposed redemption limit, some funds may alter an acquiring fund's investment strategy to invest in different affiliated or unaffiliated acquired funds to avoid owning more than 3% of any acquired fund, which could frustrate the investment expectations of shareholders, and may increase the costs and complexity of the fund.[193] Other commenters noted that this restriction would force acquiring fund portfolio managers to liquidate other positions to meet redemption requests.[194] Another raised concerns as to whether the limit would impair rebalancing and restructuring transactions that may involve redemptions beyond the 3% limit.[195]

Impact on competition and innovation. Several commenters stated that requiring acquiring funds to redeem large positions slowly over time could place acquiring fund shareholders at a substantial competitive disadvantage to investors that are not subject to the same restrictions.[196] One of these commenters also stated that the redemption limit

[176] *See, e.g.,* ICI Comment Letter; Morningstar Comment Letter. Some commenters did support specific elements of the proposed limit. *See, e.g.,* MFA Comment Letter (supporting the approach that the limit not apply to sales of fund shares in secondary market transactions).

[177] *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; Comment Letter of John Hancock Investments (May 2, 2019) (''John Hancock Comment Letter'').

[178] *See, e.g.,* Comment Letter of The Vanguard Group, Inc. (May 2, 2019) (''Vanguard Comment Letter''); Comment Letter of Fidelity Rutland Square Trust II (May 2, 2019) (''Fidelity Rutland Comment Letter'').

[179] *See, e.g.,* SIFMA AMG Comment Letter; Fidelity Comment Letter; PGIM Comment Letter.

[180] *See, e.g.,* ICI Comment Letter; Guggenheim Comment Letter; Capital Group Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; Ropes Comment Letter; Comment Letter of the Independent Directors Council (May 1, 2019 (''IDC Comment Letter'').

[181] *See, e.g.,* Comment Letter of JP Morgan Asset Management (May 2, 2019) (''JP Morgan Comment Letter''); Comment Letter of Allianz Investment Management LLC (May 1, 2019) (''Allianz Comment Letter''); Vanguard Comment Letter. *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.125 and accompanying text.

[182] *See* ICI Comment Letter.

[183] *See* Fidelity Comment Letter. *See also* ABA Comment Letter; Ropes Comment Letter.

[184] *See* TRP Comment Letter; Fidelity Comment Letter. *See also* Dimensional Comment Letter; NYC Bar Comment Letter (questioning whether the Commission was, in effect, redefining ''redeemable security'' under the Act).

[185] *See, e.g.,* Fidelity Comment Letter; Ropes Comment Letter.

[186] *See* TRP Comment Letter.

[187] *See* Dechert Comment Letter; JP Morgan Comment Letter.

[188] *See* Allianz Comment Letter; John Hancock Comment Letter.

[189] *See, e.g.,* SIFMA AMG Comment Letter (providing survey results suggesting the proposed rule would have ''a significant impact on the fund of funds business''); CFA Comment Letter (stating that the proposed redemption limit would inappropriately lock fund of funds investors into funds that no longer serve their best interests for unreasonable amounts of time).

[190] *See, e.g.,* Comment Letter of Nationwide Funds Group (Apr. 26, 2019) (''Nationwide Comment Letter''); Invesco Comment Letter; PIMCO Comment Letter; CFA Comment Letter.

[191] *See* Nationwide Comment Letter; Vanguard Comment Letter; Dimensional Comment Letter.

[192] *See* CFA Comment Letter. *See also* Voya Comment Letter.

[193] *See* Allianz Comment Letter.

[194] *See* TRP Comment Letter; Dechert Comment Letter; Ropes Comment Letter.

[195] *See* Vanguard Comment Letter.

[196] *See, e.g.,* JP Morgan Comment Letter; SIFMA AMG Comment Letter (arguing that retail investors may be unfairly disadvantaged because their exposure to acquired funds through a fund of funds would be subject to the proposed redemption limit, while other investors who directly invested in an acquired fund would not be so limited and therefore would be able to access liquidity with priority over acquiring fund investors); Fidelity Comment Letter.

would encourage consolidation, raise barriers to entry for new fund managers, and limit investment options for investors.[197] Many commenters stated that the limitation would have an adverse impact upon smaller funds, in part because the 3% limit would be easier to cross with such funds.[198] Others asserted that it would adversely impact target-date funds.[199]

Other commenters focused on the proposed redemption limit's impact on fund innovation. For example, one commenter stated that the redemption limit could inhibit the formation of new investment products, such as funds intended to serve as underlying funds for other funds in the same group of investment companies, because a sufficient number of investors would not hold the new product to avoid triggering the 3% limit.[200] Similarly, a commenter raised concerns that the proposed redemption limit could discourage acquiring funds from exposure to non-traditional asset classes, which often have more volatile in- and out-flows and smaller asset bases, resulting in a less desirable mix of assets made available to investors.[201] This commenter stated that if the proposed redemption limit discourages an acquiring fund from investing in an acquired fund, this could reduce overall economies of scale and operational efficiencies of the acquired fund or even challenge its viability.

Some commenters predicted that the proposed redemption limit would have a chilling effect on acquiring funds using mutual funds in their allocations and would effectively codify the limits set forth in sections 12(d)(1)(A) and (B) of the Act as the maximum investment in unrelated acquired funds.[202] Other commenters indicated that acquiring funds would restructure to avoid the proposed redemption limitation, including investing in a larger number of funds in order to hold smaller proportions of each acquired fund, or relying more on ETFs.[203]

Same group of investment companies. Several commenters questioned the need for applying the proposed redemption limit to acquiring funds investing in acquired funds in the same group of investment companies, stating that it would be unnecessary and inappropriate to do so.[204] Some of these commenters highlighted that the proposed rule included exceptions from the voting and control provisions for funds in the same group of investment companies and stated that a similar exception should be included from the redemption limit.[205] One commenter argued that the proposed redemption limit could pose particular challenges for common fund of funds arrangements involving funds within the same group, such as when an acquired fund is exclusively available to acquiring funds managed by the same adviser. As a result, these commenters asserted there would be no colorable risk that the acquiring fund would threaten redemptions to exert undue influence.[206] Another commenter stated that, for affiliated fund of funds arrangements, the common investment adviser's fiduciary duties to both the acquiring and acquired funds would adequately address duplicative and excessive fee concerns.[207]

Liquidity. Commenters also identified a number of concerns regarding the proposed redemption limit's impact upon the liquidity of the acquiring fund's portfolio. A number of commenters thought that this aspect of the proposal would increase the difficulty of complying with rule 22e–4 by potentially impacting the liquidity categorization of an acquired fund's shares.[208] Some commenters stated that the proposed restriction would impose liquidity constraints on funds, which could become more pronounced if a particular acquired fund is under redemption pressures.[209] Other commenters discussed the impact of the proposed restriction on fund liquidations.[210]

Cost. Commenters also raised concerns over increased costs and expenses because of the proposed limit. Several commenters stated that the proposed redemption limit would increase compliance costs because of the burden of monitoring the 3% threshold.[211] One commenter thought portfolio management costs would increase if an adviser could not effect a particular strategy through a fund due to the redemption limit.[212] Some commenters suggested that acquiring funds with a limited number of acquired funds might restructure to a ''sleeved'' approach—*i.e.,* funds historically organized as funds of funds, rather than investing in acquired funds, would instead hire various sub-advisers to manage directly specified assets of the fund, thus increasing costs.[213] Some commenters also noted that the proposed limit would result in significant transaction costs as the acquiring funds restructure their investment strategies and portfolios.[214]

Alternatives. Some commenters suggested alternatives to the proposed redemption limit.[215] For example, some commenters suggested that the proposed redemption limit exclude fund of funds arrangements that involve funds in the same group of investment companies or are otherwise affiliated, stating that there is minimal risk of undue influence by an acquiring fund over an acquired fund within the same group of investment companies.[216] Another

[197] *See* Dechert Comment Letter.

[198] *See, e.g.,* PIMCO Comment Letter; IDC Comment Letter; Voya Comment Letter; Chamber of Commerce Comment Letter.

[199] *See, e.g.,* Morningstar Comment Letter; IAA Comment Letter; Comment Letter of Fidelity Fixed Income and Asset Allocation Funds (May 2, 2019) (''Fidelity Fixed Income Trustees Comment Letter''); Nuveen Comment Letter; ABA Comment Letter.

[200] *See* Comment Letter of Russell Investment Management, LLC (May 3, 2019) (''Russell Comment Letter''). *See also* Comment Letter of Mutual Fund Directors Form (May 2, 2019) (''MFDF Comment Letter'') (stating that the proposed limit may limit the desire of acquiring funds to buy large stakes in acquired funds, thus disincentivizing innovation).

[201] *See* Voya Comment Letter.

[202] *See* Capital Group Comment Letter.

[203] *See, e.g.,* ABA Comment Letter; Comment Letter of Chapman and Cutler LLP (May 2, 2019) (''Chapman Comment Letter''); Morningstar Comment Letter; Capital Group Comment Letter.

[204] *See, e.g.,* Allianz Comment Letter; Fidelity Fixed Income Trustees Comment Letter.

[205] *See, e.g.,* PIMCO Comment Letter; Wells Fargo Comment Letter; Chapman Comment Letter.

[206] *See* Fidelity Fixed Income Trustees Comment letter (arguing that there is no colorable risk of using the threat of redemptions to bully third-party investors in, or advisers to, such affiliated underlying funds).

[207] *See* SIFMA AMG Comment Letter.

[208] *See, e.g.,* MFDF Comment Letter; Wells Fargo Comment Letter; Capital Group Comment Letter (suggesting alternatives on how to consider acquired fund shares under the proposed redemption limit for rule 22e–4 purposes); Dechert Comment Letter.

[209] *See, e.g.,* ABA Comment Letter; Fidelity Comment Letter (noting that the acquiring fund could be required to remain invested in an acquired fund facing a crisis such as fraud or bankruptcy whereas other investors would be able to redeem).

[210] *See* Invesco Comment Letter; Chapman Comment Letter; Schwab Comment Letter.

[211] *See, e.g.,* TRP Comment Letter; NYC Bar Comment Letter; Ropes Comment Letter. *See* 2018 FOF Proposing Release, *supra* footnote 6, at section II.C.2.

[212] *See* Guggenheim Comment Letter. *See also* Fidelity Comment Letter (discussing the potential for managed account programs to move to direct fund investments, rather than fund of funds).

[213] *See* Allianz Comment Letter; Fidelity Comment Letter (stating such an approach could increase costs related to screening, due diligence, and ongoing monitoring and oversight, and would increase the oversight responsibilities and workload of the funds' boards of directors, estimating that the number of sub-advisers overseen by the funds' boards would approximately triple).

[214] *See* Wells Fargo Comment Letter; Fidelity Comment Letter.

[215] *See, e.g.,* Vanguard Comment Letter; Fidelity Rutland Comment Letter; Dimensional Comment Letter.

[216] *See, e.g.,* Invesco Comment Letter; Allianz Comment Letter; Thrivent Comment Letter. As discussed in more detail below, we are not

suggested an exception for fund liquidations,[217] and another suggested an exception for redemptions that merely facilitate redemption requests from the acquiring fund's shareholders.[218] Other commenters questioned the need to replace the conditions in the existing exemptive orders.[219] Some suggested that the rule permit funds to rely either on existing exemptive relief or the rule, or that the Commission codify existing relief in a rule, so that funds with existing relief would not have to comply with the proposed redemption limit.[220]

Some commenters suggested making the redemption requirement permissive,[221] letting the funds determine the size of permissible redemptions,[222] increasing the percentage of shares that could be redeemed,[223] or providing a shorter time period to align the applicable time period with rule 22e–4.[224] Others questioned the need for redemption limits at all to protect acquiring funds' investment in unaffiliated acquired funds, particularly given the existence of other protections in rule 12d1–4 and elsewhere (such as other regulations or existing fiduciary obligations).[225] Some commenters suggested that we exempt in-kind redemptions from the requirement.[226]

Other commenters stated that participation agreements, either consistent with existing Commission orders or altered in various ways, could be an alternative to the proposed redemption limit because they would provide opportunities for acquired funds to protect their interests, while preserving the benefits of fund of funds structures for shareholders.[227] As support for this framework, one commenter suggested that the acquiring fund's investment adviser certify to the acquired fund's investment adviser that it will not invest in the acquired fund as a means to exert undue influence over the acquired fund or to influence any services or transactions and notify the acquired fund if its investment exceeds the limits in section 12(d)(1)(A).[228] This commenter also suggested that the rule require periodic reporting to each of the acquiring and acquired funds' board of directors.

Another commenter suggested that the final rule require participation agreements that are approved by each of the acquiring and acquired funds' board of directors,[229] although others stated that the board should not be required to be involved in approving fund of funds arrangements.[230] This commenter suggested requiring board review, at least annually, of all transactions between the acquired fund and affiliates of the acquiring funds to determine whether the acquiring funds have influenced the transactions.[231] The commenter also suggested that the rule allow acquired funds and their boards, at their option, to set their own limit for an acquiring fund's investment. Another commenter stated that participation agreements operate efficiently and effectively to prevent undue influence and are an effective alternative to the proposed redemption limit.[232] Other commenters stated that one of the key elements of a participation agreement is the ability for the acquired fund to refuse to enter into the participation agreement, which prevents the acquiring fund from investment in the acquired fund beyond the limits set forth in section 12(d)(1)(A).[233]

Another commenter stated that the proposed limit was unnecessary because funds frequently negotiate large-scale redemptions to minimize any impacts that would result in undue influence.[234] One commenter stated that funds can manage the threat of undue influence from large-scale redemptions by delaying payment for up to seven days where immediate payment would harm the fund.[235] Others suggested that the Commission require pre-notification of large trades as an alternative to the limit.[236]

Commenters suggested a number of other alternatives to the proposed redemption limit. One commenter suggested that we limit the overall percentage of acquired fund shares that an acquiring fund could own to 20%.[237] Another recommended a policies and procedures-based system to ensure that the acquiring fund's adviser acts in the acquiring fund's best interest.[238] Others suggested that, if the Commission retained the proposed redemption limit, we also retain rule 12d1–2.[239] One suggested that the Commission replace the real-time tracking that would have been required to satisfy the proposed redemption limit with an allowance to rely upon the shares listed in the acquired fund's most recently published financial statements.[240]

Disclosure. In connection with the proposed redemption limit, we also proposed that a fund relying on rule 12d1–4 would be required to disclose in

exempting funds within the same group of investment companies from the fund of funds investment agreement requirement in the rule as adopted because, among other things, these funds can have different advisers and different boards. *See infra* text accompanying footnote 364.

[217] *See* Invesco Comment Letter.

[218] *See* NYC Bar Comment Letter.

[219] *See, e.g.,* ICI Comment Letter; IDC Comment Letter; MFDF Comment Letter.

[220] *See, e.g.,* Fidelity Rutland Comment Letter; John Hancock Comment Letter (further suggesting that the adviser, rather than the fund, be responsible for monitoring and oversight, subject to board reporting).

[221] *See, e.g.,* Invesco Comment Letter; Comment Letter of MFS Investment Management (May 2, 2019) (''MFS Comment Letter''); BlackRock Comment Letter.

[222] *See* Schwab Comment Letter; *see also* John Hancock Comment Letter (suggesting to exempt situations where the acquiring fund goes over 3% as a result of the decrease in the outstanding securities of the acquired fund from the proposed limit).

[223] *See* NYC Bar Comment Letter.

[224] *See* BlackRock Comment Letter.

[225] *See, e.g.,* PIMCO Comment Letter; BlackRock Comment Letter.

[226] *See* Comment Letter of Thrivent Financial for Lutherans (May 1, 2019) (''Thrivent Comment Letter''); Ropes Comment Letter (stating that the ability of an acquired fund to satisfy redemption requests in-kind mitigates undue influence concerns).

[227] *See* NYC Bar Comment Letter (suggesting a redemption management agreement); ICI Comment Letter (suggesting a simplified participation agreement); Federated Comment Letter; PIMCO Comment Letter; John Hancock Comment Letter (suggesting that, instead of a participation agreement, each fund receive reciprocal written acknowledgment that the funds would be relying upon, and comply with, the rule); Advent Comment Letter (arguing that the rule should require funds to enter into a participation agreement if the investment is more than 10% of the acquired fund's voting securities); IDC Comment Letter; Vanguard Comment Letter (suggesting a framework of acquiring fund advisers making a best interest finding and then entering into a participation agreement); Dimensional Comment Letter; Fidelity Rutland Comment Letter; Wells Fargo Comment Letter; Capital Group Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; IAA Comment Letter; Nationwide Comment Letter. *But see* BlackRock Comment Letter (arguing against the inclusion of participation agreements in the final rule).

[228] *See* Vanguard Comment Letter.

[229] *See* Dimensional Comment Letter. While we are not requiring that fund boards approve fund of funds arrangements, we will require reporting to boards to facilitate their oversight function. *See infra* footnotes 314 through 320 and accompanying text.

[230] *See* ICI Comment Letter; Voya Comment Letter; Invesco Comment Letter.

[231] *See* Dimensional Comment Letter.

[232] *See* Fidelity Rutland Comment Letter.

[233] *See* Chapman Comment Letter; Dimensional Comment Letter.

[234] *See* John Hancock Comment Letter. *See also* JP Morgan Comment Letter (stating that, in its experience, large investors are amenable to procedures designed to facilitate careful redemptions, which typically are in all parties' interests).

[235] *See* Fidelity Comment Letter. This commenter also noted that, as a practical matter, two-day settlement requirements under 17 CFR 240.15c6–1 effectively take most fund investments to a T+2 settlement timeline.

[236] *See* Schwab Comment Letter; JP Morgan Comment Letter.

[237] *See* John Hancock Comment Letter.

[238] *See* SIFMA AMG Comment Letter.

[239] *See* Nuveen Comment Letter; Vanguard Comment Letter (further recommending that rule 12d1–2 be expanded to non-securities); Russell Comment Letter.

[240] *See* NYC Bar Comment Letter.

its registration statement that it is (or at times may be) an acquiring fund for purposes of the proposed rule.[241] This disclosure requirement was intended to put other funds seeking to rely on rule 12d1–4 on notice that a fund they seek to acquire is itself an acquiring fund, and therefore to allow a fund to limit its acquisition of the acquiring fund's securities accordingly.

Commenters generally opposed the disclosure requirement, predicting that funds would prophylactically disclose that they may rely upon the rule, and that acquired funds would not be able to monitor continuously the disclosure of potential acquired funds.[242] Further, commenters suggested that such an approach could reduce the number of funds willing to become acquired funds and create fewer investment opportunities for funds of funds.[243] As an alternative, a commenter recommended that acquiring funds disclose a principal investment strategy of investing in other funds, or allow funds to rely on a representation in a participation agreement.[244] One commenter suggested that the Commission provide for alternative disclosures for BDCs and other closed-end funds.[245]

b. Fund Findings and Fund of Funds Investment Agreement

After considering the comments received, we have determined not to adopt the proposed redemption limit or require funds to disclose whether they are (or at times may be) an acquiring fund for purposes of the rule.[246] Instead, we are adopting a combination of conditions that we believe will protect investors in fund of funds arrangements from the concerns the proposed redemption limit sought to address and will provide the notice that the proposed disclosure requirements would have provided. Specifically, the rule will require: (i) An acquired management company's adviser to make certain findings focused on addressing undue influence concerns, including through redemptions, by considering specific enumerated factors; (ii) an acquiring fund's adviser, principal underwriter, or depositor to conduct an evaluation of the complexity of the fund of funds structure and its aggregate fees and expenses and make a finding that the fees and expenses are not duplicative;[247] and (iii) both the acquiring and acquired funds to enter into a fund of funds investment agreement to memorialize the terms of the arrangement (including terms that serve as a basis for the required findings) when the acquiring and acquired fund do not share an investment adviser. The rule's requirements vary based on the structural characteristics of the funds involved in the arrangement, but seek the same goal of avoiding the historical abuses that section 12(d)(1) was intended to prevent.[248]

The Commission proposed the redemption limit believing that it would be more effective and less burdensome than conditions set forth in our orders.[249] Commenters provided additional context and information regarding the impact of the proposed limit, suggesting that the proposed redemption limit would have a larger impact on fund of funds arrangements and would be more burdensome than the Commission contemplated in the proposal. We believe that our adopted approach expanding the proposed finding requirement will address undue influence concerns more effectively and with less disruption to current market practices than the proposed redemption limit (or the conditions in our existing exemptive orders) and will more effectively put funds on notice that a fund they seek to acquire is itself an acquiring fund.[250]

i. Evaluations and Findings for Management Companies[251]

Under the final rule, a fund's investment adviser will be required to make certain evaluations and findings that are tailored to the specific concerns that underlie section 12(d)(1).[252] For management companies that are acquired funds, rule 12d1–4 will require the acquired fund's investment adviser to find that any undue influence concerns associated with the acquiring fund's investment in the acquired fund are reasonably addressed, after considering certain specific factors.[253] These factors are (1) the scale of contemplated investments by the acquiring fund and any maximum investment limits; (2) the anticipated timing of redemption requests by the acquiring fund; (3) whether, and under what circumstances, the acquiring fund will provide advance notification of investment and redemptions; and (4) the circumstances under which the acquired fund may elect to satisfy redemption requests in kind rather than in cash and the terms of any redemptions in kind. These factors are designed to focus the analysis of an acquired fund's adviser on potential ways to reduce the threat of undue influence, including through redemptions, when an acquiring fund invests in the acquired fund beyond the section 12(d)(1) limits under the rule. Because concerns regarding undue influence are more salient for acquired funds, only the adviser to an acquired fund will be required to make this determination.

In cases where the acquiring fund is a management company, rule 12d1–4 will require the management company's adviser to evaluate the complexity of the structure associated with the acquiring

[241] *See* proposed rule 12d1–4(b)(4).

[242] *See, e.g.,* SIFMA AMG Comment Letter; Fidelity Rutland Comment Letter; Skadden Comment Letter. However, a few commenters did suggest enhanced disclosure, including an expansion of this disclosure requirement, in lieu of other proposed requirements. *See* Comment Letter of Massachusetts Mutual Life Insurance Company (May 2, 2019) (''MassMutual Comment Letter'') (with regard to private funds); Ropes Comment Letter; Nationwide Comment Letter (with regard to the proposed redemption limit).

[243] Fidelity Comment Letter.

[244] Fidelity Comment Letter. One commenter also suggested that investor confusion concerns could be mitigated by an acquired fund's adviser, including with an assurance regarding its disclosure in its report to the acquired fund's board. TRP Comment Letter. *See infra* Section II.C.2.c (discussing the board reporting requirements).

[245] *See* BlackRock Comment Letter.

[246] We are, as proposed, amending N–CEN to require reporting when an acquired fund has holdings in other funds. *See infra* Section III.

[247] The final rule refers to ''fees and expenses'' in a number of places where the proposed rule only referred to ''fees.'' *Compare* rule 12d1–4(b)(2)(i)(A) *with* proposed rule 12d1–4(b)(3)(i). In the 2018 FOF Proposing Release, when we discussed fees, we mentioned a number of ''fees'' that may more appropriately be characterized as ''expenses.'' *See* 2018 FOF Proposing Release, *supra* footnote 6, at 61 (discussing fees for recordkeeping, sub-transfer agency services, sub-accounting services, or other administrative services). In order to avoid confusion, we have revised the relevant provisions to refer to both fees and expenses, not just fees.

[248] The Fund Findings requirement will apply regardless of the form and structure of the other fund acquired by or acquiring the fund in question. Thus, an adviser to an acquiring fund that is a management company would still need to make its finding with respect to the acquiring fund even if the acquired fund is, for example, a UIT (which will not need its own Fund Finding under the rule).

[249] The conditions in our orders generally require fund boards to make certain findings and, for investments in unaffiliated funds, adopt procedures to prevent overreaching and undue influence by the acquiring fund and its affiliates once the investment in an unaffiliated acquired fund exceeds the section 12(d)(1) limit. *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.117 and accompanying text.

[250] For example, the fund of funds investment agreement discussed below will allow the acquired fund to screen potential acquiring fund investments, thereby addressing the notice concern enumerated in the proposal. *See* 2018 FOF Proposing Release, *supra* footnote 6, at 79.

[251] The term ''management companies'' includes BDCs. *See generally* 15 U.S.C. 80a–4 (defining ''management company'' as an investment company other than a face amount certificate company or UIT) and 15 U.S.C. 80a–58 (providing that, among other things, 15 U.S.C. 80a–4 applies to a BDC to the same extent as if it were a registered closed-end investment company).

[252] *See supra* footnotes 17 and 18 and accompanying text.

[253] Rule 12d1–4(b)(2)(i)(B).

fund's investment in the acquired fund. Also, the acquiring fund's adviser must evaluate the relevant fees and expenses and find that the acquiring fund's fees and expenses do not duplicate the fees and expenses of the acquired fund.[254] Because concerns regarding duplicative fees and complexity of structure are relevant for an acquiring fund, only the adviser to an acquiring fund will need to evaluate and make findings related to these concerns. For both acquiring and acquired funds, the required analysis, and any findings based thereon, will be subject to the adviser's fiduciary duty to act in the best interest of each fund it advises.[255]

As discussed in more detail below,[256] the rule will also require the acquiring fund and acquired fund to enter into a fund of funds investment agreement for the duration of the funds' reliance upon the rule to memorialize the terms of the agreement, unless the funds share the same investment adviser. The agreement must include any material terms necessary to make the appropriate Fund Finding.[257] The final rule will provide funds with flexibility to consider—and where appropriate to negotiate and agree to as part of the fund of funds investment agreement—terms designed to protect investors and address the concerns underlying section 12(d)(1)(A).

The Fund Findings must be made, and the fund of funds investment agreement entered into, before the acquiring fund invests in the acquired fund in reliance on the rule. Consistent with the proposal, the rule also will require the adviser to report its evaluation, finding, and the basis for its evaluation or finding to the acquiring fund's board of directors. This report will not be required until the next regularly scheduled board of directors meeting.[258]

Changes from the Proposal. The Fund Findings for management companies as adopted differ from the finding requirement that we proposed in a few respects. First, the proposed finding requirement would have required the adviser of an acquiring fund to, after an evaluation of the complexity of the structure and aggregate fees and expenses associated with the acquiring fund's investment in the acquired fund, determine that the investment is in the best interest of the acquiring fund.[259] As adopted, the rule will instead require that the acquiring fund's adviser, after a similar evaluation,[260] determine that the acquiring fund's fees and expenses do not duplicate the fees and expenses of the acquired fund.[261] In the 2018 FOF Proposing Release, we had sought comment on whether we should require a best interest determination and whether we should require the determination be made on a basis of the reasonableness of fees.[262] We have made this change in part based upon comments that we received in response to this request that the concept of ''best interest'' in this context was unclear or overly broad,[263] and that we should instead require advisers to make their determinations based upon specific elements including whether the fees are duplicative.[264] While some commenters approved, and even recommended that we expand the use, of the best interest standard,[265] we believe that focusing an adviser's analysis under this provision upon an evaluation of the complexity of the fund of funds structure and a determination regarding whether fees and expenses are duplicative will be more effective in mitigating overly complex structures and duplicative fees and expenses.

Second, the proposed finding requirement for management companies would have applied only to acquiring funds, not to acquired funds. As adopted, the rule will additionally require a finding by advisers to acquired funds with a specific set of factors tailored to the concerns of an acquired fund.[266] The principal goal of the proposed redemption limit was to protect acquired funds from the threat of undue influence due to large-scale redemptions.[267] A number of commenters suggested that there were more appropriate ways to protect acquired funds from this concern.[268] Among these were suggestions that the adviser to an acquired fund make an evaluation similar to that of an acquiring fund.[269] We agree that this analysis, coupled with the fund of funds investment agreement as discussed below, is better suited to protect against this risk in that it avoids unduly impeding portfolio management or liquidity risk management while utilizing the acquired fund's adviser to assess the risks of undue influence presented by the investment, taking into account the enumerated factors.[270]

Third, the proposed rule would have required that the acquiring fund's adviser report its finding and the basis thereof to the acquiring fund's board of directors. Because the initial finding itself would have to be made prior to investing in an acquired fund in reliance on the rule, commenters were confused as to whether the investment could be made before this initial report to the board was made.[271] One commenter suggested we clarify that the adviser need not report until the next regularly scheduled board meeting.[272] We agree with this commenter, and are clarifying in the final rule that, while the adviser must complete the applicable Fund Findings (and fund of funds investment agreement) prior to initial investment, the adviser must report no later than the next regularly scheduled board meeting.[273]

Fourth, the proposed rule would have required the acquiring fund's adviser to make a finding both prior to the initial investment and with such frequency as the acquiring fund's board deems to be

[254] Rule 12d1–4(b)(2)(i)(A).

[255] *See supra* footnote 38. *See also* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (Jun. 5, 2019) [84 FR 33669 (July 12, 2019)] (''Fiduciary Duty Interpretation'') (''The duty of care includes, among other things: (i) The duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship'').

[256] *See infra* Section II.C.4.c.

[257] Rule 12d1–4(b)(2)(iv)(A).

[258] Rule 12d1–4(b)(2)(i)(C).

[259] Proposed rule 12d1–4(b)(3)(i).

[260] Consistent with this change, the final rule will require both this evaluation and the finding regarding fees and expenses, as well as the basis for these two items, be reported to the board. Rule 12d1–4(b)(2)(i)(C).

[261] Rule 12d1–4(b)(2)(i)(A).

[262] 2018 FOF Proposing Release, *supra* footnote 6, at Section II.C.3.

[263] *See* ICI Comment Letter; CFA Comment Letter; NYC Bar Comment Letter.

[264] *See* NYC Bar Comment Letter; ICI Comment Letter. *See also* Fidelity Fixed Income Trustees Comment Letter (noting that, in their experience, the adviser to the acquiring fund only charges fees if the fees are not duplicative). *But see* Dechert Comment Letter (recommending that the finding requirement not include any factors).

[265] *See* SIFMA AMG Comment Letter.

[266] Rule 12d1–4(b)(2)(i)(B).

[267] 2018 FOF Proposing Release, *supra* footnote 6, at section II.C.2 (''To address concerns that an acquiring fund could threaten large-scale redemptions as a means of exercising undue influence over an acquired fund, the proposed rule includes a condition that would limit an acquiring fund from quickly redeeming or tendering a large volume of acquired fund shares'').

[268] *See supra* footnotes 215 to 240 and accompanying text.

[269] *See* ICI Comment Letter; Voya Comment Letter; Vanguard Comment Letter. *But see* Dechert Comment Letter (stating that portfolio managers should be given flexibility and not subject to specific factors).

[270] *See also infra* footnote 296 and accompanying text.

[271] *See* NYC Bar Comment Letter; ABA Comment Letter; Dechert Comment Letter (suggesting that we not require board reporting as it will limit the ability of portfolio managers to make timely portfolio adjustments).

[272] *See* NYC Bar Comment Letter.

[273] Rule 12d–1(b)(2)(i)(C). As this requirement, as adopted, includes both evaluations and findings, the rule will also require reporting regarding evaluations and the basis for evaluations.

reasonable and appropriate thereafter, but in any case no less frequently than annually. We requested comment on whether we should prescribe the frequency of these determinations, and some commenters suggested that we not mandate a specific frequency.[274] However, some commenters suggested the Commission adopt the same or more frequent assessment and reporting frequency that we proposed in recommending their own alternatives to the proposed redemption limit,[275] and one recommended that we retain ongoing reporting but on a discretionary basis.[276] We agree that mandating ongoing assessments and reporting is unnecessary, particularly in light of other reporting and oversight mechanisms, such as rule 38a–1 under the Investment Company Act, which requires a fund's chief compliance officer to provide an annual written report to the board. As a result, the final rule will require an adviser to report the applicable Fund Findings to the board once; subsequent reporting regarding these Fund Findings will be conducted at least annually under the fund's compliance program. In addition, we do not believe it is necessary to prescribe additional requirements given the board's oversight role over fund operations.[277]

Additional Comments Received on Findings Requirement. Commenters generally supported a condition that required the investment adviser of the acquiring fund to review and consider the appropriateness of the fund of funds arrangement.[278] As noted above however, commenters suggested a number of modifications to the proposed condition, including changes to or elimination of the proposed best interest determination.[279] Some commenters suggested that we require no specific best interest determination.[280] One commenter stated that these determinations are implicit in the investment management duties of an investment adviser.[281] Another commenter stated that the Commission should provide guidance, in lieu of a best interest determination, that sets forth factors that an investment adviser should consider before investing in an acquired fund.[282]

Commenters disagreed, however, on whether the proposed best interest determination would be too flexible or not flexible enough. For example, one commenter agreed with the proposed requirements for investment advisers, but stated that the proposed requirements would not prevent fund of funds arrangements from charging duplicative fees.[283] This commenter suggested that the proposed best interest finding and the evaluation standards are too flexible, and that the Commission should interpret ''best interest'' to mean ''the best of the reasonably available options.'' The commenter also suggested that the Commission explicitly require advisers to waive duplicative fees. Conversely, another commenter agreed with the proposed best interest requirement, but stated that the proposed factors on which the finding would be based on were not flexible enough.[284] This commenter suggested that we permit the investment adviser to consider any factors that it deems relevant in its best interest finding, including subjective factors relating to investment merits.[285]

One commenter recommended expanding the proposed best interest determination to take into account fees, complexity, investment characteristics, fund size, underlying asset liquidity, asset volatility, legal structure and other characteristics.[286] Another commenter suggested that instead of the proposed best interest finding, the final rule should require the acquiring fund's investment adviser to find that the investment in the acquired fund is ''appropriate in light of the complexity and aggregate fees.'' [287] This commenter stated that this suggestion would more closely align the requisite finding (on complexity and aggregate fees instead of the proposed best interest finding) because the information on which advisers rely in making these evaluations relates to complexity and fees.

In the 2018 FOF Proposing Release, we noted that many of the conditions relating to fee limitations required in our exemptive orders, such as fee waivers and board findings regarding fees, were redundant in light of a fund adviser's and board's fiduciary duties and statutory obligations. As a result, we did not propose to require them as part of the finding requirement.[288] A number of commenters agreed with this approach,[289] but one commenter would have required fee waivers.[290] This commenter argued that fiduciary duties are often not enough to ensure that investors are not subject to duplicative fees.[291] We are requiring specific evaluations and findings to help address this concern.[292]

After considering comments, and in conjunction with our determination to eliminate the proposed redemption limit, we are adopting a modified requirement for management companies regarding Fund Findings that is designed to address the complexity and fees associated with the fund of funds arrangement, as well as undue influence concerns, such as from the threat of large-scale redemption. However, we are also providing advisers with flexibility to tailor their analysis to these specific concerns.

This requirement will apply to all management companies, including when both funds involved are in the same group of investment companies. While we believe it is appropriate to provide an exception from the voting and control conditions under the rule for funds in the same group of investment companies, such an exception is not appropriate for the finding condition. For example, two management companies in the same group of investment companies could

[274] *See* ABA Comment Letter; Dechert Comment Letter. *See also* NYC Bar Comment Letter (opining that the CCO's role under rule 38a–1 obviates the need for advisers to report to fund directors on all proposed investments).

[275] *See* ICI Comment Letter; John Hancock Comment Letter.

[276] *See* NYC Bar Comment Letter. *See also* ABA Comment Letter (stating that fund boards should be able to select their desired reporting frequency and that the rule should not mandate a minimum frequency).

[277] *See* Compliance Rule Adopting Release, *supra* footnote 59 (''A fund's board plays an important role in overseeing fund activities to ensure that they are being conducted for the benefit of the fund and its shareholders'').

[278] *See, e.g.,* SIFMA AMG Comment Letter (stating the ''adviser to an acquiring fund, rather than the acquiring fund's board, should be the party primarily responsible for entering into and monitoring fund of funds arrangements''); Invesco Comment Letter.

[279] *See, e.g.,* PGIM Comment Letter; ABA Comment Letter; NYC Bar Comment Letter.

[280] *See, e.g.,* ABA Comment Letter; NYC Bar Comment Letter.

[281] *See* ABA Comment Letter.

[282] *See* NYC Bar Comment Letter.

[283] *See* CFA Comment Letter; *but see* PGIM Comment Letter (arguing that the rule should not require fee waivers because a fund board of directors is already required to evaluate the terms of advisory agreements, which encompass the finding requirements of the proposed rule).

[284] *See* Dechert Comment Letter.

[285] *See id.* (''[P]ortfolio managers should be given deference and afforded flexibility with respect to their consideration of factors that they deem most relevant to the proposed best interest finding, including subjective factors relating to investment merits.'').

[286] *See* SIFMA AMG Comment Letter.

[287] *See* ICI Comment Letter.

[288] *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.146 and accompanying text.

[289] *See* ICI Comment Letter; Voya Comment Letter; PGIM Comment Letter; ABA Comment Letter.

[290] *See* CFA Comment Letter.

[291] *See also* Comment Letter of Anonymous, (Dec. 28, 2018) (suggesting that, if an underlying fund pays a fee, these payments should be made into the assets of the acquiring fund, and that fund of funds arrangements should not be used to avoid fee limitations).

[292] *See also infra* footnotes 297 to 299 and accompanying text.

have two different advisers and two different boards satisfying their fiduciary duties to their respective shareholders. Requiring these advisers to evaluate the fund of funds arrangement separately and make the appropriate findings tracks their separate—albeit parallel—fiduciary duties. Further, this requirement also applies if both the acquiring and acquired funds have the same adviser. This approach is similar to the proposed redemption limit, which would have applied to both unaffiliated and affiliated fund of funds arrangements.

We also believe that it is appropriate to require each fund's investment adviser to make the applicable Fund Findings because whether to invest in an acquired fund to achieve a fund's investment objective, or accept any investment from an acquiring fund, is generally a question of portfolio management.[293] That said, given the conflicts of interest at issue, we believe that the rule as adopted should provide a framework for advisers to conduct their analysis. Also, as discussed below, the fund's board of directors will be required to review these arrangements as part of its oversight responsibilities.

Acquired Fund Findings. We are requiring that advisers to acquired management companies make a finding that any undue influence concerns associated with the acquiring fund's investment in the acquired fund are reasonably addressed.[294] As part of this finding, the acquired management company's investment adviser will be required to consider a specific list of non-exhaustive factors. We believe these factors will help ensure that acquired fund advisers make appropriate determinations when assessing whether a fund of funds arrangement has terms that reasonably address undue influence by the acquiring fund, including through the threat of large-scale redemptions. Additionally, because this finding requirement (along with the fund of funds investment agreement) is replacing the protections that the proposed redemption limit would have provided, requiring consideration of specific factors is designed to enable the acquired fund to effectively negotiate appropriate terms regarding the acquiring fund's use of redemptions and other ways that the acquiring fund could exert undue influence over the acquired fund.

The rule does not dictate the particular terms or how acquired fund advisers must evaluate or weigh these factors because we believe that the investment adviser is in the best position to make these decisions.[295] We believe that the adviser's familiarity with a fund's investment strategies and operations will inform its ability to identify and discern the most pertinent factors and concerns related to a fund of funds arrangement. This flexibility will allow an acquired fund to establish a fund of funds arrangement that appropriately protects its own interests and those of its investors.

We believe that collectively this list of factors will assist acquired fund advisers in determining whether undue influence has been reasonably addressed. We devised these factors based upon the issues we raised in the 2018 FOF Proposing Release and as informed by comments received with regard to the proposed redemption limit.[296] This list of factors is not an exhaustive list, and acquired fund advisers should consider anything else relevant under the circumstances when making their findings.

One commenter objected to a finding that involves an analysis of specific factors, stating that we should afford portfolio managers deference and flexibility when making an investment decision.[297] This commenter suggested that the fiduciary duties of the adviser and board are sufficient to protect against the undue influence concerns behind section 12(d)(1). Another commenter made a similar suggestion, stating that the guidance provided regarding the proposed finding requirement would add complexity, cost, and additional time to the investment process without adding significant value beyond the adviser exercising its fiduciary duty alone.[298] While we agree that an adviser acting according to its fiduciary duty helps to protect against these concerns, the factors we are adopting should help the acquired fund adviser to exercise that duty by focusing upon those issues we believe are most important for an acquired fund in assessing this risk.[299]

We believe each of the following factors is appropriate for an investment adviser to a management company to consider before making its finding:

- *Scale of investment.* The final rule will require the acquired fund's investment adviser to consider the scale of contemplated investments by the acquiring fund and any maximum investment limits.[300] For example, the investment adviser may determine that certain levels of investment by an acquiring fund in excess of the section 12(d)(1) limits would be appropriate for the acquired fund's operations. Conversely, the adviser could determine that investments above a certain level would raise undue influence concerns because of the adverse effect a large-scale redemption from one large investor (*e.g.,* 10% of the acquired fund's outstanding voting shares) could have on the fund and its investors. Assuming the funds have different advisers, the acquired fund could set the limit in the fund of funds investment agreement, or for funds with the same adviser, as part of the written record of its Fund Findings.[301] To the extent an acquiring fund exceeded the acquired fund's specified threshold, the acquired fund could terminate the fund of funds agreement as an additional means of prohibiting additional investments. Alternatively, an acquired fund's adviser may determine that such a limitation on its investment is not necessary to address reasonably undue influence by the acquiring fund through the threat of large-scale redemptions.
- *Anticipated timing of redemption requests.* The final rule will require the acquired fund's investment adviser to consider the anticipated timing of redemption requests by the acquiring fund.[302] The acquired fund's adviser could, for example, determine that the

[293] *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.140 and accompanying text.

[294] By undue influence concerns, we mean circumstances where the acquiring fund will be in a position to control the assets of the acquired fund and use those assets to enrich the acquiring fund at the expense of acquired fund shareholders. *See supra* footnote 17 and accompanying text.

[295] As noted above, an investment adviser has a fiduciary duty to act in the best interests of a fund it advises. *See supra* footnote 38.

[296] *See, e.g.,* Nationwide Comment Letter (suggesting that redeeming in-kind and advance notification of redemptions are common practices that funds engage in to protect against harms from possible large scale redemptions); ABA Comment Letter (suggesting that acquired funds prefer permissive limitations, such as the redemption limit in section 12(d)(1)(F)(ii), that they can negotiate with an acquiring fund). *See also* 2018 FOF Proposing Release, *supra* footnote 6, at 54 (requesting comment as to whether there should be an exception to the redemption limit for redemptions in-kind), 55 (requesting comment as to whether the redemption limit should be voluntary at the election of an acquired fund and, if so, what other safeguards could be added to protect against undue influence), and 57 (requesting comment, if the proposed redemption limit does not appropriately limit the threat of using redemptions to exercise undue influence or control, on what other conditions would better do so).

[297] *See* Dechert Comment Letter. *But see* NYC Bar Comment Letter (stating that, while it believes that a best interest determination is unnecessary, it is appropriate for the Commission to highlight areas that it believes an investment adviser should consider prior to entering into a fund of funds arrangement).

[298] *See* Guggenheim Comment Letter.

[299] *See also supra* footnotes 288 to 292 and accompanying text.

[300] *See* rule 12d1–4(b)(2)(i)(B)(1).

[301] *See infra* footnote 360 and accompanying text.

[302] *See* rule 12d1–4(b)(2)(i)(B)(2).

undue influence concerns regarding an acquiring fund's investment would be reasonably addressed only if the acquiring fund commits to submitting redemption requests over multiple days. Depending on the particular investment strategy and liquidity of the acquired fund, such an adviser might consider the impact of immediate, large redemption requests and determine that the undue influence concerns would be reasonably addressed only if such requests are made over multiple days.[303]

• *Advance notification of investments or redemptions.* The final rule will require the acquired fund's investment adviser to consider whether and under what circumstances the acquiring fund will provide advance notification of investments and redemptions.[304] For example, the adviser may request or require that the acquiring fund provide advance notice of a large redemption before entering into a fund of funds investment agreement. However, any agreement related to this factor would still have to comply with section 22(e) of the Act.

• *In-kind redemptions.* The final rule requires the acquired fund's investment adviser to consider whether redemptions will be made in cash or in kind by the acquired fund.[305] For example, to facilitate redemptions or investments, the adviser may consider as part of its arrangement whether redemptions will be in cash or in kind, or whether only redemptions above a certain threshold may be made in-kind.[306]

In order to make its finding, an acquired fund's adviser also would need to consider any other relevant regulatory requirements. For example, an acquired fund's consideration of the threat of undue influence through redemptions would depend in part on the fund's liquidity risk and how it manages that risk. Accordingly, the adviser to an acquired fund may need to consider how it would manage any liquidity risk from the acquiring fund's investment under its liquidity risk management program required by rule 22e–4. Terms agreed upon through assessment of the factors described above may be a part of how the acquired fund plans to manage any such liquidity risk. In other cases, the acquired fund's adviser may determine that an acquiring fund's investment does not raise a threat of undue influence through large-scale redemptions—or that any threat is addressed through the terms of the fund of funds investment agreement—but that it must take other steps through its liquidity risk management program to manage liquidity risks under rule 22e–4. In negotiating a fund of funds investment agreement, an acquired fund adviser should address all matters to the extent necessary to allow the fund to comply with legal and regulatory requirements under the Federal securities laws.

Acquiring Fund Evaluations and Findings. As we discussed in the 2018 FOF Proposing Release, the evaluations (and related finding) that we are requiring of advisers to management companies that are acquiring funds are designed to help guard against the construction of a complex structure that could be confusing to the acquiring fund's shareholders and to prevent excessive layering of fund costs.[307]

In evaluating the complexity of a fund of funds structure, an acquiring fund adviser should consider the complexity of the acquiring fund's investment in an acquired fund versus direct investment in assets similar to the acquired fund's holdings. The adviser should consider whether the resulting structure would make it difficult for shareholders to appreciate the fund's exposures and risks or circumvent the acquiring fund's investment restrictions and limitations. The adviser also should consider whether an acquired fund invests in other funds, which may create additional complexity.[308]

In evaluating the fees associated with the fund's investment in acquired funds, an adviser should consider the fees of both the acquiring and acquired funds within the fund of funds arrangement with an eye towards duplication. Specifically, an adviser should consider whether the acquired fund's advisory fees are for services that are in addition to, rather than duplicative of, the adviser's own services to the acquiring fund. The adviser also should consider the other fees and expenses, such as sales charges, recordkeeping fees, sub-transfer agency services, and fees for other administrative services.

We believe the flexibility provided by the rule will allow an acquiring fund to establish a fund of funds investment agreement that appropriately protects its own interests and those of its investors. However, as with acquired fund advisers, in negotiating a fund of funds investment agreement, an acquiring fund adviser should address all matters to the extent necessary to allow the fund to comply with legal and regulatory requirements under the Federal securities laws.

An acquiring fund board already has a responsibility to see that the fund is not being overcharged for advisory services regardless of any findings we require.[309] Section 15(c) of the Act requires the board of directors of the acquiring fund to evaluate any information reasonably necessary to evaluate the terms of the acquiring fund's advisory contracts (which information would include fees, or the elimination of fees, for services provided by an acquired fund's adviser).[310] Section 36(b) of the Act also imposes on fund advisers a fiduciary duty with respect to their receipt of compensation.[311] We believe that to the extent advisory services are being performed by another person, such as the adviser to an acquired fund, this fiduciary duty would require an acquiring fund's adviser to only charge fees or expenses for the services that the acquiring fund's adviser is providing, and not for any services performed by an adviser to an acquired fund.[312] In addition, when an adviser to an acquiring fund (or an affiliate of an adviser) receives compensation from, or related to, an acquired fund in connection with an investment by the acquiring fund, the adviser has a conflict of interest. The adviser has a fiduciary duty to the acquiring fund under the Advisers Act and must act in the best interest of its clients, including eliminating or making full and fair disclosure of this conflict.[313]

Nevertheless, we believe that it is appropriate for the rule to require that the acquiring fund's adviser find that the aggregate fees and expenses are not duplicative, given the inherent conflict

[303] Investors in mutual funds can redeem their shares on each business day and, by law, must receive approximately their pro rata share of the fund's net assets (or its cash value) within seven calendar days after receipt of the redemption request. *See* section 22(e) of the Act (providing, in part, that no registered investment company shall suspend the right of redemption, or postpone the date of payment upon redemption of any redeemable security in accordance with its terms for more than seven days after tender of the security absent unusual circumstances).

[304] *See* rule 12d1–4(b)(2)(i)(B)(3).

[305] *See* rule 12d1–4(b)(2)(i)(B)(5).

[306] Many funds reserve the right to redeem their shares in-kind instead of with cash. *See, e.g.,* rule 18f-1; rule 22e–4(b)(v); Election by Open-End Investment Companies to Make Only Cash Redemptions, Investment Company Act Release No. 6561 (June 14, 1971) [36 FR 11919 (June 23, 1971)] (stating that the definition of ''redeemable security'' in section 2(a)(32) of the Investment Company Act ''has traditionally been interpreted as giving the issuer the option of redeeming its securities in cash or in kind'').

[307] *Id.*

[308] *Id.* at n.141 and accompanying text.

[309] *See* 2006 FOF Adopting Release, *supra* footnote 19, at n.52 and accompanying text.

[310] 15 U.S.C. 80a–15(c).

[311] 15 U.S.C. 80a–36(b).

[312] *See* 2006 FOF Adopting Release, *supra* footnote 19, at n.52.

[313] *See* Fiduciary Duty Interpretation, *supra* footnote 255.

of interest the adviser faces in this circumstance. This finding, which is reported to the board of directors, gives the fund's board information specific to the fund of funds arrangement to review when exercising its oversight responsibilities over the adviser.

Investment Adviser Reporting and Board Oversight. The final rule will require the adviser to a management company to report its evaluation, finding, and the basis for its evaluation or finding to the fund's board of directors no later than the next regularly scheduled board meeting.[314] As discussed above,[315] the final rule differs from the proposed rule in that we will not additionally require the fund's board of directors to set the frequency of determination as reasonable and appropriate after the initial investment, but in any case no less frequently than annually.

Some commenters suggested that the Commission eliminate or modify the requirement that the investment adviser of the acquiring fund report the proposed best interest determination to the acquiring fund's board of directors.[316] One commenter characterized this requirement as unduly burdensome, as another mandatory report that may be complex and data heavy.[317] Rather than reporting the finding to the board of directors before investing in an acquired fund, a commenter recommended that the final rule require such reporting and the basis for the adviser's determination to the board of directors at the next regularly scheduled meeting.[318] On the other hand, one commenter stated that the board of directors appropriately serves an oversight role, supporting the proposal's investment adviser reporting requirements. The commenter recommended that the frequency of reporting should be set forth in a fund's policies and procedures adopted and approved by the board under rule 38a–1 under the Act.[319]

We continue to believe that the board of directors provides an additional layer of protection for acquiring and acquired funds that are management companies and their respective investors against the abuses historically associated with fund of funds arrangements. We are therefore adopting conditions that will require the investment adviser to each of the acquiring and acquired funds to report its evaluation, finding, and the basis for its evaluation or finding. We are adopting this change to the proposed rule to conform to the final rule's regulatory framework, which now applies to acquiring and acquired fund advisers. As proposed,[320] the final rule will not require a management company's adviser to make the applicable Fund Findings in connection with every investment in an acquired fund.

ii. UIT Findings

Rule 12d1–4 will include an alternative finding condition when the acquiring fund is a UIT. Specifically, on or before the date of initial deposit of portfolio securities into a registered UIT, the UIT's principal underwriter or depositor must find that the fees of the UIT do not duplicate the fees and expenses of the acquired funds that the UIT holds or will hold at the date of deposit.[321] The final rule will require the principal underwriter or depositor to base its finding on an evaluation of the complexity of the structure and the aggregate fees and expenses associated with the UIT's investment in acquired funds.[322] This requirement is essentially the same as proposed.[323]

We received limited comments addressing this aspect of the proposal, but the comments received provided support or did not recommend any UIT-specific changes to the proposal.[324] For example, one commenter supported the rule requiring the principal underwriter or depositor of a UIT to make a finding regarding aggregate UIT and acquired fund fees.[325]

The condition for acquiring UITs under rule 12d1–4 differs from the condition applicable to acquiring management companies in many respects, and we believe that this is appropriate for several reasons. First, by statute, a UIT is unmanaged and its portfolio fixed.[326] Unlike a management company, a UIT does not have a board of directors, officers, or an investment adviser to render advice during the life of the trust. Second, acquiring UITs typically raise different fee and expense concerns than management companies. A UIT, for example, does not bear investment advisory fees, and the payments UITs make are limited by section 26 of the Act.[327]

Due to the unmanaged nature of UITs and the fixed nature of their portfolios, we continue to believe it would be inconsistent with their structure to require a re-evaluation of their acquired fund finding over time or other reporting requirements. The requirement only applies, therefore, at the time of the UIT's creation. Nevertheless, this determination generally should consider the planned structure of the UIT's holdings. In particular, if the UIT tracks an index, the determination should consider the index design and whether the index design is likely to lead to the UIT holding acquired funds with duplicative fees or overly complex structures. We believe that the UIT-specific finding requirement that its fees and expenses do not duplicate the fees and expenses of the acquired funds that the UIT holds or will hold at the date of deposit, is an appropriately calibrated means to protect investors, given a UIT's unmanaged structure.

Unlike acquired management companies, we are not extending this finding requirement to acquired funds that are UITs.[328] We do not believe it is necessary to require these UITs to make similar findings given their structure. A UIT that is an acquired fund does not have similar section 12(d)(1) undue influence concerns as a management company because the UIT is unmanaged. This is distinguishable from UITs that are acquiring funds where we are only requiring UITs to consider the complexity of the structure and the aggregate fees and expenses associated with the UIT's investment,

[314] Rule 12d1–4(b)(2)(i)(C).

[315] *See supra* footnotes 271 through 276 and accompanying text.

[316] *See, e.g.,* Dechert Comment Letter; NYC Bar Comment Letter; ABA Comment Letter.

[317] *See* ABA Comment Letter (suggesting elimination of the best interest determination and board reporting requirements).

[318] *See* NYC Bar Comment Letter.

[319] *See* MFDF Comment Letter.

[320] *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.143 and accompanying text.

[321] Rule 12d1–4(b)(3)(ii).

[322] Under rule 12d1–4(b)(3)(iv), fund of funds arrangements (including acquiring and acquired funds that are UITs) must enter into a fund of funds investment agreement. *See infra* section II.C.2.4II.C.2.b.iv.

[323] The only change is that we have revised the final rule to make clear that it requires the principal underwriter or depositor to consider expenses in addition to fees. *See supra* footnote 247.

[324] *See* ABA Comment Letter; SIFMA AMG Comment Letter.

[325] *See* ABA Comment Letter.

[326] *See* 15 U.S.C. 80a–4(2) (defining a UIT, in part, to mean an investment company organized under a trust indenture or similar instrument that issues redeemable securities, each of which represents an undivided interest in a unit of specified securities).

[327] Section 26(a)(2)(C) of the Act requires that the trust indenture for a UIT prohibit payments to the depositor or to any affiliated person thereof, except payments for performing bookkeeping and other administrative services of a character normally performed by the trustee or custodian itself. 80 U.S.C. 80a–26(a)(2)(C). UIT ETFs have exemptive relief that allow the ETF to pay certain enumerated expenses that would be prohibited under section 26(a)(2)(C). *See* Exchange-Traded Funds, Investment Company Act Release No. 33140 (July 31, 2018) [83 FR 37332 (July 31, 2018)] (''2018 ETF Proposing Release'') at n.52 and accompanying text.

[328] However, if the acquiring fund is a management company, it would need to make its own finding consistent with the rule. *See supra* footnote 248.

which is only relevant when the UIT is acquiring other funds.

This condition will apply only at the time of initial deposit for UITs that are formed after the rule's effective date as proposed. We do not believe it is necessary to exclude UITs that are already in existence from relying on rule 12d1–4 as acquiring funds. UITs that serve as separate account vehicles funding variable annuity and variable life insurance contracts will be subject to additional fee conditions, as discussed below. The majority of UITs fall into this category.[329] In addition, we believe that existing UIT ETFs are unlikely to rely on rule 12d1–4 as acquiring funds because they replicate the components of broad-based securities indexes that do not currently include funds.[330] Even if funds were to become significant components of these indexes in the future, we believe that acquiring funds that invest in broad-based securities indexes are unlikely to raise complex structure concerns because the funds replicate the relevant index.[331] If an index were to include funds, the UIT ETF would simply acquire those funds as part of replicating the broader index. Such an arrangement also is unlikely to raise duplicative fee concerns because existing UIT ETFs do not bear advisory fees, sales loads, or other types of service fees at the UIT ETF level. Finally, UITs that do not serve as variable insurance contract separate account vehicles or that are not ETFs typically have a limited term, sometimes of approximately 12–18 months.[332] Given this short term, the number of UITs that have not made the finding required by rule 12d1–4 would decrease quickly over time. Absent this provision, it is unlikely that pre-existing UITs could rely upon the rule given the statutory requirement that UITs be organized under a trust indenture, contract of custodianship or agency, or similar instrument.

iii. Separate Accounts Funding Variable Insurance Contract Certification

With respect to a separate account funding variable insurance contracts that invests in an acquiring fund, the final rule will require an acquiring fund to obtain a certification from the insurance company issuing the separate account that it has determined that the fees and expenses borne by the separate account, acquiring fund, and acquired fund, in the aggregate, are consistent with the standard set forth in section 26(f)(2)(A) of the Act.[333] The standard set forth in section 26(f)(2)(A) of the Act provides that the fees must be reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company. This requirement generally is the same as proposed.[334]

Comments received regarding the insurance company certification generally raised concerns with this requirement.[335] One commenter stated that the certification requirement is inappropriate because the separate account is a separate and distinct legal entity from the fund of funds arrangement.[336] For example, this commenter stated that typical fees associated with separate accounts, such as mortality and expense risk fees or account fees and expenses, are the responsibility of, and paid by, the insurance contract owners. Some commenters also stated that the acquiring fund's investment adviser may have limited ability to obtain or compel this type of certification from an unrelated insurance company to comply with the rule.[337]

Some commenters stated that section 26 of the Act already requires that the separate account and sponsoring insurance company fees and charges deducted under a variable insurance contract, in the aggregate, be reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company.[338] Commenters argued that, in making this determination, the insurance company sponsoring the separate account is entitled to rely on the obligations already imposed on the investment adviser and board of trustees of any fund in which the separate account invests, to ensure that the fees borne by any funds that are available through variable insurance contracts are appropriate.[339] Other commenters argued that the requirement was superfluous in light of existing requirements for review and approval of acquiring and acquired fund advisory agreements under section 15(c) of the Act and a fund adviser's fiduciary duty under section 36(b) of the Act with respect to the receipt of compensation for services, or of payments of a material nature, from an acquiring or acquired fund.[340]

We believe the final rule should include a condition that addresses the concerns underlying the limits in section 12(d)(1), particularly duplicative fee concerns, in this three-tier arrangement.[341] We disagree with commenters that the finding is unnecessary or duplicative of section 15(c) or section 36(b) because we believe it is appropriate to address concerns with duplicative fees at each tier of the arrangement. In addition, section 15(c) and 36(b) generally will not apply in each tier of such an arrangement since the funds involved in this arrangement typically include UITs, which do not have boards of directors or investment advisers.[342] In addition, this certification requirement will ensure an analysis of the aggregate fee and expense structure of all the funds involved.

The final rule's conditions for separate accounts funding variable insurance contracts are based on the current fund of funds exemptive orders.[343] Our exemptive orders include a condition similar to the certification requirement.[344] Under the orders, the

[329] According to UIT annual Form N–CEN filings, as of April 2020, insurance UITs made up 674 of the total 716 registered UITs.

[330] There are five existing UIT ETFs that had total assets of approximately $436.6 billion as of December 31, 2019, representing 85.7% of UIT assets. All existing UIT ETFs seek to track the performance of a broad-based securities index by investing in the component securities of the index in the same approximate portions as the index.

[331] The exemptive relief that has been granted to UIT ETFs provides that the trustee will make adjustments to the ETF's portfolio only pursuant to the specifications set forth in the trust formation documents in order to track changes in the ETF's underlying index. The trustee does not have discretion when making these portfolio adjustments. *See* 2018 ETF Proposing Release, *supra* footnote 81, at nn. 46–47 and accompanying text.

[332] This estimate is based on staff sampling of equity UIT prospectuses.

[333] Rule 12d1–4(b)(2)(iii).

[334] The only change is that we have revised the final rule to make clear that it requires the insurance company to consider expenses in addition to fees. *See supra* footnote 247.

[335] *See, e.g.,* Nationwide Comment Letter; ICI Comment Letter; PGIM Comment Letter; ABA Comment Letter.

[336] *See* Nationwide Comment Letter.

[337] *See, e.g.,* Dechert Comment Letter; ICI Comment Letter; Comment Letter of Insured Retirement Institute (May 2, 2019) (''IRI Comment Letter'').

[338] *See* ICI Comment Letter; PGIM Comment Letter; ABA Comment Letter.

[339] *See, e.g.,* Nationwide Comment Letter.

[340] *See, e.g.,* PGIM Comment Letter; John Hancock Comment Letter; Dechert Comment Letter.

[341] Rule 12d1–4 restricts fund of funds arrangements to two tiers other than in limited circumstances, such as master-feeder arrangements in reliance on section 12(d)(1)(E) of the Act. *See infra* section II.C.3 (discussing complex structure requirements).

[342] Section 15(c) of the Act applies to registered open-end funds that have a board of directors, whereas section 36(b) of the Act applies to certain payments to a registered investment company's investment adviser.

[343] *See* 2018 FOF Proposing Release, *supra* footnote 6, at section II.C.3.c.

[344] Specifically, in the orders, each acquiring fund must represent in its participation agreements with an acquired fund that no insurance company sponsoring a registered separate account funding variable insurance contracts will be permitted to

insurance company must certify to the acquiring fund that the aggregate of all fees and charges associated with each variable insurance contract that invests in the acquiring fund are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company.

Under the rule, an insurance company sponsoring a separate account must certify that the fees and expenses borne by the separate account, acquiring fund, and acquired fund in the aggregate are reasonable and consistent with the standard set forth in section 26 of the Act. Because the final rule will require most funds to enter into a fund of funds investment agreement, we considered whether to codify the approach of the exemptive orders and require that the fund of funds investment agreement include a representation regarding the insurance company's certification.[345] Rule 12d1–4 will not require that the fund of funds investment agreement include this representation, although the agreement may do so. This is consistent with our general approach not to codify in our rule all the particularized terms that an agreement must include to reflect the fund of funds arrangement.

iv. Fund of Funds Investment Agreements

The final rule will require funds to enter into a fund of funds investment agreement before the acquiring fund acquires securities of the acquired fund in excess of the limits of section 12(d)(1) in reliance on rule 12d1–4 unless both funds have the same adviser.[346] This requirement works in tandem with the requirement to make certain Fund Findings by providing a method to hold the parties to the arrangement to the terms that led each fund's investment adviser to agree to the arrangement in the first place. In negotiating the fund of funds investment agreement, funds can set the terms of the agreement to support the Fund Findings. For example, an acquired fund could require the acquiring fund to agree to submit redemptions over a certain amount for a given period as a condition to the fund of funds investment agreement. This agreement both sets the expectations of the parties at the outset of the arrangement and provides a method of enforceability should one party not live up to these expectations. Thus, the fund of funds investment agreement is designed to address historical abuse concerns under section 12(d)(1), including an acquiring fund threatening large-scale redemptions as a means of exercising undue influence over an acquired fund.[347] Further, the requirement to enter into such agreement puts the acquired fund on notice that an acquiring fund is investing in it in reliance on the rule.

In the 2018 Proposing Release, we requested comment on alternatives to the proposed redemption limit, specifically asking whether we should permit acquired funds to set their own redemption limit (and, if so, what parameters we should establish) or whether we should require participation agreements.[348] As discussed above, a number of commenters recommended a negotiated agreement similar to the participation agreements required in our exemptive orders as an alternative to the proposed redemption limit.[349] We agree with these commenters that a negotiated agreement, combined with the findings requirements discussed above, would be a more effective control against the threat of the use of large redemptions to exercise undue influence than the proposed redemption limit.

The fund of funds investment agreement differs in certain ways from the requirement in our exemptive orders that, prior to investing in another fund, acquiring and acquired funds enter into a participation agreement. Participation agreements under our orders require both funds in a fund of funds arrangement (and their investment advisers) to fulfill their responsibilities under the order.[350] Participation agreements also require that the acquiring fund notify the acquired fund prior to investing in excess of the limits of section 12(d)(1)(A) and provide the acquired fund a list of the names of each of its affiliates to help the acquired fund ensure compliance with the affiliated transaction provisions of the Act.[351] Because all funds operating in accordance with rule 12d1–4 will be required to comply with the rule's conditions, the rule will not require that a fund of funds investment agreement include these types of contractual provisions.[352] In contrast to a participation agreement, the fund of funds investment agreement will be required to memorialize the terms of the arrangement that serve as a basis for the required finding. The agreement will empower funds relying on the rule to negotiate and tailor appropriate terms to protect their interests in a fund of funds arrangement. For example, the fund of funds investment agreement will provide a mechanism for an acquired fund to limit an acquiring fund's investments in reliance on the rule and arm itself with other tools it desires to protect against potential undue influence from an acquiring fund.

Rule 12d1–4 also will require funds operating in accordance with it to enter into a fund of funds investment agreement that includes three specific provisions. While some commenters suggested that we did not need to outline specific provisions in these agreements,[353] we believe that certain minimum requirements are necessary to ensure that the fund of funds agreement is effective at curtailing undue influence. These requirements are based on the Fund Findings, as well as elements of our exemptive orders and

invest in the acquiring fund unless the insurance company has made a certification to the acquiring fund. *Id.* at n.173–174 and accompanying text.

[345] The Commission proposed the certification requirement, in part, because the proposal did not contemplate participation agreements. *See* 2018 FOF Proposing Release, *supra* footnote 6, at section II.C.3.c.

[346] Rule 12d1–4(b)(2)(iv). Unlike the conditions relating to voting and control, the rule will require funds that are part of the same group of investment companies to enter into a fund of funds investment agreement if they do not have the same investment adviser.

[347] We believe that, due to the flexibility that the final rule provides in this regard, no special exceptions for certain funds or situations, such as interval funds or acquired fund liquidations, are necessary. *But see* NYC Bar Comment Letter (suggesting that these instances should be exempted from its proposed alternative approach to the proposed redemption limit). We would expect that the relevant parties would negotiate appropriate terms into their fund of funds investment agreement.

[348] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 57–58. We also requested comment on: (i) Whether participation agreements require the parties to a fund of funds arrangement to provide information necessary for compliance with other provisions of the Act; and (ii) whether we should codify the conditions of existing exemptive orders including the procedural requirements. *See id.*

[349] *See supra* footnotes 221 through 236, 266 through 270, and 296 through 299 and accompanying text.

[350] Fund of funds exemptive orders require a participation agreement to state, without limitation, that the funds' boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. *See, e.g.,* ETF Managers Trust, et al., Investment Company Act Release Nos. 33799 (Feb. 19, 2020) [85 FR 10794 (Feb. 25, 2020)] (notice) and 33823 (Mar. 24, 2020) (order) and related application (''ETF Managers Trust'').

[351] While not required by exemptive orders, some funds include other provisions in participation agreements to govern the fund of funds arrangement, such as provisions related to mirror voting, waiver of compensation, and notification upon exceeding certain thresholds. We are not requiring that these conditions be included in the written agreement.

[352] *See* ICI Comment Letter.

[353] *See* ICI Comment Letter (stating that because a fund of funds arrangement would need to comply with the generally applicable provisions of the rule, its proposed alternative to a participation agreement would not require negotiation). *But see* Capital Group Comment Letter (suggesting that the Commission should include practical conditions in a participation agreement-type regime).

commenters' recommendations in response to our requests for comment.[354]

First, the fund of funds investment agreement must include any material terms necessary for the adviser, underwriter, or depositor to make the Fund Finding where the funds involved include management companies or UITs.[355] This ensures that the adviser or other party making the Fund Finding will have memorialized the terms of the investment that underpin the Fund Finding, thereby making these terms fixed and clearly agreed if a dispute arises in the future. Given the importance of the Fund Findings to rule 12d1–4's protections, we believe that it is critical for the agreement to identify such terms to minimize ambiguity.

Second, each fund of funds investment agreement must include a termination provision whereby either party can terminate the agreement with advance written notice within a period no longer than 60 days.[356] This provision will give an acquired fund the ability to terminate an acquiring fund's acquisition of additional fund shares and provides the acquired fund with the negotiating leverage to address undue influence concerns. Termination of the agreement does not, unless otherwise agreed to by the parties, require that the acquiring fund reduce its position in the acquired fund, but will prevent the acquiring fund from purchasing additional shares of the acquired fund beyond the limits of section 12(d)(1).[357]

Lastly, the agreement must include a provision requiring an acquired fund to provide the acquiring fund with fee and expense information to the extent reasonably requested.[358] We believe that this requirement is appropriate to assist the acquiring fund's adviser with assessing the impact of fees and expenses associated with an investment in an acquired fund. For example, an acquired fund that invests in other funds would more readily have fee and expense information associated with the underlying investment than the acquiring fund, which may inform the acquiring fund's consideration of fees and expenses associated with an investment in the acquired fund. We believe that fund of funds investment agreements are material contracts not made in the ordinary course of business. As a result, they must be filed as an exhibit to each fund's registration statement.[359]

In sum, we believe that this requirement provides important additional protections beyond those provided by the Fund Findings requirement. First, it ensures both parties agree to the significant terms of the investment, including those terms on which the adviser or other party making the Fund Finding has based its analysis. Second, it ensures that an acquiring fund has the information it needs to assess the impact of the relevant fees and expenses. Lastly, these agreements permit funds to terminate the investment if they so choose, thereby ending the funds' ability to rely upon the rule for any additional investments in the acquired fund.

The rule will not require acquired funds and acquiring funds that are advised by the same adviser to enter into a fund of funds investment agreement. We believe that there are comparatively fewer benefits to formalizing a fund of funds arrangement with an executed agreement if the funds have the same adviser, assuming that the funds' adviser has made the applicable Fund Finding. Given the importance of the fund of funds investment agreement to the structure of the rule, we think it is important to require it of every fund unless the same adviser is the primary adviser to both funds. That is, the exception will not be available when an investment adviser acts as an adviser to one fund and a sub-adviser to the other fund in a fund of funds arrangement relying on the rule or as sub-adviser to both funds. We believe that this distinction is appropriate because a sub-adviser may not have the same access to information or be negotiating from the same position as other advisers. Thus, in situations where an adviser is the primary adviser to the acquired fund and serves as the sub-adviser to the acquiring fund, a fund of funds investment agreement would be required. Similarly, funds that do not have an adviser, such as internally managed funds or UITs, always would need to enter into a fund of funds investment agreement. Funds that do have the same adviser must still memorialize the arrangements that led the relevant adviser to make the Fund Finding for each fund under the rule.[360]

In the 2018 Proposing Release, we noted that an adviser to both an acquiring and acquired fund would owe a fiduciary duty to each of these funds.[361] As noted above, some commenters suggested that this was a reason to exclude affiliated funds of funds from the proposed redemption limit.[362] However, another commenter questioned whether advisers to more than one fund can effectively exercise their fiduciary duty to each fund independently of the other fund.[363] Advisers must act in accordance with their fiduciary duties to each respective fund, which should address the conflicts of interests advisers face when acting as an adviser to both the acquiring and acquired funds. Because of this, and the requirement to make the Fund Findings, we believe that it is unnecessary to apply the fund of funds investment agreement requirement to funds having the same adviser. In cases where an adviser believes that it cannot satisfy its fiduciary duty to both funds in a fund of funds arrangement, the adviser should not enter into the arrangement.

We also are not exempting all funds within the same group of investment companies from the fund of funds investment agreement requirement, as suggested by a number of commenters in relation to the more-restrictive proposed redemption limit.[364] While some funds within the same group may

[354] *See, e.g.,* ETF Managers Trust, *supra* footnote 350 (representing, among other things, that the participation agreement permitted an unaffiliated acquired fund to terminate it). *See also* ICI Comment Letter (''[r]equiring the acquired fund to agree to (and then terminate, if desired) the investment by an acquiring fund from a different group of investment companies would give the acquired fund a critical tool for protecting the interests of its shareholders''); Wells Fargo Comment Letter (stating that the standard representations, compliance polices, and other conditions accompanying participation agreements in the exemptive orders establish an effective framework of checks and balances that has successfully governed unaffiliated fund of funds arrangements); Fidelity Comment Letter (suggesting that in a participation agreement, an acquired fund could always protect itself by refusing to enter into such an agreement); NYC Bar Comment Letter (suggesting, among other things, that a participation agreement-type regime would permit the acquiring fund to negotiate the glide-path of redemptions).

[355] Rule 12d1–4(b)(2)(iv)(A). This is not required of separate accounts because the acquiring fund is obtaining a certification from the insurance company offering the separate account rather than making a finding regarding the separate account.

[356] Rule 12d1–4(b)(2)(iv)(B). The 60-day period is based upon a similar provision in section 15(a) of the Act. *See* 15 U.S.C. 80a–15(a)(3). We believe that this period is also consistent with the termination provision in some existing participation agreements.

[357] Termination of the agreement would mean that the funds could no longer rely upon the rule to purchase or otherwise acquire, or sell or otherwise dispose of, fund securities in excess of the limits of section 12(d)(1) because they would not have a fund of funds investment agreement effective for the duration of the fund's reliance on the rule. *See* rule 12d1–4(b)(2)(iv).

[358] Rule 12d1–4(b)(2)(iv)(C).

[359] *See, e.g.,* Item 28(h) of Form N–1A.

[360] Rule 12d1–4(c)(2). *See also supra* section II.C.4.

[361] 2018 FOF Proposing Release, *supra* footnote 6, at n.107 and accompanying text.

[362] *See* Wells Fargo Comment Letter; Thrivent Comment Letter; SIFMA AMG Comment Letter; *see also* John Hancock Comment Letter; MFS Comment Letter; Ropes Comment Letter.

[363] *See* CFA Comment Letter.

[364] *See supra* footnote 216 and accompanying text.

have effective communication and controls such that a fund of funds investment agreement may seem duplicative, not all do. As we noted above, two funds in the same group of investment companies could have two different advisers and two different boards satisfying their fiduciary duties to their respective funds and shareholders. In some cases, the investment advisers to funds in the same group of investment companies are not even affiliated persons.[365] Further, these funds are likely subject to different compliance policies and procedures and, as a result, we believe that a fund of funds investment agreement is an effective mechanism to memorialize the arrangement in these circumstances.

In summary, we believe that the requirement to enter into a fund of funds investment agreement, coupled with the expanded Fund Findings, are collectively a more effective approach than the proposed redemption limit to address undue influence concerns from redemptions. As compared to the proposed redemption limit that applied to all fund of funds arrangements, the conditions we are adopting provide funds with the ability to tailor their limits or protections to specific arrangements to better promote protection against potential undue influence and are more similar to requirements in orders providing section 12(d)(1) relief for fund of funds. As a result, we believe the rule, as adopted, will be an effective, less burdensome approach.

3. Complex Structures

A concern underlying section 12(d)(1) is that complex multi-tier fund structures could lead to excessive fees and investor confusion. To address this concern rule 12d1–4 will include conditions designed generally to restrict fund of funds arrangements to two-tiers, largely as proposed. Additionally, as proposed, rule 12d1–4 includes exceptions to the two-tier limitation that are limited in scope and designed to capture circumstances that do not raise the concerns underlying section 12(d)(1) of the Act. In response to concerns raised by commenters, however, we are adding an additional exception that will permit an acquired fund to invest up to 10% of its total assets in other funds without restriction on the purpose of the investment or types of underlying funds, or the size of the investment in a particular underlying fund (the ''10% Bucket''). The final rule's conditions seek to permit innovation and efficient portfolio management while limiting the potential for confusing structures and duplicative fees.

a. General Prohibition on Three-Tier Structures

Rule 12d1–4 includes conditions designed to restrict fund of funds arrangements to two tiers (other than in limited circumstances), generally as proposed. Commenters were mixed with respect to the proposed rule's general prohibition on three-tier structures. Some commenters agreed with the Commission that multi-tier structures have the potential to confuse investors and generate duplicative fees.[366] One commenter, for example, supported a broad restriction that limits fund of funds arrangements to two levels.[367] Some commenters generally supported a prohibition on three-tier structures, but also advocated for broad-based exceptions for certain acquired fund investments in underlying funds that had been permitted under historical exemptive relief and included in the proposed rule.[368]

Other commenters stated that multi-tier structures may be beneficial and recommended that the Commission allow such structures by relying on other aspects of the rule to enhance investor protection.[369] Some commenters recommended that the rule permit certain specific multi-tier structures, stating that such structures are beneficial to fund shareholders and do not raise the concerns section 12(d)(1) was designed to prevent.[370] Similarly, one commenter wrote that the proposed three-tier condition was too rigid and would constrain legitimate three-tier arrangements.[371] Further, some commenters noted that the proposed condition would require restructuring of certain fund of funds arrangements, resulting in additional costs for investors and limiting the variety of investment strategies available in the marketplace.[372] Some commenters also recommended that the three tier limitations should not apply to acquired fund investments in private funds, since section 12(d)(1) does not restrict a fund from investing in private funds.[373]

As an alternative to the three-tier condition, some commenters suggested that the Commission require the acquiring fund adviser to engage in a best interest determination and enhanced board reporting on the use of complex structures.[374] Other commenters recommended that the Commission require enhanced investor disclosure rather than restricting fund structures.[375]

Although we acknowledge that three-tier structures may provide efficient and cost-effective exposure to certain market segments in certain circumstances, we continue to believe that multi-tier structures can obfuscate the fund's investments, fees, and related risks.[376] For example, if an acquiring fund invests in an acquired fund that in turn invests in other funds, an acquiring

[365] *See supra* footnotes 166 through 170 and accompanying text.

[366] *See, e.g.,* CFA Comment Letter; Invesco Comment Letter; Voya Comment Letter.

[367] CFA Comment Letter.

[368] *See, e.g.,* Invesco Comment Letter (recommending exceptions for securities lending programs and cash sweep arrangements), Voya Comment Letter (recommending exceptions for master-feeder arrangements, short-term cash management, interfund borrowing and lending, and investments in wholly owned subsidiaries).

[369] Morningstar Comment Letter (advising against a general prohibition on three-tier structures in favor of fee and expense disclosure in prospectuses and annual reports); TRP Comment Letter (stating that the proposed rule's requirements that an adviser evaluate the complexity of the structure and engage in a best interest finding are sufficient without a broader prohibition on three-tier structures).

[370] *See, e.g.,* ICI Comment Letter (recommending that the rule include an expanded list of permitted multi-tier fund of fund arrangements that could be beneficial to shareholders); Fidelity Rutland Comment Letter (recommending that the rule permit the use of affiliated funds commonly created by an adviser for the purpose of efficiently managing exposure to a specific asset class (commonly referred to as ''central funds'')); Ropes Comment Letter (recommending that the rule permit three-tier structures where the underlying fund is an ETF or where all three funds in the structure are in the same group of investment companies); Comment Letter of Davis Polk & Wardwell LLP (May 2, 2019) (''DPW Comment Letter'') (recommending that the rule permit three-tier structures where the underlying fund is a limited life grantor trust).

[371] TRP Comment Letter (recommending a principles-based approach that would generally permit multi-tier structures subject to the other conditions of the rule).

[372] *See, e.g.,* PIMCO Comment Letter; Nuveen Comment Letter; SIFMA AMG Comment Letter.

[373] ICI Comment Letter. *See also* IPA Comment Letter (recommending that the rule exempt BDC investments in private funds from the general prohibition on three-tier structures); Guggenheim Comment Letter (recommending an exception for structured finance vehicles if the rule generally prohibits acquired funds from investing in private funds).

[374] TRP Comment Letter; SIFMA AMG Comment Letter.

[375] *See, e.g.,* Morningstar Comment Letter; TRP Comment Letter (suggesting enhancing the proposed report to the board to include a statement that the adviser believes the fund of funds structure and disclosure documents sufficiently mitigate the risk of the three-tier structure being overly confusing to investors). *But See* CFA Comment Letter (expressing skepticism about the benefit of enhanced disclosures to retail investors) *citing* Study Regarding Financial Literacy Among Investors As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Staff of the U.S. Securities and Exchange Commission (August 2012).

[376] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 83.

fund shareholder could find it difficult to determine the nature and value of the holdings ultimately underlying his or her investment. Accordingly, we continue to believe that it is appropriate to limit the ability of funds to structure multi-tier arrangements in reliance on rule 12d1–4. We also believe that enhanced disclosure, without additional limitations on multi-tier structures, would be insufficient to address potential investor confusion associated with complex structures.[377] As discussed below, we have made certain modifications to the final rule, however, that are designed to provide additional flexibility for acquired funds to gain exposure to underlying funds in order to minimize disruption to existing fund structures and preserve some flexibility for efficient multi-tier arrangements.[378] We believe that the final rule's three-tier limitation appropriately provides such flexibility and provides protections against complex structures and excessive fees.

b. Limitations on Other Funds' Acquisitions of Acquiring Funds

Rule 12d1–4 includes a condition designed to prevent an acquiring fund from also being an acquired fund under the rule or under section 12(d)(1)(G) of the Act. Specifically, the rule prohibits a fund that is relying on section 12(d)(1)(G) of the Act (15 U.S.C. 80a–12(d)(1)(G)) or rule 12d1–4 from acquiring, in excess of the limits in section 12(d)(1)(A), the outstanding voting securities of an acquiring fund (a ''second-tier fund''), unless the second-tier fund makes investments permitted by rule 12d1–4(b)(3)(ii) as discussed below.[379] As a result, this condition will limit a fund's ability to create multi-tier arrangements, subject to certain limited exceptions. This condition is generally more comprehensive and, therefore, limiting, than the conditions in our orders, and addresses certain multi-tier arrangements that have emerged.[380]

This provision, however, will not prevent a fund from investing all of its assets in an acquiring fund in reliance on section 12(d)(1)(E).[381] We do not believe three-tier structures involving a master-feeder arrangement present the risk that section 12(d)(1) was designed to address. In addition, this condition will not prevent other funds from acquiring the voting securities of an acquiring fund in amounts of 3% or less, which effectively creates a type of three-tier structure that does not raise the concerns that section 12(d)(1) was designed to prevent.[382]

Rule 12d1–4's limitation on investments in acquiring funds is generally consistent with the proposed complex structures provision. However, the final rule will not apply the condition only to investments in an acquiring fund that discloses in its registration statement that it may be an acquiring fund for purposes of rule 12d1–4, as proposed.[383] Because rule 12d1–4 will require most funds to enter into a fund of funds investment agreement, and an adviser that manages both acquiring and acquired funds should have information regarding an acquired fund's investments, the final rule will prohibit a fund from investing in an acquiring fund without tying this limitation to registration statement disclosures.[384]

While several commenters addressed the proposed limit on multi-tier structures generally, no commenters addressed whether the rule should prohibit a fund from investing in an acquiring fund. We continue to believe that concerns of undue influence, complex structures, and excessive fees apply both to three-tier structures where registered funds invest in acquiring funds and three-tier structures where an acquired fund invests a substantial portion of its assets in other registered funds. Accordingly, we continue to believe that it is appropriate to limit funds' ability to invest in acquiring funds, subject to the exception for funds relying on section 12(d)(1)(E). We believe this condition will help limit the construction of complex multi-tier structures, while preserving some flexibility for efficient multi-tier arrangements. In addition, rule 12d1–4 does not prohibit other funds from acquiring the voting securities of an acquiring fund in amounts allowed by the Act (*i.e.,* 3% or less). We do not believe that multiple registered funds holding 3% or less of the acquiring fund implicate the historical abuses, such as undue influence, that section 12(d)(1) is intended to prevent.[385]

c. Limitations on Acquired Funds' Acquisition of Other Funds and Private Funds; Exceptions to Three-Tier Limitation

As proposed, rule 12d1–4 will include a condition designed to limit fund of funds arrangements where the acquired fund is itself an acquiring fund. The rule generally will prohibit arrangements where an acquired fund invests in other investment companies or private funds in excess of the limits in section 12(d)(1)(A). Specifically, the rule states that no acquired fund may purchase or otherwise acquire the securities of an investment company or private fund if immediately after such purchase or acquisition, the securities of investment companies and private funds owned by the acquired fund have an aggregate value in excess of 10% of the value of the total assets of the acquired fund, subject to certain enumerated exceptions.[386] We continue to believe that the general limitation on acquired fund investments in other investment companies or private funds is an appropriate means to protect against the creation of overly complex structures.[387] While investments by acquired funds in other investment companies or in private funds may provide efficient exposure to a specific asset class or offer other portfolio management advantages, such investments can be confusing to investors and can result in additional

[377] *See infra* footnotes 388–390 and accompanying text.

[378] *See, e.g.,* Guggenheim Comment Letter (predicting that many debt funds that serve as acquired funds would need to be restructured given that such funds hold substantial investments in entities that rely on section 3(c)(1) and 3(c)(7) of the act, such as structured finance vehicles).

[379] Rule 12d1–4(a)(3)(i). *See also* section 12(d)(1)(G)(v) (granting the Commission authority to prescribe rules or regulations with respect to acquisitions under section 12(d)(1)(G) as necessary and appropriate for the protection of investors).

[380] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 77 (noting that our orders do not expressly prohibit a fund from investing in an acquiring fund (*i.e.,* the top tier in a traditional fund of funds structure) beyond the limits in section 12(d)(1)).

[381] For example, this type of three-tier structure would permit a target date fund (itself an acquiring fund) to simply act as a conduit through which an insurance product separate account invests.

[382] A fund could acquire the securities of an acquiring fund within the limits of section 12(d)(1)(A). Funds relying on section 12(d)(1)(F) could acquire up to 3% of the outstanding voting securities in an unlimited number of funds. *See* section 12(d)(1)(F).

[383] Proposed rule 12d1–4(b)(4)(ii) (prohibiting a fund relying on the rule or section 12(d)(1)(G) of the Act from acquiring the securities of a fund that discloses in its most recent registration statement that it may be an acquiring fund in reliance on proposed rule 12d1–4).

[384] We believe funds investing in reliance on section 12(d)(1)(G) likely would have, or be able to obtain, sufficient information to know which other funds within the same group of investment companies are acquiring funds under rule 12d1–4. *See* 2018 FOF Proposing Release, *supra* footnote 6, at 79. We do not believe that funds within the same group of investment companies will face challenges in obtaining this information because of the potential for information barriers. *See supra* section II.C.1.a.i.

[385] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 78–79.

[386] Rule 12d1–4(b)(3)(ii). This prohibition applies to investments in a company that is controlled by an investment company, because such a controlled company is also subject to section 12(d)(1) when it acquires the securities of other investment companies. *See* section 12(d)(1)(A).

[387] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 81.

fees and expenses.[388] We believe that this potential reduction of investment flexibility for acquired funds is appropriate to prevent potential increases in duplicative fees and expenses, and to avoid the investor confusion, that might occur if the final rule did not impose such limits on multi-tier structures.[389] As explained above with respect to complex structures generally, we believe a structural three-tier prohibition will help to limit the potential for complex structures that could be difficult for investors to understand even with comprehensive disclosures.[390]

Largely as proposed, the rule will allow arrangements where an acquired fund invests in other funds in certain enumerated circumstances. These exceptions are limited in scope and are designed to capture circumstances where an acquired fund may invest in another fund to efficiently manage uninvested cash, to address specific regulatory or tax limitations, or to facilitate certain transactions. Specifically, these categories include securities of another investment company that is: (i) Acquired in reliance on section 12(d)(1)(E) of the Act (*i.e.,* master-feeder arrangements); (ii) acquired pursuant to rule 12d1–1; (iii) a subsidiary wholly-owned and controlled by the acquired fund; (iv) received as a dividend or as a result of a plan of reorganization of a company; or (v) acquired pursuant to exemptive relief from the Commission to engage in interfund borrowing and lending transactions.[391] These categories have been permitted under existing exemptive orders and addressed in no-action letters, and do not raise the concerns that section 12(d)(1) was designed to address, as discussed further below.

We made several modifications to the enumerated exceptions of the proposed rule to address many of the concerns identified by commenters. Additionally, in a change from the proposal, rule 12d1–4 will include a separate exception that will permit an acquired fund to invest up to 10% of its assets in other investment companies or private funds. As discussed below, we do not believe that permitting these arrangements will raise concerns identified by Congress when enacting section 12(d)(1).[392]

i. Master-Feeder Investments

The proposed exception for master-feeder arrangements in reliance on section 12(d)(1)(E) of the Act did not receive substantial public comment and we are adopting as proposed.[393] Under section 12(d)(1)(E) of the Act, the acquired feeder fund in this example is, in effect, a conduit through which the acquiring fund can access the master fund. We do not believe that permitting these arrangements would create an overly complex structure that could confuse investors, nor do we believe that these arrangements involve concerns regarding undue influence or layering of fees.[394] For example, an acquired feeder fund's investment in its master fund would be entirely transparent because the feeder fund would disclose the master fund's portfolio holdings in its shareholder reports.

ii. Rule 12d1–1 Investments

The final rule will permit an acquired fund to invest more than 10% of its total assets in investment companies and private funds if such investments are made pursuant to rule 12d1–1. The proposed rule included an exception for short-term cash management purposes pursuant to rule 12d1–1 or exemptive relief from the Commission.[395]

Several commenters requested clarification or expansion of this proposed exception.[396] For instance, two commenters recommended that the Commission remove the phrase ''short-term cash management purposes'' from the exception because rule 12d1–1 does not include the phrase.[397] These commenters suggested there could be a variety of reasons other than short-term cash management that an acquired fund would invest in reliance on rule 12d1–1 that do not raise any additional fund of funds concerns.[398] Another commenter requested that the Commission clarify the applicable exemptive relief referenced in the exception, since the Commission also proposed to rescind relevant exemptive relief.[399]

Some commenters recommended that the final rule eliminate the reference to rule 12d1–1 and instead expand the types of investments that would be permitted for short-term cash management purposes to include short-term bond funds.[400] Another commenter recommended that the Commission expand the relief to permit acquired funds to equitize cash by investing in other funds, such as certain ETFs.[401] One commenter recommended that the Commission also consider exceptions for securities lending and cash sweep arrangements among affiliates.[402]

In response to concerns raised by commenters, we have modified this exception to permit an acquired fund to

[388] *See* Guggenheim Comment Letter. Although one commenter suggested that the rule should not limit an acquired fund's ability to invest in private funds because section 12(d)(1) of the Act does not limit a fund's ability to invest in private funds, (*See* ICI Comment Letter), the risks of investor confusion and fee layering apply both with respect to an acquired fund's investments in other investment companies and with respect to an acquired fund's investments in private funds in a multi-tier structure. Accordingly, we believe it is appropriate that the complex structures limitations of rule 12d1–4 apply to an acquired fund's investments in private funds. This approach also is consistent with the complex structures limitations in our exemptive orders.

[389] We believe it would be more appropriate for the Commission to consider multi-tier structures that do not fall within the confines of rule 12d1–4 through the exemptive application process. This will allow the Commission to weigh the policy considerations of such structures in the context of the facts and circumstances of the specific fund of funds arrangement described in the application. While the expenses of a third-tier fund may represent only a small proportion of the expenses of a top-tier acquiring fund because a third-tier fund would represent only a small proportion of the top tier acquiring fund's investment portfolio, the exemptive application process would permit the Commission to consider whether additional fee- or expense-related conditions would be appropriate in connection with a specific multi-tier arrangement or in connection with a specific investment strategy undertaken through a multi-tier structure.

[390] For example, without a general three-tier prohibition, an acquired fund could shift a substantial portion of its assets among underlying funds with different investment exposures and risks, and disclosure at the acquiring fund level may still leave acquiring fund investors unaware of substantial changes to their investment exposure and risks at the acquired fund and underlying fund levels. *See* CFA Comment Letter (expressing skepticism about the benefit of enhanced disclosures to retail investors); *but see* Morningstar Comment Letter (supporting an enhanced disclosure requirement) and TRP Comment Letter (suggesting that the adviser report to the fund's board that a fund of funds disclosure documents sufficiently mitigate the risk of investor confusion).

[391] Rule 12d1–4(b)(3)(ii).

[392] *See also* 2018 FOF Proposing Release, *supra* footnote 6, pp 80–83 and associated footnotes (describing the enumerated circumstances under which our exemptive orders permitted three tier fund of funds structures and the rationale in support of such structures).

[393] Voya Comment Letter (supporting the exceptions for master-feeder arrangements and investments in wholly-owned and controlled subsidiaries).

[394] *See* 2018 FOF Proposing Release, *supra* footnote 6, at p. 78.

[395] Proposed Rule 12d1–4(b)(3)(ii)(B).

[396] *See, e.g.,* ICI Comment Letter; NYC Bar Comment Letter; PIMCO Comment Letter; PGIM Comment Letter.

[397] NYC Bar Comment Letter; ICI Comment Letter.

[398] ICI Comment Letter; Dechert Comment Letter (acquiring funds may make investments pursuant to rule 12d1–1 for the purpose of complying with asset coverage requirements and other legitimate portfolio management purposes).

[399] ICI Comment Letter (noting it is unclear whether investments in short-term bond funds would be permitted under the proposed exception given the rescission of exemptive relief, despite numerous exemptive orders providing relief for investments in short-term bond funds).

[400] ICI Comment Letter; PIMCO Comment Letter; PGIM Comment Letter.

[401] ABA Comment Letter.

[402] Invesco Comment Letter.

invest in investment companies and private funds in excess of the section 12(d)(1) limits if such investments are made pursuant to rule 12d1–1.[403] By removing the phrase ''short-term cash management purposes,'' the final rule will provide acquired funds with additional flexibility to invest in funds pursuant to rule 12d1–1 for any investment purpose. We also removed the reference to the phrase ''or exemptive relief from the Commission'' in order to clarify that the exception for acquired fund investments pursuant to rule 12d1–1 does not incorporate prior exemptive relief that an acquired fund may have received for cash management or collateral management purposes. As described below, we are rescinding this exemptive relief and removed the associated reference from the rule text. Although several commenters requested that the Commission not rescind prior exemptive relief that allows an acquired fund's investment in short-term bond funds for cash management or collateral management purposes, we believe rule 12d1–4 provides appropriate flexibility for funds to invest for these purposes. Specifically, rule 12d1–4 provides the 10% Bucket, which permits an acquired fund to invest up to 10% of its assets in other investment companies for any investment purposes.

In response to concerns raised by commenters relating to investments to equitize cash, the final rule will permit an acquired fund to invest up to 10% of its assets in other funds to equitize cash or for other investment purposes, pursuant to the 10% Bucket described in section II.C.3.d below.[404] The exception for investments pursuant to rule 12d1–1 is designed to permit acquired funds to invest in money market funds, which we do not believe raise the concerns that section 12(d)(1) was designed to prevent.[405] Accordingly, we decline to broaden the rule to permit additional investments under this exception, and clarify that investments are only permissible under this exception to the extent they are made pursuant to rule 12d1–1.

iii. Investments in a Wholly-Owned Subsidiary

We are adopting an exception from the three-tier limitation for investments in funds that are wholly-owned and controlled by the acquired fund, as proposed. Wholly-owned subsidiaries are typically organized under the laws of a non-U.S. jurisdiction in order to invest in commodity-related instruments and certain other instruments for tax and other reasons.[406] We requested comment as to whether the rule should include additional limits on acquired funds' use of subsidiaries, and requested suggestions on the contours of any such limitations.[407] Commenters did not address this aspect of the proposal, and rule 12d1–4 will include an exception to the general three-tier limitation for investments through such wholly-owned and controlled subsidiaries. Because the wholly-owned subsidiary's financial statements are consolidated with the financial statements of the acquired fund, we do not believe that this arrangement would be so complex that investors could not understand the nature of such exposure.[408]

iv. Investments Received as a Dividend as a Result of a Plan of Reorganization and Investments Acquired To Engage in Interfund Borrowing and Lending

We continue to believe that it is appropriate to provide exceptions from the three-tier limitation to facilitate certain transactions.[409] The proposed rule included exceptions for arrangements where an acquired fund receives fund shares as a dividend or as a result of a plan of reorganization. Acquired funds do not acquire such investments to create a multi-tier fund structure. Rather, a fund acquires these investments from a business restructuring unrelated to a fund's status as an acquired fund under the rule.[410] The proposed rule also included an exception for acquired fund investments entered into pursuant to exemptive relief from the Commission to engage in interfund borrowing and lending transactions. This exception would facilitate certain interfund transactions, subject to conditions specifically designed to address the concerns that such transactions present under the terms of existing interfund lending orders.[411] A commenter supported the proposed rule's exception of these transactions from the three-tier limitation, and we continue to believe it is appropriate that the rule include these exceptions.[412] Therefore, we are adopting these exceptions as proposed.

d. Ten Percent Bucket

In addition to the enumerated exceptions to the limitation on acquired fund investments, the rule will permit an acquired fund to invest up to 10% of its total assets in other funds, regardless of the size of the investment in any one fund, in order to provide funds with additional flexibility, and thereby permit certain structures that could benefit investors through greater efficiency. For purposes of calculating the 10% Bucket, investments by an acquired fund pursuant to the general exceptions in the section above would not be included. While the proposed rule did not include the 10% Bucket for acquired fund investments in other funds, we requested comment on whether the proposed rule's limitations were appropriately calibrated to mitigate complex structure concerns, and whether we should adopt different investment limits.[413] We also requested comment on whether the rule should permit acquired funds relying on section 12(d)(1)(G) to invest in a third-tier fund in order to centralize the portfolio management of floating rate or other instruments.[414]

Under rule 12d1–4, an acquired fund might utilize the 10% Bucket for cash management purposes outside of investments made in reliance on rule 12d1–1, to equitize cash, or for any other portfolio management purposes.[415] The 10% Bucket provides flexibility for fund of funds arrangements to evolve, while limiting the complex arrangements that section 12(d)(1) was designed to prevent. If an acquired fund wishes to acquire other underlying funds in excess of the 10% Bucket, the acquired fund may seek exemptive relief. In such circumstances, the Commission would have the opportunity to consider the proposed

[403] Rule 12d1–4(b)(3)(ii)(B).

[404] *See* ICI Comment Letter; PIMCO Comment Letter; PGIM Comment Letter; ABA Comment Letter.

[405] *See* 2006 FOF Adopting Release, *supra* footnote 19, at 9–10.

[406] *See* 2018 FOF Proposing Release, *supra* footnote 6, at pp. 82–83.

[407] *See id.,* at pp. 84.

[408] In this type of arrangement, the acquired fund controls the wholly-owned subsidiary and the acquired fund consolidates its financial statements with the wholly-owned subsidiary's financial statements, provided that U.S. GAAP or other applicable accounting standards permit consolidation and acquired fund's total annual fund operating expenses include the wholly-owned subsidiaries' expenses. *See, e.g.,* Consulting Group Capital Markets Fund, et al., Investment Company Act Release Nos. 32940 (Dec. 15, 2017) [82 FR 60463 (Dec. 20, 2017)] (notice) and 32966 (Jan. 9, 2018) (order) and related application.

[409] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 82.

[410] *See* section 12(d)(1)(D) (exempting from section 12(d)(1) securities received as a dividend, as a result of an offer of exchange approved under section 11, or as a result of a plan of reorganization).

[411] *See, e.g.,* Franklin Alternative Strategies Funds, *et al.,* Investment Company Act Release Nos. 33095 (May 10, 2018) [83 FR 22720 (May 16, 2018)] (notice) and 33117 (June 5, 2018) (order) and related application (permitting funds to participate in an interfund lending facility).

[412] *See, e.g.,* Voya Comment Letter.

[413] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 84.

[414] *See id.,* at 86.

[415] As an example, an acquired fund could utilize the 10% Bucket to invest in short-term bond funds for cash management purposes.

structure in the context of rule 12d1–4 and weigh the benefits of the proposed structure against the concerns underlying section 12(d)(1).

As discussed above, section 12(d)(1)(A)(iii) of the Act limits an acquiring fund's total investment in other funds to no more than 10% of the acquiring fund's assets. The 10% Bucket effectively applies this 10% limit to acquired funds' investments in underlying funds.[416] The rule as adopted, however, will not impose the 3% and the 5% limits of section 12(d)(1)(A)(i) and (ii), respectively, on investments by an acquired fund in third-tier funds. Accordingly, the rule will not prohibit an acquired fund from holding more than 3% of the outstanding voting securities of any single third-tier fund and will not prohibit an acquired fund from investing more than 5% of its assets in any single third-tier fund. Rather, the 10% Bucket will allow an acquired fund some flexibility to invest up to 10% of its assets in other funds in order to meet its investment objectives while minimizing shareholder confusion by limiting the extent of those acquired fund investments. This limit is intended to prohibit multiple layers of funds, which raise greater concerns of duplication of fees and expenses as well as investor confusion, and reflects a view that funds that invest in another fund beyond the 3% and the 5% limits of section 12(d)(1)(A)(i) and (ii), but not the 10% limit of section 12(d)(1)(A)(iii), are not primarily designed to invest in other funds and do not implicate the concerns that led to the adoption of the 10% limit in 1970.[417] In such a structure, by which an acquired fund relies on the 10% Bucket to invest in an underlying fund in excess of the section 12(d)(1) limits, the acquired fund and underlying funds must comply with the conditions of rule 12d1–4 as acquiring and acquired funds, respectively, or operate pursuant to another exemption.[418]

We proposed a similar provision in 2008 as part of a proposal to allow funds to invest in ETFs beyond the section 12(d)(1) statutory limits.[419] In order to prevent the formation of overly complex structures, the proposed 2008 rule would have prohibited an acquired ETF from investing more than 10% of its assets in other funds and private funds. One commenter on proposed rule 12d1–4 recommended that rule 12d1–4 include a 10% bucket to provide additional flexibility for acquired fund investments in other funds, and noted that the Commission's 2008 rule proposal included such a provision.[420]

As discussed in the 2018 FOF Proposing Release, our staff has previously stated that it would not recommend enforcement action if an acquired fund in a fund of funds arrangement invested up to 10% of its assets in other funds, including ''central funds,'' which are affiliated funds commonly created by an adviser for the purpose of efficiently managing exposure to a specific asset class.[421] However, the staff stated its position in light of several considerations, including that: (a) An acquired fund would not exceed the 5% limit in section 12(d)(1)(A)(ii) with respect to an investment in shares of a single central fund or the 10% limit in 12(d)(1)(A)(iii) with respect to investments in underlying investment companies generally; (b) management fees and other fees that were subject to limits; (c) acquisitions by the central fund in other investment companies or private funds that were subject to limits; (d) a requirement that shares of the central fund be sold solely to the funds within the same group of investment companies; and (e) the board of directors of each of the funds would consider the reasons for the proposed investments in the central fund and the benefits expected to be realized from such investments.[422] In a subsequent letter, the staff stated that it would not recommend enforcement action if an acquired fund invested, solely for short-term cash management purposes, up to 25% of its assets in a central fund that is a fixed-income fund that could have a dollar-weighted average portfolio maturity of up to 3 years.[423]

Several commenters advocated that the final rule permit acquired funds to invest in central funds.[424] Commenters noted that central funds are frequently used for cash management purposes, but

[416] Like the limits under section 12(d)(1) of the Act, the 10% Bucket is an acquisition test. Accordingly, if an acquired fund holds more than 10% of its assets in other underlying funds due to market movements it could not invest any additional assets in underlying funds, but the 10% Bucket would not require the acquired fund to dispose of its existing investments in underlying funds to under 10% of its assets. Further, if an existing acquired fund holds more than 10% of its total assets in other funds pursuant to an existing exemptive order, the acquired fund would not be required to dispose of those holdings after the rescission of its exemptive order and the effective date of the rule. However, the acquired fund could invest additional assets in underlying funds only in accordance with the terms of the rule.

[417] *See* Reporting Modernization Adopting Release, *supra* footnote 56, at 81936. *See also* PPI Report *supra* footnote 64, at page 322 (describing concerns about the organization and operation of registered fund holding companies whose primary purpose is the acquisition of shares of other registered investment companies). The House and Senate Reports that accompanied the 1970 amendments to the Act describe concerns about ''fundholding companies'' whose portfolios consist entirely or largely of the securities of other investment companies. *See* H.R. Rep. No. 1382, 91st Cong., 2d Sess. 28 (1970) (''1970 Amendments House Report''); S. Rep. No. 184, 91st Cong., 1st Sess. 29 (1969) (''1970 Amendments Senate Report''). By imposing the 10% limit in section 12(d)(1)(A)(iii) as part of the 1970 amendments to the Act, Congress distinguished between investment companies that invest less than 10% of their assets in other investment companies, on the one hand, and fund holding companies whose primary purpose is the acquisition of shares of other registered investment companies, on the other.

[418] For example, if an acquired fund invests 10% of its total assets in a third-tier underlying fund, and the investment by the acquired fund accounts for 20% of the voting stock of the underlying fund, the acquired fund and the underlying fund would be required to comply with the conditions of rule 12d1–4 as an acquiring fund and acquired fund, respectively.

[419] 2008 ETF Proposing Release, *supra* footnote 18, at n.225 and accompanying text (requiring an acquired ETF to have a disclosed policy that prohibits it from investing more than 10% of its assets in other investment companies in reliance on section 12(d)(1)(F) and 12(d)(1)(G) of the Act).

[420] ICI Comment Letter (''Allowing for this exception generally would permit the structures contemplated by the recent no-action letters and the 2008 Commission proposal, and permit acquired funds to have additional limited ability to invest in other funds when such investments would not exceed the basic 10 percent limit included in Section 12(d)(1)(A)(iii) to protect against overly complex structures.'').

[421] 2018 FOF Proposing Release, *supra* footnote 6, at 86. *See* Franklin Templeton Investments, Staff No-Action Letter (pub. avail. April 3, 2015) (''Franklin Templeton No-Action Letter''). In the Franklin Templeton No-Action Letter, the staff stated it would not recommend that the Commission take any enforcement action under sections 12(d)(1)(A) and (B) (and other sections of the Act) if an acquiring fund relying on section 12(d)(1)(G) purchases or otherwise acquires shares of an underlying fund that, in turn, purchases or otherwise acquires shares of a central fund. The Franklin Templeton No-Action Letter also included a representation that an acquired fund's adviser would waive fees on assets invested in underlying central funds.

[422] Franklin Templeton No-Action Letter.

[423] Thrivent Financial for Lutherans and Thrivent Asset Management LLC, Staff No-Action Letter (pub. avail. Sep. 27, 2016) (''Thrivent No-Action Letter''). The circumstances of the Thrivent No-Action Letter did not involve a limitation on acquired funds exceeding the 5% limit in section 12(d)(1)(A)(ii) with respect to an investment in shares of a single central fund, and included a representation that the central funds would not charge advisory fees). *See id.* Rule 12d1–4(b)(3)(ii)(B) provides cash management flexibility by permitting an acquired fund to invest in other investment companies or private funds beyond the 10% limit if the acquired fund makes such investments in reliance on rule 12d1–1.

[424] Comment Letter of MFS Investment Management (May 2, 2019); Fidelity Comment Letter; PGIM Comment Letter (cash management); ICI Comment Letter (short-term bond funds); Thrivent Comment Letter (25% of its total assets in one or more short-term bond funds); Guggenheim Comment Letter (short-term bond funds); Dechert Comment Letter (short-term bond funds); NYC Bar Comment Letter (money market funds); Fidelity Rutland Trust Comment Letter; SIFMA AMG Comment Letter; Comment Letter of Capital Research and Management Company (Jan. 8, 2019) (''Capital Group (2) Comment Letter'').

could also be used to gain exposure to any asset class or sector.[425] Several commenters recommended that the rule permit acquired funds to invest in private funds, structured finance vehicles, and other entities that rely on sections 3(c)(1) or 3(c)(7) of the Act that are not traditionally considered pooled investment vehicles.[426] Other commenters requested an exception for acquired fund investments in ETFs.[427] While the final rule does not incorporate prior staff positions regarding acquired fund investments in central funds, the rule provides substantial flexibility for fund groups to continue to utilize central funds within the 10% Bucket. The 10% Bucket allows acquired funds to gain exposure to any asset class or sector through investments in affiliated or unaffiliated underlying investment companies and private funds without imposing many of the limitations that were associated with prior staff positions in this area.

As we discussed in the 2018 FOF Proposing Release, some existing multi-tier structures may be required to modify their investments to ensure compliance with rule 12d1–4.[428] For example, as of June 2018, we identified 231 three-tier structures for which both the first- and second-tier funds invested in other funds beyond the limits in section 12(d)(1).[429] Such multi-tier arrangements may need to restructure their holdings over time to continue to maintain the same investment, to the extent that the acquired funds in such structures invest more than 10% of their assets in underlying funds, exclusive of investments in underlying funds made pursuant to the enumerated exceptions described above.[430]

We agree with commenters that additional flexibility to enter into multi-tier arrangements could lead to efficiencies and cost savings for fund investors. However, unlimited ability to enter into multi-tier arrangements could lead to complex structures in which an acquiring fund shareholder finds it difficult to determine the nature and value of the holdings ultimately underlying his or her investment. We do not believe that a 25% limit would be appropriate for investments in underlying funds in pursuit of any investment purpose because such a limit is based on considerations related to investments in central funds for short-term cash management purposes. In addition, such a limit would be far in excess of the 10% limit that Congress enacted in 1970 in response to its concerns about ''fund holding'' companies.[431] Accordingly, rule 12d1–4 provides flexibility for acquired funds to invest in private funds, structured finance vehicles, central funds, ETFs, and other investment funds up to a 10% limit, consistent with the 10% limit set forth in section 12(d)(1). We believe that this 10% Bucket, when combined with the enumerated exceptions discussed above, will provide flexibility for beneficial multi-tier arrangements while limiting the harms that Congress sought to prevent.

4. Recordkeeping

The final rule will require the acquiring and acquired funds that participate in fund of funds arrangements in accordance with the rule to maintain and preserve certain written records for a period of not less than five years, the first two years in an easily accessible place. These records include: (i) A copy of each fund of funds investment agreement that is in effect, or was in effect in the past five years, and any amendments thereto; (ii) a written record of the relevant Fund Finding made under the rule and the basis therefor within the past five years; and (iii) the certification from each insurance company required by the rule.[432] These requirements are largely as proposed, with the addition of fund of funds investment agreement records as these agreements were not part of the proposal. Also, to match the expansion of the Fund Findings requirement, both acquiring and acquired funds will need to keep records of the applicable evaluations and findings under the final rule. We also are not adopting the proposed requirement to keep the reports provided to the board of directors regarding management company findings, as we believe that this would be duplicative with the requirements of rule 31a–1, particularly the requirements to keep minute books of directors' meetings and advisory material received from the investment adviser.[433] We did not receive comments on the recordkeeping provisions of the proposed rule.[434]

Funds and UITs currently have compliance program-related recordkeeping procedures in place that incorporate this type of retention period, and consistency with that period minimizes compliance burdens to funds related to the preservation of the records.[435] Although the retention period would differ from the required period for UIT findings under rule 22e–4 and the general recordkeeping requirements in rule 31a–2, we believe it is appropriate to have consistent recordkeeping requirements under rule 12d1–4.[436] We believe that these recordkeeping requirements allow for external examinations of compliance with this condition without placing an undue burden on the funds. Moreover, because the fund of funds investment agreement sets forth the relevant material terms of the fund of funds arrangement specific to particular acquiring funds and acquired funds, we believe it is appropriate to include it as part of a fund's recordkeeping requirements.

D. Rescission of Rule 12d1–2 and Amendment to Rule 12d1–1

1. Rescission of Rule 12d1–2

We are rescinding rule 12d1–2, as proposed, to create a more consistent and efficient regulatory framework for the regulation of fund of funds arrangements. As discussed above, section 12(d)(1)(G) allows a registered open-end fund or UIT to acquire an unlimited amount of shares of other open-end funds and UITs that are in the same ''group of investment companies.'' A fund relying on this exemption is subject to certain conditions, including

[425] *See, e.g.,* Capital Group (2) Comment Letter (describing central fund investments in investment-grade corporate bonds, mortgage-backed securities and high yield securities).

[426] ICI Comment Letter; Guggenheim Comment Letter; Dechert Comment Letter; Comment Letter of Small Business Investor Alliance, *et al.* (Feb. 28. 2019) (''SBIA Comment Letter''); FS Comment Letter; IPA Comment Letter; PIMCO Comment Letter; SIFMA AMG Comment Letter.

[427] Ropes Comment Letter; Chapman Comment Letter; ICI Comment Letter.

[428] 2018 FOF Proposing Release, *supra* footnote 6, at 150.

[429] *Id.*

[430] As noted above, because the 10% Bucket is an acquisition test, if an acquired fund holds more than 10% of its assets in other underlying funds pursuant to an existing exemptive order, the acquired fund would not be required to dispose of those holdings after the rescission of its exemptive order and the effective date of the rule. However, the acquired fund could invest additional assets in underlying funds only in accordance with the terms of the rule.

[431] *See* 1970 Amendments House Report; 1970 Amendments Senate Report *supra* footnote 417 and accompanying text.

[432] Rule 12d1–4(c).

[433] Rule 31a–1(b)(4) and (11).

[434] We received comments on the substantive elements underlying the proposed recordkeeping requirements. *See supra* section II.C.2.b (discussing proposed findings and determinations requirements and related comments).

[435] The retention period is consistent with the period provided in rule 38a–1(d).

[436] *See* rule 22e–4(c) (requiring a UIT to maintain, for the life of the UIT and for five years thereafter, a record of the determination that the portion of the illiquid investments that the UIT holds or will hold at the date of deposit that are assets is consistent with the redeemable nature of the securities it issues). *See also* Investment Company Liquidity Risk Management Programs, Investment Company Act Release No. 32315 (Oct. 13, 2016) [81 FR 82142 (Nov. 18, 2016)]; 2018 FOF Proposing Release, *supra* footnote 6, at 69.

a condition limiting the types of securities an acquiring fund can hold, in addition to the shares of funds in the same group of investment companies, to government securities and short-term paper.[437] Congress designed this limit to restrict the use of this exemption to a ''bona fide'' fund of funds, while providing the fund with a source of liquidity to redeem shares.[438]

In 2006, the Commission exercised its exemptive authority to adopt rule 12d1–2.[439] Rule 12d1–2 codified, and in some cases expanded, three types of relief that the Commission provided for fund of funds arrangements that did not conform to the section 12(d)(1)(G) limits. Specifically, rule 12d1–2 permitted a fund relying on section 12(d)(1)(G) to: (i) Acquire the securities of other funds that are not part of the same group of investment companies, subject to the limits in section 12(d)(1)(A) or 12(d)(1)(F);[440] (ii) invest directly in stocks, bonds, and other securities;[441] and (iii) acquire the securities of money market funds in reliance on rule 12d1–1.[442] Rule 12d1–2 was designed to provide a fund relying on section 12(d)(1)(G) with greater flexibility to meet its investment objective when the risks that lead to the restrictions in section 12(d)(1) are minimized.[443] The Commission stated that the investments permitted under rule 12d1–2 did not raise additional concerns under section 12(d)(1)(G) because: (i) They were not investments in funds; or (ii) they represented fund investments that are limited in scope (*i.e.,* cash sweep arrangements under rule 12d1–1) or amount (*i.e.,* up to the limit in section 12(d)(1)(A) or 12(d)(1)(F)).[444]

We have also granted exemptions that permit funds to invest in funds within the same group of investment companies as an alternative to the requirements of section 12(d)(1)(G) and rule 12d1–2.[445] Funds relying on these orders could invest in the same group of related investment companies and unaffiliated funds without regard to the limitations in sections 12(d)(1)(A) or 12(d)(1)(F). In addition, funds relying on our exemptive orders could invest to a greater extent in funds that were not part of the same group of investment companies and in other investments. Funds relying on exemptive relief also could invest in closed-end funds to a greater extent than funds relying on section 12(d)(1)(G) combined with rule 12d1–2 and could invest in other financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act, such as derivatives.[446]

Our exemptive orders include conditions that differ from the conditions in section 12(d)(1)(G) and the conditions within those orders also differ depending on whether the investment involves an acquired fund that is in the same group of investment companies.[447] The orders generally subject investments in funds that are not part of the same group of investment companies to a broader set of conditions designed to protect investors from the harms Congress sought to address by enacting section 12(d)(1).[448] Under this existing framework, substantially similar fund of funds arrangements are subject to different limitations and conditions.[449] This has resulted in an inconsistent and inefficient regulatory framework where the relief on which a fund of funds arrangement is relying is not always clear to other funds, investors, or regulators.

Commenters generally opposed the proposed rescission of rule 12d1–2.[450] Some commenters stated that rescinding rule 12d1–2 would disrupt investment strategies, opportunities, and operations, and lead to an increase in funds' compliance or investing costs.[451] Commenters also suggested, as discussed in more detail below, that the rescission of rule 12d1–2, along with the rescission of exemptive orders and withdrawal of staff letters, would impact funds' ability to utilize certain fund structures, such as three-tier central fund arrangements.[452] Several commenters suggested a number of changes to proposed rule 12d1–4 in response to the Commission's proposed rescission of rule 12d1–2.[453] For example, these commenters recommended eliminating or substantially restructuring the proposed redemption limit, exempting funds within the same group of investment companies from the proposed redemption limit, or permitting continued reliance on rule 12d1–2 for funds in the same group of investment companies.[454] In particular, two of these commenters raised specific concerns about the proposed redemption limit's impact on fund of funds arrangements if the Commission rescinds rule 12d1–2.

Some commenters recommended that the Commission retain rule 12d1–2 and codify existing exemptive orders permitting funds relying on rule 12d1–2 to enter into derivatives and financial

[437] *See* 15 U.S.C. 80a–12(d)(1)(G)(i)(II). The acquired fund also must have a policy against investing in shares of other funds in reliance on section 12(d)(1)(F) or 12(d)(1)(G) to prevent multi-tier structures, and overall distribution expenses are limited to prevent excessive sales loads.

[438] *See* Fund of Funds Investments, Investment Company Act Release No. 26198 (Oct. 1, 2003) [68 FR 58226 (Oct. 8, 2003)].

[439] *See* 2006 FOF Adopting Release, *supra* footnote 19.

[440] *See* rule 12d1–2(a)(1).

[441] *See* rule 12d1–2(a)(2). Rule 12d1–2 limits investments to ''securities.'' The Commission has issued a series of exemptive orders that allow a fund relying on section 12(d)(1)(G) to invest in financial instruments that may not be ''securities.'' These orders provide that the funds will comply with rule 12d1–2, but for the ability to invest in a portion of their assets in these other investments. *See, e.g.,* Van Eck Associates Corp, *et al.,* Investment Company Act Release Nos. 31547 (Apr. 6, 2015) [80 FR 19380 (Apr. 10, 2015)] (notice) and 31596 (May 6, 2015) (order) and related application.

[442] 17 CFR 270.12d1–2(a)(3).

[443] 2006 FOF Adopting Release, *supra* footnote 19.

[444] *Id.*

[445] *See* Janus Investment Fund, *et al.,* Investment Company Act Release Nos. 31753 (Aug. 13, 2015) (notice) and 31808 (Sept. 9, 2015) (order) and related application (''Janus Investment Fund'').

[446] A fund relying on section 12(d)(1)(G) and rule 12d1–2 could acquire no more than 3% of a closed-end fund's outstanding voting securities. A fund relying on an exemptive order could acquire an unlimited amount of the voting securities of a closed-end fund in the same group of investment companies and up to 25% of the outstanding voting securities of other closed-end funds. Further, funds are limited to investments in securities if they rely upon section 12(d)(1)(G) and rule 12d1–2. *See supra* footnote 441.

[447] *See, e.g.,* Northern Lights Fund Trust, *et al.,* Investment Company Act Release Nos. 32973 (Jan. 23, 2018) [83 FR 4081 (Jan. 29, 2018)] (notice) and 33008 (Feb. 21, 2018) (order) and related application (setting forth conditions applicable to affiliated fund of funds arrangements, including that: (1) any sales charges or service fees charged with respect to shares of acquiring funds would not exceed the limits set forth in FINRA Rule 2341; and (2) no acquired fund will acquire securities of any other investment company in excess of the limitations of section 12(d)(1) except to the extent that such acquired fund (a) acquires such securities in compliance with section 12(d)(1)(E), (b) receives such securities as a dividend or as the result of a plan of reorganization, or (c) acquires such securities pursuant to exemptive relief from the Commission permitting the acquired fund to acquire the securities of investment companies for short-term cash management purposes or to engage in interfund lending).

[448] *See supra* footnote 446 and accompanying text (regarding conditions applicable to unaffiliated acquired funds).

[449] *See supra* footnote 26.

[450] *See, e.g.,* Allianz Comment Letter; Invesco Comment Letter; Thrivent Comment Letter, PIMCO Comment Letter; Fidelity Rutland Comment Letter; Schwab Comment Letter; NYC Bar Comment Letter; PGIM Comment Letter, BlackRock Comment Letter; ABA Comment Letter; SIFMA AMG Comment Letter; Capital Group Comment Letter.

[451] *See, e.g.,* Allianz Comment Letter; Thrivent Comment Letter; PIMCO Comment Letter; ABA Comment Letter; SIFMA AMG Comment Letter.

[452] *See generally* PIMCO Comment Letter.

[453] *See, e.g.,* Allianz Comment Letter; Thrivent Comment Letter; NYC Bar Comment Letter; ABA Comment Letter; BlackRock Comment Letter; PIMCO Comment Letter; Fidelity Rutland Comment Letter; PGIM Comment Letter; SIFMA AMG Comment Letter.

[454] *See, e.g.,* NYC Bar Comment Letter; PIMCO Comment Letter; SIFMA AMG Comment Letter.

instruments.[455] As an alternative, some commenters suggested that the Commission ''grandfather'' existing fund of funds arrangements that rely on rule 12d1–2 if the Commission rescinds the rule.[456] Commenters stated that rescinding rule 12d1–2 would increase costs and operational inefficiencies by requiring existing fund of funds arrangements to either: (i) Comply with section 12(d)(1)(G) of the Act and eliminate any investments other than those permitted under the statute; or (ii) operate in accordance with rule 12d1–4 and restructure to comply with the proposed redemption limit and complex structure limitations.[457]

We continue to believe that it is necessary to rescind rule 12d1–2 in order to harmonize the overall regulatory structure and create a consistent and efficient regulatory framework for the regulation of fund of funds investments. The rescission of rule 12d1–2 will eliminate some of the flexibility of funds relying on section 12(d)(1)(G) to: (i) Acquire the securities of other funds that are not part of the same group of investment companies, subject to the limits in section 12(d)(1)(A) or 12(d)(1)(F); and (ii) invest directly in stocks, bonds, and other securities.[458] Accordingly, funds that wish to invest in funds within the same group of investment companies beyond the limits in section 12(d)(1)(A), as well as other securities and the securities of the other funds, will no longer be able to rely on section 12(d)(1)(G) and rule 12d1–2.[459] Instead, acquiring funds will have flexibility to invest in different types of funds and other asset classes under rule 12d1–4 under a single set of conditions that are tailored to address the concerns that underlie section 12(d)(1) of the Act.

We believe that this approach will enhance investor protection by subjecting more funds of funds arrangements to the conditions in rule 12d1–4. As we discussed in the 2018 FOF Proposing Release, the purpose of this rule is to streamline and enhance the regulatory framework applicable to fund of funds arrangements. As we have exercised our statutory authority to exempt fund of funds arrangements, we have created a regulatory regime where substantially similar fund of funds arrangements are subject to different conditions. The rule reflects decades of experience with fund of funds arrangements, and will subject funds that operate in accordance with it to a tailored set of conditions that we believe will help protect investors from the harms Congress sought to address by enacting section 12(d)(1) of the Act. The requirements of the rule are designed to provide investors with the benefits of fund of funds arrangements while protecting them from the historical abuses that section 12(d)(1) is designed to prevent.[460] We therefore believe that it is crucial that fund of funds arrangements follow the protections of rule 12d1–4 and are rescinding rule 12d1–2. We also are not exempting or providing other relief for existing investments for these funds for similar reasons.

We believe that the tailored conditions in rule 12d1–4 are appropriate to protect investors and create a harmonized fund of funds regulatory regime. We further believe that for fund of funds arrangements currently relying on rule 12d1–2, reliance on rule 12d1–4 will be less disruptive to their arrangements than suggested by commenters because the final rule does not include a redemption limit and permits an acquired fund to invest up to 10% of its total assets in other funds.[461] Additionally, rule 12d1–4 includes tailored conditions for fund of funds arrangements in the same group of investment companies by excepting them from the rule's control and voting conditions.

As proposed, in order to limit the hardship that the rescission of rule 12d1–2 could have on existing fund of funds arrangements, we are adopting a one-year period after the effective date before rule 12d1–2 is rescinded. We did not receive comment on this aspect of the proposed rescission of rule 12d1–2. We believe that one year is adequate time for funds relying on current rule 12d1–2 to bring their future operations into conformity with section 12(d)(1)(G) or rule 12d1–4. We also decline to exempt existing funds relying on rule 12d1–2 past this one-year period, as suggested by some commenters,[462] because it would add unnecessary complexity to the regulatory framework and potentially create an uneven playing field for funds based on differing rule conditions, as discussed above.

2. Amendment to Rule 12d1–1

We are adopting an amendment to rule 12d1–1 under the Act, as proposed, to allow funds relying on section 12(d)(1)(G) to also rely upon the rule. This provides these funds with continued flexibility to invest in money market funds outside of the same group of investment companies despite the rescission of rule 12d1–2.[463] Comments received on this aspect of the proposal supported it.[464]

We continue to believe that such investments in money market funds do not raise the concerns that underlie section 12(d)(1).[465] We also believe that retaining this flexibility will help funds in smaller complexes that do not have a money market fund as part of their fund complex invest in an unaffiliated money market fund, subject to the conditions of rule 12d1–1.[466] This limited flexibility may be less costly than complying with section 12(d)(1)(G)'s limited conditions.[467] We are therefore amending rule 12d1–1 as proposed, to provide an exemption from section 12(d)(1)(G) for an investment company to acquire the securities of a money market fund.

[455] *See, e.g.,* PIMCO Comment Letter; Fidelity Rutland Comment Letter; PGIM Comment Letter; BlackRock Comment Letter; ABA Comment Letter; SIFMA AMG Comment Letter.

[456] *See, e.g.,* Allianz Comment Letter; Thrivent Comment Letter.

[457] *See, e.g.,* PIMCO Comment Letter; ABA Comment Letter; NYC Bar Comment Letter; SIFMA AMG Comment Letter.

[458] Rule 12d1–2(a)(1) and (a)(2). In connection with our proposed amendment to rule 12d1–1 discussed below, funds relying on section 12(d)(1)(G) could continue to invest in money market funds that are not part of the same group of investment companies even with the proposed rescission of rule 12d1–2(a)(3).

[459] Funds also may continue to rely on section 12(d)(1)(F) to make smaller investments in a number of funds and section 12(d)(1)(E) to invest all of their assets in a master-feeder arrangement. *See supra* footnote 20 and accompanying text.

[460] *See* 2018 FOF Proposing Release, *supra* footnote 6.

[461] *See* NYC Bar Comment Letter (suggesting that eliminating the proposed redemption limit would address commenters' inflexibility concerns with the proposed rescission of rule 12d1–2); *see also* SIFMA AMG Comment Letter (suggesting that the Commission should exempt affiliated fund of funds arrangements from the proposed redemption limit). *See supra* section II.C.3 (discussing complex structures including general exceptions to the three-tier limitation and the 10% Bucket provision). *See infra* section V.C.1.a (discussing Form N–PORT data related to the proposed redemption limit).

[462] *See supra* footnote 456 and accompanying text.

[463] Rule 12d1–1(a) provides an exemption from section 12(d)(1)(G) for an investment company to acquire the securities of a money market fund. Rule 12d1–2, which we propose to rescind, provided the same relief.

[464] *See, e.g.,* BlackRock Comment Letter.

[465] *See* 2006 FOF Adopting Release, *supra* footnote 19, at n.23 and accompanying text.

[466] *See id.,* at section II.A.1(a).

[467] *See, e.g.,* section 12(d)(1)(G)(i)(III)(bb) (limiting combined sales charges and service fees to limits under current FINRA sales rule); section 12(d)(1)(G)(i)(IV) (requiring the acquired fund to have a policy that prohibits it from acquiring securities of registered open-end investment companies or registered UITs in reliance on section 12(d)(1)(G) or (F)).

E. Disclosures Relating to Fund of Funds Arrangements

1. Amendments to Form N–CEN

Form N–CEN is a structured form that requires registered funds to provide census-type information to the Commission on an annual basis.[468] Form N–CEN provides both the Commission and the public with enhanced and updated census-type information on a wide-range of compliance, risk assessment, and policy related matters.[469] We proposed to add a requirement to Form N–CEN that would require reporting if a management company relied on rule 12d1–4 or the statutory exception in section 12(d)(1)(G) during the reporting period. While Form N–CEN already requires a management company to report if it is a fund of funds, we proposed to collect this information in order to better assess reliance on rule 12d1–4 or the statutory exception in section 12(d)(1)(G) by management companies and to assist us with our accounting, auditing and oversight functions. We also proposed to require UITs to report if they relied on proposed rule 12d1–4 or the statutory exception in section 12(d)(1)(G) during the reporting period. In proposing this requirement, we noted that the UIT section of Form N–CEN does not currently require a UIT to identify if it is a fund of funds.[470]

Commenters that addressed the proposed amendments to Form N–CEN supported them,[471] and we are adopting these amendments to the form as proposed.[472] We believe the amendments we are adopting to the form will help us better assess reliance on rule 12d1–4, or the statutory exception in section 12(d)(1)(G). In turn, this will allow the staff to evaluate whether additional disclosure is needed. These amendments to Form N–CEN will also assist with our accounting, auditing and oversight functions, including compliance with the Paperwork Reduction Act.[473]

2. Acquired Fund Fees and Expenses

An acquiring fund is currently required to disclose the fees and expenses it incurs indirectly from investing in shares of one or more acquired funds. In Form N–1A, for example, an open-end fund investing in another fund is required to include in its prospectus fee table an additional line item titled ''Acquired Fund Fees and Expenses''.[474] Since we adopted the AFFE disclosure requirement, some have expressed concerns about the impact of this disclosure on certain acquired funds, including BDCs.[475] The 2018 FOF Proposing Release requested comment on fees and expenses, including with respect to AFFE disclosure.

Some commenters similarly expressed certain concerns about current AFFE disclosure requirements. For example, several commenters suggested that fee table disclosure should focus on a fund's operating expenses and should not incorporate AFFE.[476] Some commenters suggested eliminating the inclusion of certain investment-related expenses in fee tables in the prospectus for all types of funds, or moving AFFE disclosure to the risk factors or narrative description of a prospectus.[477] Several commenters also expressed particular concern about treating BDCs as acquired fund investments and recommended excluding BDC investments from AFFE.[478]

On the other hand, some commenters expressed general support for the current AFFE disclosure requirements in the prospectus fee table.[479] Two commenters credited AFFE disclosure for providing investors with the necessary information to understand the potential layering of fees in fund of funds arrangements and to compare similar funds and expenses.[480]

We are not addressing AFFE disclosure requirements as part of this rulemaking. Instead, we are considering modifications to AFFE disclosure as part of a broader review of how funds disclose fees in their prospectuses.[481] In this regard, in the Investor Experience Proposal, the Commission requested comment on a proposal to replace the current requirement that AFFE be included in the prospectus fee table of open-end funds regardless of the scope of investments in acquired funds with a more tailored requirement based on the percentage of assets invested in acquired funds.[482] This amendment, which the Commission proposed in conjunction with other changes to funds' prospectus fee disclosure requirements, would permit open-end funds that invest 10% or less of their total assets in acquired funds to omit AFFE from the fund's bottom line expenses in the fee table and instead disclose the amount of the fund's AFFE in a footnote to the fee table. Open-end funds that invest more than 10% of their total assets in acquired funds would continue to present AFFE as a line item

[468] *See, e.g.,* Reporting Modernization Adopting Release, *supra* footnote 56.

[469] *Id.*

[470] 2018 FOF Proposing Release, *supra* footnote 6.

[471] *See, e.g.,* Federated Comment Letter; Voya Comment Letter; ICI Comment Letter.

[472] Items C.7.l. and C.7.m. of Form N–CEN (for management companies) and Items F.18 and F.19 of Form N–CEN (for UITs).

[473] We are also making conforming changes to the title of Item C.7. of Form N–CEN to reflect that the item includes a statutory exemption. *See* amendment to Item C.7. (''Reliance on certain statutory exemption and rules. Did the Fund rely on the following statutory exemption or any of the rules under the Act during the reporting period? (check all that apply)'').

[474] *See* Instruction 3(f)(i) to Item 3 of Form N–1A. Other forms, including N–2, N–3, N–4 and N–6 similarly require disclosure relating to AFFE. *See, e.g.,* Instruction 10.a to Item 3.1 of Form N–2. A fund may include AFFE in the line item for ''Other Expenses'' rather than in a separate line item if the aggregate expenses attributable to acquired funds does not exceed 0.01%

[475] *See, e.g.,* ICI Comment Letter to File No. S7–12–18, *https://www.sec.gov/comments/s7-12-18/s71218-4560073-176206.pdf;* House Report to [Omnibus Spending Bill/H.R. 3280] (July 17, 2017), *https://www.congress.gov/congressional-report/115th-congress/house-report/234/1?overview=closed;* Fidelity Management & Research Company, Petition for Rulemaking (Dec. 28, 2006), *https://www.sec.gov/rules/petitions/2006/petn4-528.pdf* (''Fidelity Petition''); *see also* Comment Letter of the Coalition for Business Development to File No. 812–15065, *https://www.sec.gov/comments/s7-27-18/s72718-6668087-203950.pdf* (Jan. 16, 2020); Comment Letter of Brett Palmer, President, SBIA, et al. to File No. S7–27–18, *https://www.sec.gov/comments/s7-27-18/s72718-6892436-211002.pdf* (Feb. 28. 2020) (''SBIA Comment Letter 2''); Comment Letter of Gwen Moore, Steve Stivers, Brad Sherman and Bill Huizenga, Members of Congress to File No. S7–27–18, *https://www.sec.gov/comments/s7-27-18/s72718-6913308-211215.pdf* (March 5, 2020).

[476] *See, e.g.,* ICI Comment Letter; PIMCO Comment Letter; Invesco Comment Letter; Chapman Comment Letter; SIFMA AMG Comment Letter.

[477] *See, e.g.,* PIMCO Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter.

[478] *See, e.g.,* SBIA Comment Letter (stating that AFFE disclosure distorts an acquiring fund's expense ratio and has disproportionately harmed BDCs because this disclosure requirement has led to funds no longer investing in BDCs and several index providers dropping BDCs from their indexes); Chapman Comment Letter; Nuveen Comment Letter; FS Comment Letter; Chamber of Commerce Comment Letter; Comment Letter of Alternative Credit Council (May 2, 2019) (stating that AFFE disclosure overstates the costs of a fund investing in a BDC because it essentially requires double-counting of a BDC's operating expenses and that because AFFE disclosure has effectively resulted in funds no longer investing in BDCs, it has restricted the market for BDCs, limited institutional ownership of BDCs, and reduced investor choice); ICI Comment Letter; John Hancock Comment Letter.

[479] Kauff Comment Letter at 2; Rand Comment Letter at 1–2; Cooper Comment Letter at 1–2.

[480] Kauff Comment Letter; Rand Comment Letter.

[481] *See* Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, Investment Company Act Release No. 33963 (Aug. 5, 2020) (''Investor Experience Proposal''). The Commission, in proposing the AFFE disclosure modifications in the Investor Experience Proposal, considered comments received in connection with the 2018 FOF Proposing Release. *Id.,* at paragraph accompanying n. 608. The comment period for the Investor Experience Proposal closes 60 days after its publication in the **Federal Register**.

[482] *Id.* at paragraph accompanying n. 615.

in the prospectus fee table, as they do today. The Commission also requested comment on whether to amend AFFE disclosure requirements similarly for other types of registered investment companies.

F. Compliance Dates

The Commission is providing for a transition period for the amendments to Form N–CEN. Specifically, we are adopting compliance dates for our amendment to Form N–CEN of January 19, 2022, one year following the amendment's effective date. All reports on this form filed on or after the compliance date must comply with the amendments. Based on the staff's experience, we believe that this will provide adequate time for affected funds to compile and review the information that must be disclosed.

III. Rescission of Exemptive Relief; Withdrawal of Staff Letters

Pursuant to our authority under the Act to amend or rescind our orders when necessary or appropriate to the exercise of the powers conferred elsewhere in the Act, we are rescinding, as proposed, the exemptive relief permitting fund of funds arrangements that fall within the scope of rule 12d1–4.[483] As discussed in more detail below, exemptive relief granted to fund of funds arrangements outside the scope of the rule is not being rescinded.

We proposed to rescind all orders granting relief from sections 12(d)(1)(A), (B), (C), and (G) of the Act with one limited exception. We did not propose to rescind the exemptive orders providing relief from section 12(d)(1)(A) and (B) granted to allow certain interfund lending arrangements.[484] Interfund lending arrangements allow certain funds within the same complex to lend money to and borrow money from each other for temporary purposes and subject to certain conditions. While such arrangements require exemptive relief from sections 12(d)(1)(A) and (B), among other provisions, we stated that they do not result in the pyramiding of funds or the related potential abuses that the proposed rule was designed to address, and thus they were not included within the scope of the proposed rule.

We also proposed to rescind the exemptive relief from sections 12(d)(1)(A) and (B) that has been included in our ETF and ETMF orders.[485] We believed that rescinding this fund of funds relief in the ETF and ETMF orders, as well as more generally, would establish a transparent regulatory framework for these arrangements. As discussed in the 2018 FOF Proposing Release, we expected that the need to comply with the requirements of proposed rule 12d1–4, as opposed to their orders, would not significantly negatively affect the operations of most existing fund of funds arrangements.[486]

Commenters had mixed reactions to our proposal to rescind existing fund of funds exemptive orders. Several commenters supported the proposed rescission of exemptive orders in connection with the adoption of rule 12d1–4, citing the benefits of a standardized rule.[487] Many other commenters requested that we not rescind existing fund of funds exemptive orders, and instead codify and expand on existing prior exemptive orders.[488] These commenters stated that our proposal would eliminate a fund's ability to rely on existing fund of funds relief and could result in undue costs and burdens, including potential restructuring of existing arrangements.

Other commenters suggested the Commission take a tailored approach in order to limit disruption to existing fund of funds arrangements.[489] For example, one commenter requested we rescind only the exemptive orders described in the 2018 FOF Proposing Release.[490] Many commenters requested additional specificity as to which exemptive orders would be withdrawn, and whether the Commission intended to withdraw relief from provisions of the Act other than section 12(d)(1) in such exemptive orders.[491]

As discussed in more detail below, several commenters requested that the Commission expand the rule to incorporate individualized relief set forth in certain exemptive orders.[492] Alternatively, some commenters suggested that the Commission preserve existing orders, and allow current recipients of exemptive relief to follow the conditions of their relief rather than relying on the rule.[493] One commenter suggested that the Commission give the holders of exemptive orders at least a one-year period to transition operations or obtain new exemptive relief.[494]

As proposed, and as discussed in more detail below, we are rescinding the fund of funds exemptive orders that fall within the scope of rule 12d1–4. Specifically, we are rescinding exemptive relief that permits investments in funds beyond the limits in 12(d)(1)(A), (B), or (C) of the Act, other than in circumstances that we believe are outside the scope of rule 12d1–4 as discussed below. We are also rescinding exemptive relief under section 12(d)(1)(G) that permits an affiliated fund of funds to invest in assets that are beyond the scope of that statutory provision. We continue to believe that rescinding these orders will help to create a consistent framework for fund of funds arrangements, subject to conditions that appropriately address the concerns underlying section 12(d)(1), including the prevention of overly complex structures for funds of funds. In order to limit the hardship that revocation of these orders could have on existing fund of funds arrangements, however, we are adopting a one-year period after the effective date before rescission to give acquiring and acquired funds relying on these exemptive orders time to conform their operations with the requirements of the rule and rule amendments.

Fund of funds exemptive relief that falls outside the scope of rule 12d1–4, as well as the relevant portions of fund of funds exemptive orders that grant relief for provisions in the Act outside of the scope of this rulemaking, will remain in place. For example, we have issued several exemptive orders that

[483] *See* section 38(a) of the Investment Company Act (15 U.S.C. 80a–37(a)).

[484] *See* 2018 FOF Proposing Release, *supra* footnote 6, at 95.

[485] Some of the exemptive orders we have issued to ETFs include relief permitting ETFs to use certain master-feeder arrangements. We rescinded other master-feeder fund relief generally, while continuing to permit ETF master-feeder arrangements to rely on that relief as part of the implementation of rule 6c-11. *See* 2019 ETF Adopting Release, *supra* footnote 25. In addition, we understand that existing ETMFs currently rely on the master-feeder relief in the orders and did not propose to rescind that relief. *See, e.g.,* Eaton Vance Management, et al., Investment Company Act Release Nos. 31333 (Nov. 6, 2014) (notice) and 31361 (Dec. 2, 2014) (order) (''Eaton Vance Order'').

[486] 2018 FOF Proposing Release, *supra* footnote 6, at 96. *See also* section II.D.

[487] *See, e.g.,* MFDF Comment Letter; Morningstar Comment Letter; TRP Comment Letter.

[488] *See, e.g.,* Nationwide Comment Letter; ICI Comment Letter; Federated 2 Comment Letter; Allianz Comment Letter; Fidelity Fixed Income Trustees Comment Letter; Fidelity Comment Letter.

[489] John Hancock Comment Letter; Federated Comment Letter; TRP Comment Letter.

[490] NYC Bar Comment Letter.

[491] *See, e.g.,* Nationwide Comment Letter; ICI Comment Letter; Voya Comment Letter; TRP Comment Letter; Federated Comment Letter; NYC Bar Comment Letter; Federated Comment Letter; Dechert Comment Letter; Chamber of Commerce Comment Letter.

[492] Nationwide Comment Letter; Allianz Comment Letter; DPW Comment Letter; Voya Comment Letter; Capital Group Comment Letter; Fidelity Comment; NYC Bar Comment Letter; PIMCO Comment Letter; PGIM Comment Letter; Federated 2 Comment Letter.

[493] *See, e.g.,* Allianz Comment Letter; PGIM Comment Letter; ABA Comment Letter; Fidelity Fixed Income Trustees Comment Letter; Fidelity Rutland Comment Letter; John Hancock Comment Letter.

[494] NYC Bar Comment Letter.

provide relief from sections 17(a) and 17(d) of the Act and rule 17d–1 under the Act that allow a registered fund to invest in private funds.[495] We are not rescinding the relief from section 17(a) and under section 17(d) and rule 17d–1 granted in these orders. Similarly, we are not rescinding the portions of certain funds of funds exemptive orders that grant relief from section 17(d) of the Act and rule 17d–1 under the Act to enter into fee sharing agreements to avoid duplicative fees.[496] In addition, to the extent we rescind 12(d)(1) relief, we are also rescinding any related 17(a) relief for the acquisition and redemption of fund shares by another fund. We are not, however, rescinding 17(a) relief permitting sales or redemptions of fund shares in-kind or portfolio transactions between two funds.

The major topical areas of fund of funds exemptive relief that are within the scope of rule 12d1–4 are as follows:

Standard Fund of Funds Relief. Our exemptive relief relating to standard fund of funds arrangements generally grants exemptions from sections 12(d)(1)(A), (B), and (C) of the Act and sections 17(a)(1) and (2) of the Act to permit acquiring funds to invest in acquired funds in excess of the limits of in section 12(d)(1) of the Act.[497] This relief is rescinded, one year from the effective date of the rule.

Fund of Funds Relief for ETFs and ETMFs. As proposed, the exemptive relief from sections 12(d)(1)(A) and (B) that has been included in our ETF and ETMF orders is rescinded, one year from the effective date of the rule.

ETFs Relying on Rule 6c–11. In 2019, we adopted rule 6c–11 under the Investment Company Act to permit ETFs that satisfy certain conditions to operate without the expense and delay of obtaining an exemptive order from the Commission under the Act.[498] In connection with that rulemaking, we rescinded those portions of certain ETF exemptive orders that grant relief related to the formation and operation of an ETF, but we did not rescind the relief provided to ETFs from section 12(d)(1) and sections 17(a)(1) and (a)(2) under the Act related to fund of funds arrangements involving ETFs. The fund of funds exemptive relief for these ETFs is rescinded as well.[499]

Fund of Funds Relief for Non-Transparent ETFs and ETMFs. We also have granted exemptive relief permitting certain actively managed ETFs to operate without being subject to the daily portfolio transparency condition included in other actively managed ETF orders (''non-transparent ETFs'').[500] These orders include relief from sections 12(d)(1)(A) and (B) of the Act to permit certain fund of funds arrangements. We also have granted relief from sections 12(d)(1)(A) and (B) permitting ETMFs to be an acquired fund in a fund of funds arrangement.[501] We believe that non-transparent ETFs and ETMFs raise the same concerns regarding the pyramiding of funds and the related potential abuses that the rule is designed to address. As a result, relief under section 12(d)(1)(A) and (B) for non-transparent ETFs and ETMFs is rescinded as proposed.[502]

Fund of Funds Direct Investment Relief. We have granted exemptive relief to permit fund of funds arrangements that rely on section 12(d)(1)(G) of the Act to invest in assets other than funds within the same group of investment companies, government securities, and short-term paper. Certain exemptive relief granted prior to the adoption of rule 12d1–2 in 2006 permitted funds of funds relying on section 12(d)(1)(G) to invest in securities and other financial instruments.[503] Some exemptive orders granted after the adoption of rule 12d1–2 provide relief from rule 12d1–2(a) to the extent necessary to permit an acquiring fund that relies on section 12(d)(1)(G) of the Act to invest in financial instruments that may not be ''securities.''[504] Although some commenters requested we retain the relief for direct investments,[505] we are rescinding this relief, one year from the effective date of the rule. As discussed above in section II.D, we are rescinding rule 12d1–2 in order to create a more consistent and efficient regulatory framework for the regulation of fund of funds arrangements. We similarly believe that rescinding the direct investment exemptive relief will establish an appropriate, consistent framework for the regulation of these fund of funds arrangements by subjecting them to the conditions of rule 12d1–4 if they continue to invest in assets other than those permitted by section 12(d)(1)(G) of the Act.

Fund of Funds Affiliated Structures. The Commission granted certain exemptive relief to permit an open-end fund or UIT to invest in other open-end funds and UITs that are in the ''same group of investment companies'' in excess of the limits in section 12(d)(1), subject to certain enumerated conditions.[506] Some exemptive orders

[495] *See, e.g.,* Aberdeen Asset Management Inc., et al., Investment Company Act Release Nos. 33058 (March 27, 2018) (notice) and 33080 (April 24, 2018) (order).

[496] *See, e.g.,* Lord Abbett Investment Trust, et al., Investment Company Act Release Nos. 23088 (March 27, 1998) (notice) and 23122 (April 21, 1998) (order) (granting relief for, among other things, a servicing arrangement under which one or more of the applicant funds may pay a portion of the administrative expenses of another applicant fund).

[497] The standard fund of funds orders grant an exemption from sections 12(d)(1)(A) and 12(d)(1)(B). *See, e.g.* Aberdeen Asset Management Inc., et al., Investment Company Act Release Nos. 28429 (Sept. 30, 2008) (notice) and 28475 (Oct. 28, 2008) (order). A subcategory of these standard fund of funds exemptive orders also grant additional relief under section 12(d)(1)(C) to permit investment in closed-end funds beyond the limits imposed by section 12(d)(1)(C). *See, e.g.,* Ares Credit and Income Trust and Ares Capital Management III LLC, Investment Company Act Release Nos. 33243 (Sept. 21, 2018) (notice) and 33275 (Oct. 17, 2018) (order). The rescission of standard fund of funds exemptive orders applies to the orders that grant additional relief under section 12(d)(1)(C), as well, since that relief is within the scope of rule 12d1–4.

[498] 2019 ETF Adopting Release, *supra* footnote 25, at 8.

[499] *Id.* We also stated that ETFs relying on rule 6c–11 that do not have exemptive relief from sections 12(d)(1)(A) and (B) may enter into fund of funds arrangements as set forth in recent ETF exemptive orders, provided that such ETFs satisfy the terms and conditions for fund of funds relief in those orders. The 2019 ETF Adopting Release noted that this position would be available only until the effective date of a rule permitting registered funds to acquire the securities of other registered funds in excess of the limits in section 12(d)(1), including rule 12d1–4 if adopted. *See id.* at 130–133. In order to give any ETFs relying on this position sufficient time to come into compliance with rule 12d1–4, however, this position will be available for a one-year period following the effective date of rule 12d1–4.

[500] Because these non-transparent ETFs do not provide daily portfolio transparency, they do not meet the conditions of rule 6c–11. *See* 2019 ETF Adopting Release, *supra* footnote 25, at text accompanying n. 192.

[501] *See, e.g.,* Eaton Vance Order, *supra* footnote 485.

[502] *See supra* footnote 485 noting that master-feeder relief for ETMFs will not be rescinded.

[503] *See, e.g.,* Nations Fund Trust, Investment Company Act Release Nos. 24781 (Dec. 1, 2000) (notice) and 24804 (Dec. 27, 2000) (order) (permitting a fund to invest in funds in the same group of investment companies and in other securities (not issued by another fund)).

[504] *See, e.g.,* Context Capital Advisors, LLC, et al., Investment Company Act Release Nos. 31689 (June 24, 2015) and 31720 (July 21, 2015). As discussed in more detail below, certain staff no-action letters in connection with this rulemaking, including Northern Lights Fund Trust, SEC Staff No-Action Letter (June 29, 2015) (''Northern Lights Letter'') will be withdrawn. The Northern Lights Letter permits an affiliated fund of funds arrangement relying on section 12(d)(1)(G) and rule 12d1–2 to invest a portion of its assets in other financial instruments (*e.g.,* derivatives that are not securities under the Act), consistent with its investment objectives, policies and restrictions.

[505] *See, e.g.,* Allianz Comment Letter.

[506] Some of these orders pre-date the implementation of section 12(d)(1)(G), while other orders also included this relief for certain affiliated fund of funds arrangements after the implementation of section 12(d)(1)(G). *See, e.g.,* Franklin Templeton Fund Manager, *et al.,* Investment Company Act Release Nos. 21964 (May 20, 1996) (notice) and 22022 (June 17, 1996) (order); Aberdeen Asset Management Inc., *et al.,* Investment Company Act Release Nos. 28429 (Sept. 30, 2008) (notice) and 28475 (Oct. 28, 2008) (order). *See also*

Continued

also permitted funds of funds to invest in an affiliated closed-end fund.[507] As with the standard fund of funds relief, we are rescinding the affiliated structure relief. These fund of funds arrangements may rely on section 12(d)(1)(G) or rule 12d1–4 to the extent they intend to purchase other funds in the same group of funds beyond the limits of section 12(d)(1). Additionally, although several commenters requested that the Commission not rescind certain exemptive relief that allows an acquired fund's investment in short-term bond funds for cash management or collateral management purposes,[508] rule 12d1–4 provides appropriate flexibility for funds to invest for these purposes. Specifically, rule 12d1–4 permits an acquiring fund to invest in any acquired fund in excess of the statutory limits pursuant to the conditions of the rule. Further, rule 12d1–4 provides an exception from the rule's general prohibition against three tiers to permit an acquired fund to invest in an underlying fund pursuant to rule 12d1–1 in excess of the statutory limits, and provides the 10% Bucket, which permits an acquired fund to invest up to 10% of its assets in other investment companies for any investment purposes. Rule 12d1–4 limits the potential for confusing structures and duplicative fees, while providing the flexibility of the 10% Bucket. Accordingly, we believe it is appropriate to rescind this relief, one year from the effective date of the rule. For similar reasons, we believe it is appropriate to rescind the exemptive relief that acquired funds have relied on to invest in ''central funds.'' [509] We believe that the 10% Bucket provided in rule 12d1–4, when combined with the enumerated exceptions discussed above, will provide appropriate flexibility for beneficial multi-tier arrangements while limiting the harms that Congress sought to prevent. Accordingly, the central funds exemptive relief falls within the scope of rule 12d1–4 and is rescinded, one year from the effective date of the rule.[510] As discussed above, some existing multi-tier structures, including ''central funds'' arrangements that currently rely on existing exemptive relief, may be required to modify their investments to ensure compliance with rule 12d1–4.[511] However, unlimited ability to enter into multi-tier arrangements could lead to complex structures in which an acquiring fund shareholder finds it difficult to determine the nature and value of the holdings ultimately underlying his or her investment.

Captive Funds. One commenter requested that the Commission retain exemptive orders for fund of funds arrangements that are captive to an affiliated managed account program.[512] This commenter stated these kinds of captive funds of funds are simply conduits that advisers use to deliver a more efficient range of investment strategies and achieve a more consistent allocation of investment strategies across these accounts. We recognize that rescinding such exemptive relief may cause fund of funds arrangements that are captive to an affiliated managed account program to restructure to comply with the conditions of rule 12d1–4.[513] However, rule 12d1–4 provides appropriate flexibility and conditions for affiliated fund of funds structures, including structures that are captive to an affiliated managed account program. Accordingly, such exemptive relief is rescinded, one year from the effective date of the rule.

We have also given relief from section 12(d)(1) in certain circumstances that we believe are outside the scope of rule 12d1–4. The major topical areas section 12(d)(1) exemptive relief that we believe are outside the scope of rule 12d1–4 are as follows:

Interfund Lending. As proposed, we are not rescinding the exemptive relief from section 12(d)(1)(A) and (B) granted to allow certain interfund lending arrangements. Commenters generally agreed with this approach.[514] We continue to believe that these arrangements do not result in the pyramiding of funds or the related potential abuses that rule 12d1–4 is designed to address.

Affiliated Insurance Fund Relief. Commenters requested more clarity with respect to certain orders allowing insurance funds to invest in fixed income instruments issued by affiliates. For example, one commenter requested clarification regarding the status of its 2002 exemptive relief, which permits its funds of funds to invest in affiliated and unaffiliated underlying funds, other securities, and a fixed interest contract issued by its affiliate.[515] Another commenter similarly requested clarification whether we are rescinding its exemptive relief, a portion of which allows funds to invest in a guaranteed rate investment contract issued by an affiliate.[516] The orders cited by these commenters grant exemptions from 12(d)(1)(A) and 12(d)(1)(B), as well as from section 17(a) for the purchase of the guaranteed rate investment contract issued by an affiliate. As described above, we are rescinding only the portion of the exemptive orders granting fund of funds relief that falls within the scope of rule 12d1–4. We agree with commenters that the relief granted under sections 6(c) and 17(b) permitting investment in a fixed income instrument issued by an affiliate is distinct from the fund of funds relief granted in these orders. As noted above, we are not rescinding relief under section 17 when the relief does not implicate fund of funds arrangements. Accordingly, we are not rescinding this portion of the exemptive relief, which is unrelated to the fund of funds exemptive relief.

Transaction-Specific Relief. From time to time, we have granted exemptive relief to funds under section 12(d)(1) in order to engage in a transaction that might otherwise violate such provision.

supra section II.B for a general discussion of exemptive relief related to affiliated structures.

[507] *See, e.g.,* Sierra Asset Management Portfolios, *et al.,* Investment Company Act Release Nos. 22842 (Oct. 7, 1997) (notice) and 22869 (Oct. 31, 1997) (order).

[508] *See* PGIM Comment Letter (referring to its exemptive order permitting acquired funds (and acquiring funds) to invest in a public or private short-term bond fund for cash management purposes).

[509] *See supra* footnote 421 and accompanying text describing central funds. *See also* PIMCO Comment Letter (referring to PIMCO Funds, et al., Investment Company Act Release Nos. 25220 (Oct. 22, 2001) (notice) and 25272 (Nov. 19, 2001) (order)). *See also supra* footnote 424 for commenters addressing central fund arrangements, including related to the Thrivent No-Action Letter.

[510] As discussed in more detail below, certain staff no-action letters in connection with this rulemaking, including Franklin Templeton Investments, SEC Staff No-Action Letter (Apr. 3, 2015) (''FTI Letter'') will be withdrawn. The FTI Letter permits underlying funds to rely on 12(d)(1)(G) to invest in a central fund that invests in floating rate securities.

[511] *See* section II.C.3.d, noting that as of June 2018, we identified 231 three-tier structures for which both the first- and second-tier funds invested in other funds beyond the limits in section 12(d)(1) that may need to restructure their holdings over time to continue to maintain the same investment, to the extent that the acquired funds in such structures invest more than 10% of their assets in underlying funds, exclusive of investments in underlying funds that are made pursuant to the enumerated exceptions described above; *see also* 2018 FOF Proposing Release, *supra* footnote 6, at 150.

[512] Fidelity Comment Letter (referring to Fidelity Rutland Square Trust, et al., Investment Company Act Release Nos. 28259 (Apr. 30, 2008) (notice) and 28287 (May 28, 2008) (order)).

[513] *See* section V.C.1.ii for an analysis of the anticipated benefits and costs of rescinding exemptive orders; *see also* section V.D.1 for the economic analysis of retaining existing exemptive orders.

[514] *See, e.g.,* Voya Comment Letter.

[515] Nationwide Comment Letter (referring to Nationwide Life Insurance Co., Investment Company Act Release Nos. 25492 (Mar. 21, 2002) (notice) and 25528 (Apr. 16, 2002) (order)).

[516] Voya Comment Letter (referring to ING Partners Inc., et al., Investment Company Release Nos. 27116 (Oct. 12, 2005) (notice) and 27142 (Nov. 8, 2005) (order).

In many cases, this relief relates to fund reorganizations.[517] This transaction-specific relief does not involve ongoing fund of funds arrangements where the concerns underlying section 12(d)(1) are most pronounced and where the conditions of rule 12d1–4 will serve to protect investors against those concerns. As a result, we do not believe it is necessary to rescind such relief.

Grantor Trusts. One commenter requested we retain an exemptive order pertaining to current and future automatic common exchange security (''ACES'') trusts.[518] ACES trusts are limited-life, grantor trusts. We have previously granted exemptive relief to funds and private funds to invest in a grantor trust (typically structured as a closed-end fund) in excess of the section 12(d)(1) limits, along with related relief.[519] The grantor trusts in this line of exemptive orders are not marketed to provide investors with either professional investment asset management or the benefits of investment in a diversified pool of assets. As a result, they do not result in the pyramiding of funds or the related potential abuses that the rule is designed to address, and therefore we are not rescinding this relief.

Fund of Funds Arrangements with Managed Risk Provision and other Relief Related to Section 12(d)(1)(E). One commenter requested that we not rescind a fund of funds exemptive order that permits a ''managed risk'' fund structure.[520] This commenter stated that the relief allows an insurance series fund that invests in one underlying fund in excess of the limits in section 12(d)(1)(A) also to invest in cash, cash equivalents, and certain hedging instruments in connection with a risk-management strategy that is specifically designed to reduce the volatility of the acquiring fund. Because of the fund's investment in certain hedging instruments, the fund cannot rely on section 12(d)(1)(E) of the Act for purposes of an exception from the general prohibition against three tiers. We are not rescinding exemptive relief from sections 12(d)(1)(A) and (B) of the Act to the extent that the relief effectively allows a feeder fund to rely on section 12(d)(1)(E) without complying with certain aspects of section 12(d)(1)(E) of the Act. Accordingly, we believe this relief is outside the scope of rule 12d1–4 with respect to the treatment of a fund for purposes of the three-tier prohibition.[521]

We continue to believe that the one-year period for the termination of our fund of funds exemptive relief is sufficient to give adequate time for funds relying on impacted exemptive orders to bring their future operations into conformity with section 12(d)(1)(G) or rule 12d1–4.

The Commission does not believe that it is necessary to give individual hearings to the holders of the prior orders or to any other person.[522] This rule is prospective in effect and is intended to set forth for the entire industry the Commission's exemptive standards for these types of fund of funds arrangements. Funds are able to request Commission approval to operate as a fund of funds that does not meet the requirements of the rule.

As discussed in the 2018 FOF Proposing Release, our staff has previously stated that it would not recommend that the Commission take enforcement action in certain situations relating to section 12(d)(1). The 2018 FOF Proposing Release noted that the staff in the Division of Investment Management were reviewing staff letters relating to section 12(d)(1) to determine whether any such letters should be withdrawn in connection with any adoption of this rule. As we noted in the 2018 FOF Proposing Release, some of the letters may be moot, superseded, or otherwise inconsistent with the rule and, therefore, will be withdrawn.

The staff of the Division of Investment Management has issued a line of letters stating that the staff would not recommend enforcement action to the Commission under sections 12(d)(1)(A) or (B) of the Act if a fund acquires the securities of other funds in certain circumstances. We understand that certain industry practices have developed in connection with these letters. In particular, we understand that: (i) Some funds have created three-tier master-feeder structures for tax management, cash management, or portfolio management purposes; (ii) other funds have invested in assets that may not be securities, but have otherwise complied with the restrictions in rule 12d1–2;[523] (iii) sponsors of UITs have deposited units of existing trusts into portfolios of future UIT series; (iv) foreign pension funds and profit sharing funds, and foreign subsidiaries and feeder funds have invested in other funds beyond the limits of section 12(d)(1); and (v) foreign funds have invested in other funds under section 12(d)(1) to the same extent as private funds.

In the 2018 FOF Proposing Release, we asked that commenters detail their concerns with the withdrawal of any of the letters. Commenters stated preferences for retaining certain no-action letters, including those that relate to three-tier structures, subject to the circumstances described in those letters.[524] Some commenters requested that no-action letters relating to a foreign fund that invests in a U.S. fund to comply with section 12(d)(l)(A)(i) but not sections 12(d)(l)(A)(ii) and (iii) not be withdrawn.[525] Other commenters suggested that certain no-action letters be retained related to the status of investment vehicles domiciled outside the U.S., where such foreign funds are

[517] *See, e.g.,* Allied Capital Corporation, et al., Investment Company Act Release Nos. 22902 (Nov. 21, 1997) (notice) and 22941 (order) (granting relief under sections 12(d)(1)(A) and 12(d)(1)(C), among other provisions, to allow for the acquisition of investment company subsidiaries in a merger).

[518] DPW Comment Letter (citing Goldman, Sachs & Co., Investment Company Act Release Nos. 32460 (Jan. 31, 2017) (notice) and 32514 (Feb. 28, 2017) (order) (''Goldman ACES Order'')).

[519] *See, e.g.,* Goldman ACES Order; *see also* J.P. Morgan Securities Inc., Investment Company Act Release Nos. 24060 (Sept. 29, 1999) (notice) and 24112 (Oct. 26, 1999) (order).

[520] *See* Capital Group Comment Letter (referring to the ''managed risk fund provision'' in American Funds Insurance Series, et al., Investment Company Act Release Nos. 31677 (June 17, 2015) (notice) and 31715 (July 14, 2015) (order)).

[521] In addition, we did not proposed to rescind exemptive relief related to section 12(d)(1)(F) and are not doing so. *See* FOF Proposing Release *supra* footnote 6 at 95.

[522] *See also id.* at 97 (stating that ''The Commission does not believe that it is necessary to give individual hearings to the holders of the prior orders or to any other person.'').

[523] The Commission has previously issued exemptive orders to funds that rely on section 12(d)(1)(G) to allow those funds to invest in futures contracts and other financial instruments. *See, e.g.,* KP Funds, *et al.,* Investment Company Act Release Nos. 30545 (June 3, 2013) [78 FR 34413 (June 7, 2013)] (notice) and 30586 (July 1, 2013) (order); Financial Investors Trust and Hanson McClain Strategic Advisors, Inc., Release Nos. 30521 (May 15, 2013) [78 FR 30346 (May 22, 2013)] (notice) and 30554 (order). Following those orders, the staff of the Division of Investment Management issued a no-action letter stating that it would not recommend enforcement action to the Commission under section 12(d)(1)(A) or (B) of the Act against a fund of funds that meets all of the provisions of section 12(d)(1)(G) and rule 12d1–2, except to the extent that it invests in assets that might not be securities under the Act. *See, e.g.,* Northern Lights Letter *supra* footnote 504.

[524] *See, e.g.,* Thrivent Comment Letter; ICI Comment Letter.

[525] Vanguard Comment Letter. The Commission previously stated that a foreign fund that uses U.S. jurisdictional means in the offering of securities it issues and relies on section 3(c)(1) or 3(c)(7) of the Act will be treated as a private fund for purposes of section 12(d)(1). *See* 2018 FOF Proposing Release, at footnote 52, *citing* ''Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers,'' Investment Advisers Act Release No. 3222, at note 294 and accompanying text (June 22, 2011) [76 FR 39646 (July 6, 2011)]. Staff no-action letters stating that the staff would not recommend enforcement action if a foreign fund purchases securities of U.S. funds in excess of the limits of section 12(d)(1) under certain facts and circumstances will not be withdrawn. *See, e.g.,* Dechert LLP, SEC No-Action Letter (pub. avail. Aug. 4. 2009).

acquired funds in fund of funds arrangements.[526] Commenters expressed views in favor of retaining no-action letters related to investments in three tier ''central fund'' structures.[527] Finally, other commenters requested that the staff publicly indicate specifically which no-action letters would be withdrawn.[528]

As a result of these considerations, the no-action letters stating that the staff would not recommend an enforcement action under specific circumstances related to section 12(d)(1) will be withdrawn one year from the effective date of the final rule. Importantly, as recognized above, the final rule provides a consistent and rules-based mechanism for fund of funds arrangements. As with the rescission of fund of funds exemptive orders, the withdrawal of staff no-action letters will include only those letters that fall within the scope of rule 12d1–4. With respect to comments asking for specificity as to which no-action letters will be withdrawn, we refer commenters to the resource provided on the Division of Investment Management's website.[529]

IV. Other Matters

Pursuant to the Congressional Review Act,[530] the Office of Information and Regulatory Affairs has designated this rule a ''major rule,'' as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

V. Economic Analysis

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(c) of the Investment Company Act states that when the Commission is engaging in rulemaking under the Investment Company Act and is required to consider or determine whether the action is necessary or consistent with the public interest, the Commission shall consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors. The following analysis considers, in detail, the potential economic effects that may result from the final rule,[531] including the benefits and costs to investors and other market participants as well as the broader implications of the final rule for efficiency, competition, and capital formation.

A. Introduction

Rule 12d1–4 will allow funds to acquire the securities of another fund in excess of the limits in section 12(d)(1) of the Act without obtaining an exemptive order from the Commission. We are also rescinding rule 12d1–2 under the Act and certain exemptive relief, and amending rule 12d1–1 and Form N–CEN.[532]

The final rule will affect funds' investment flexibility, increase regulatory consistency and efficiency, and eliminate the need for acquiring and acquired funds to obtain an exemptive order from the Commission and incur the associated costs and delays. At the same time, the final rule will impose one-time costs on funds that will need to assess whether their operations are consistent with the final rule. In addition, the conditions in rule 12d1–4 will impose certain ongoing costs on funds, such as compliance, monitoring, and recordkeeping costs. Finally, certain funds will be required to restructure additional investments in other funds and incur the associated costs, such as transaction costs, to ensure compliance with the final rule.

B. Economic Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the fund market and the current regulatory framework for funds of funds.

1. Current State of the Funds Market

To establish a baseline for the economic analysis of the final rule, we provide descriptive statistics on the current state of the fund of funds market. In particular, we provide descriptive statistics on funds, investment advisers, sponsors, and depositors of funds, and fund investors because these are the persons that likely will be affected by the final rule.

First, we provide descriptive statistics on the number and size of funds and funds of funds.[533] We provide these statistics not only for funds of funds but also for single-tier funds to provide an understanding of the fund market as a whole and because the final rule will affect both current funds of funds and single-tier funds that may consider a fund of funds structure in the future. Master-feeder funds created in reliance on section 12(d)(1)(E) and funds that only acquire securities of money market funds in reliance on rule 12d1–1 are excluded from our analysis because these fund of funds structures are beyond the scope of rule 12d1–4.

Table 1 below shows the number and size of all funds and acquiring funds of funds using data from Form N–CEN filings as of May 2020.[534] A fund of

[526] Ropes Comment Letter (citing Touche, Remnant & Co., SEC No-Action Letter (pub. avail. Aug. 27, 1984) and Red Rocks Capital, LLC, SEC No-Action Letter (pub. avail. Jun. 3, 2011) (''Red Rocks'')); Blackrock Comment Letter (citing Red Rocks; The France Growth Fund, Inc., SEC Staff No-Action Letter (July 15, 2003); and Templeton Vietnam Opportunities Fund, Inc., SEC Staff No-Action Letter (Sept. 6, 1996).

[527] Capital Group Comment Letter (noting reliance on Northern Lights Letter *supra* footnote 504).

[528] *See, e.g.,* Voya Letter.

[529] *See supra* footnote 30.

[530] 5 U.S.C. 801 *et seq.*

[531] For purposes of this section, we use the term ''final rule'' to refer collectively to rule 12d1–4, the rescission of rule 12d1–2 and the exemptive orders, the amendment to rule 12d1–1, and the amendments to Form N–CEN.

[532] We expect that the amendments to Form N–CEN will have immaterial economic effects. In particular, we expect that the amendments to Form N–CEN will increase the annual estimated burden hours associated with preparing and filing Form N–CEN by approximately 0.1 hours for each fund (*see infra* section VI.D). In addition, the amendments to Form N–CEN will facilitate the supervision and regulation of the fund industry, which will ultimately benefit fund investors, but any such effects are likely small. Hence, the economic analysis focuses on the economic effects of rule 12d1–4, the rescission of rule 12d1–2 and the exemptive relief, and the amendment to rule 12d1–1.

[533] We use Form N–CEN and Form N–PORT filings with the Commission as of May 2020 in our analysis. Form N–CEN provides census-type information on an annual basis and is filed by all registered investment companies, except for face amount certificate companies (rule 12d1–4 will not be available to face amount certificate companies). Form N–PORT provides portfolio holdings information on a monthly basis and is filed by registered management investment companies and ETFs organized as UITs. Hence, Form N–CEN provides information for the universe of potentially affected funds, with the exception of BDCs. Form N–PORT covers a subset of the potentially affected funds covered by Form N–CEN but it provides relevant portfolio holdings information for those funds, which is unavailable in Form N–CEN, and thus data from Form N–PORT yields additional insights on the fund market.

As of the data collection date, all fund groups file Form N–CEN but only large fund groups file Form N–PORT. Large fund groups are funds that, together with other investment companies in the same ''group of related investment companies,'' have net assets of $1 billion or more as of the end of the most recent fiscal year of the fund. Filing Form N–PORT began in April 2020 for small fund groups, and this information became available to the Commission in July 2020, which was after the May 2020 cut-off date of our data analysis. However, we do not believe that such data would qualitatively change the results of our analysis. *See* Amendments to the Timing Requirements for Filing Reports on Form N–PORT, Investment Company Act Release No. 33384 (Feb. 27, 2019) [84 FR 7980 (Mar. 6, 2019)]. Nevertheless, large fund groups represent 84% of all fund groups in terms of total assets. *See infra* sections V.C.1.a.ii and V.C.1.b.v for discussion of differential effects of the rule on smaller relative to larger fund complexes.

[534] Form N–CEN data does not allow us to identify and provide statistics on acquired funds. BDCs do not file reports on Forms N–CEN and so are excluded from Table 1. The UIT section of Form

funds in Form N–CEN is a fund that acquires securities issued by any other investment company in excess of the amounts permitted under paragraph (A) of section 12(d)(1) of the Act but does not include a fund that acquires securities issued by money market funds solely in reliance on rule 12d1–1 under the Act.[535]

A trade association representing regulated investment companies globally provided the Commission with the results of a survey of its U.S. members and found that as of 2018, there were 1,359 funds of funds with $2.8 trillion in assets under management.[536] Of those funds, the survey observed that 31% (*i.e.,* 423 out of 1,359) of the funds of funds, representing $829 billion in assets, will not be affected by the final rule because they are structured solely in reliance on sections 12(d)(1)(E), 12(d)(1)(F), or 12(d)(1)(G), and the remaining 69% (*i.e.,* 936 out of 1,359) of the funds of funds, representing $2.0 trillion in assets, will need to comply with the rule 12d1–4 conditions or restructure their investments.[537]

Another commenter, representing asset managers, conducted a survey of its members and found that all 15 surveyed sponsors, representing 655 funds of funds and assets of $1.8 trillion, stated that they rely on a variety of authorities (often in combination), including sections 12(d)(1)(F) (*i.e.,* five sponsors), section 12(d)(1)(G) (*i.e.,* 14 sponsors), rule 12d1–2 (*i.e.,* 14 sponsors), exemptive orders (*i.e.,* 14 sponsors), and/or structure funds of funds consistent with Commission staff no-action letters (*i.e.,* three sponsors).[538] All 15 sponsors indicated that they sponsor funds that invest in affiliated open-end funds and UITs;[539] 13 sponsors indicated that they sponsor funds that invest in unaffiliated open-end funds and UITs; four sponsors indicated that they sponsor funds that invest in affiliated central funds; two sponsors indicated that they sponsor funds that invest in affiliated unregistered funds; two sponsors indicated that they sponsor funds that invest in unaffiliated closed-end funds; one sponsor indicated that it sponsors funds that invest in unaffiliated BDCs; and one sponsor indicated that it sponsors funds that invest in unaffiliated unregistered funds.

TABLE 1—DESCRIPTIVE STATISTICS FOR ALL FUNDS AND ACQUIRING FUNDS USING FORM N–CEN FILINGS

	Funds		Acquiring funds	
	Number	Net assets (bn $)	Number	Net assets (bn $)
Open-end funds	13,135	26,328	1,687	2,180
ETFs registered as open-end funds[540]	2,194	5,689	105	16
ETMFs registered as open-end funds	28	14	2	0.04
Closed-end funds	736	320	29	10
UITs	720	2,237	.....	.....
Variable annuity separate accounts registered as UITs	430	1,561	.....	.....
Variable life insurance separate accounts registered as UITs	243	165	.....	.....
ETFs registered as UITs	47	509	.....	.....
Management company separate accounts	14	225	3	0.05

N–CEN currently does not require a UIT to identify whether it is a fund of funds, and so we lack information on acquiring UITs using Form N–CEN data. We use the most recent Form N–CEN filing with the Commission for each fund between September 2018 and May 2020 for this analysis (*i.e.,* the first and last month with Form N–CEN data available as of the data collection date). We use all available Form N–CEN filings to also capture delinquent filers in our analysis. Approximately 5% of the funds in Table 1 were terminated during our sample period. Open-end funds, ETFs organized as open-end funds, and ETMFs are registered on Form N–1A. ETFs and ETMFs are identified using Item C.3.a.i and C.3.a.ii in Form N–CEN filings. Closed-end funds are registered on Form N–2. Variable annuity separate accounts organized as UITs are series, or classes of series, of trusts registered on Form N–4. Variable life insurance separate accounts organized as UITs are series, or classes of series, of trusts registered on Form N–6. ETFs registered as UITs are series, or classes of series, of trusts registered on Form N–8B–2. Non-ETF UITs are trusts registered on Forms N–4 or N–6. Management company separate accounts are trusts registered on Form N–3. The statistics in Table 1 are generally consistent with statistics on funds of funds provided by commenters. *See, e.g.,* ICI Comment Letter. One exception is a commenter that stated that as of March 2019, there were 496 closed-end funds with 236 billion in net assets. *See* Advent Comment Letter. We lack detailed information on commenter's estimation of these statistics but we believe that these statistics are lower than the statistics in Table 1 likely due to the different data sources and sample period used. *See* Table 4 of the Proposing Release for statistics of the number of acquiring funds by investment category.

[535] Hence, acquiring funds in Table 1 includes: Funds of funds that were structured in reliance on section 12(d)(1)(F); funds of funds that were structured in reliance on section 12(d)(1)(G); funds of funds that were structured in reliance on section 12(d)(1)(G) and rule 12d1–2; funds of funds that were structured in reliance on exemptive relief on which rule 12d1–4 is based; and funds of funds that were structured considering Commission staff letters.

[536] *See* ICI Comment Letter.

[537] For the purposes of this survey, a fund of funds is defined as a fund that invests in at least one other fund in excess of the limits of section 12(d)(1)(A) but does not include funds that only invest in money market funds. Hence, our definition of acquiring fund in Table 1 is similar to the definition of acquiring fund in the ICI survey. The ICI survey sample appears to be a subset of the sample of acquiring funds in Table 1. That is, the ICI sample represents approximately 79% of the acquiring funds in Table 1 (79% = 1,359 funds of funds in the ICI survey/1,719 acquiring funds in Table 1). *See* ICI Comment Letter. Our data does not allow us to distinguish whether the acquiring funds in Table 1 have been structured in reliance on section 12(d)(1)(F); in reliance on section 12(d)(1)(G); in reliance on section 12(d)(1)(G) and rule 12d1–2; in reliance on an exemptive order; or considering Commission staff no-action letters.

[538] *See* SIFMA AMG Comment Letter. For purposes of this survey, a fund of funds is a fund that invests substantially all of its assets (*i.e.,* > 85% of fund assets) in shares of other investment companies. The survey also requested information regarding funds that make investments in other investment companies beyond the limits of section 12(d)(1)(A) but where those investments, in the aggregate, represent less than 85% of fund assets. Fifty-nine of those funds hold more than 3% of an acquired fund's shares. Eight out of the 15 respondents sponsor funds that invest less than 85% of their assets in other funds, and those funds rely on a variety of authorities (often in combination), including section 12(d)(1)(F) (*i.e.,* three sponsors), section 12(d)(1)(G) (*i.e.,* seven sponsors), rule 12d1–1 (*i.e.,* three sponsors), exemptive orders (*i.e.,* eight sponsors), and/or rule 12d1–2 (*i.e.,* eight sponsors). All 8 sponsors indicated that they sponsor funds that invest in affiliated open-end funds and UITs; seven sponsors indicated that they sponsor funds that invest in unaffiliated open-end funds and UITs; three sponsors indicated that they sponsor funds that invest in affiliated central funds; two sponsors indicated that they sponsor funds that invest in unaffiliated closed-end funds; two sponsors indicated that they sponsor funds that invest in unaffiliated BDCs; one sponsor indicated that it sponsors funds that invest in unaffiliated unregistered funds; and one sponsor indicated that it sponsors funds that invest in affiliated unregistered funds. The data provided by the commenter is sponsor-level (rather than fund-level) data and so we cannot use this data to estimate how many of the acquiring and acquired funds in our sample will be affected by the final rule.

[539] According to the survey, the funds of funds that invest in affiliated open-end funds in reliance on section 12(d)(1)(G) also invest in unaffiliated money market funds, unaffiliated registered investment companies, individual securities such as stocks and bonds, and non-securities such as certain derivatives or real estate.

TABLE 1—DESCRIPTIVE STATISTICS FOR ALL FUNDS AND ACQUIRING FUNDS USING FORM N–CEN FILINGS—Continued

	Funds		Acquiring funds	
	Number	Net assets (bn $)	Number	Net assets (bn $)
Total	14,605	29,110	1,719	2,190

This table reports descriptive statistics for all funds and acquiring funds using data from Form N–CEN filings with the Commission as of May 2020. A fund of funds is a fund that acquires securities issued by any other investment company in excess of the amounts permitted under paragraph (A) of section 12(d)(1) of the Act but does not include a fund that acquires securities issued by money market funds solely in reliance on rule 12d1–1 under the Act (*see* Item C.3.e in Form N–CEN filings). Master-feeder funds are excluded from this analysis (*see* Item C.3.f in Form N–CEN). The UIT section of Form N–CEN currently does not require a UIT to identify if it is a fund of funds so information on acquiring UITs is marked as missing in this Table. For open-end funds, closed-end funds, and management company separate accounts, total net assets is the sum of monthly average net assets across all funds in the sample during the reporting period (*see* Item C.19.a in Form N–CEN). For UITs, we use the total assets as of the end of the reporting period (*see* Item F.11 in Form N–CEN), and for UITs with missing total assets information, we use the aggregated contract value for the reporting period instead (*see* Item F.14.c in Form N–CEN).

Table 2 below shows the number and size of funds, acquiring funds, and acquired funds using data from Form N–PORT filings with the Commission as of May 2020.[541] Form N–PORT is only filed by registered management investment companies and ETFs that are organized as UITs. Hence, the sample of funds in Table 2 (*i.e.,* registered management investment companies and ETFs organized as UITs) is narrower than the sample of funds in Table 1 (*i.e.,* all registered investment companies) because Form N–CEN and Form N–PORT do not apply to the same scope of funds.[542] Each acquiring fund represented in Table 2 is a registered management investment company or ETF organized as a UIT that invests a non-zero percentage of its assets in registered investment companies or BDCs, while each acquired fund is a registered investment company in which a registered management investment company or ETF organized as a UIT invests.[543] Hence, the definition of acquiring funds in Table 1 is broader than the definition of acquiring funds in Table 2.[544]

Untabulated analysis shows that out of the 4,750 acquiring funds in Table 2, 1,435, or 30%, invested in at least one acquired fund beyond the limits of section 12(d)(1).[545] These 1,435 acquiring funds invested, on average, in nine unique acquired funds beyond the section 12(d)(1) limits.

Also, untabulated analysis shows that 954, or 20%, of all acquiring funds in Table 2 appear to be relying on the statutory exemption in section 12(d)(1)(G) to structure a fund of funds arrangement.[546] Finally, untabulated analysis shows that from the 16,797 acquiring-acquired fund pairs in Table 2, for which the acquiring fund invests in the acquired fund beyond the limits of section 12(d)(1)(A), 7,400 acquiring-acquired fund pairs have a different primary investment adviser.[547]

As Table 2 shows, there were 2,151 unique top-tier acquiring funds in multi-tier (*i.e.,* more than two-tier) fund of funds structures and 986 unique second-tier acquired funds in multi-tier fund of funds structures.[548] Out of the 2,151 unique top-tier acquiring funds in multi-tier structures in Table 2, untabulated analysis shows that 721 are top-tier acquiring funds in structures that are four tiers or more, 149 are top-tier acquiring funds in structures that are five tiers or more, and 78 are top-tier acquiring funds in structures that are six tiers.[549] In the case of four-tier structures, the average investment of the top-tier acquiring fund in the fourth-tier acquired funds is equal to 0.006% of the top-tier acquiring fund's assets; in the case of five-tier structures, the average investment of the top-tier acquiring fund in the fifth-tier acquired funds is equal to 0.00006% of the top-tier acquiring fund's assets; and in the case of six-tier structures, the average investment of the top-tier acquiring

[540] The reported net assets of ETFs registered as open-end funds in Table 1 likely are overstated because reporting on whether or not a fund is an ETF on Form N–CEN is at the series level, not the class level. Hence, all share classes within an open-end fund that has ETF share classes are attributed to the ETF category.

[541] BDCs do not file reports on Form N–PORT and are therefore excluded from the definition of acquiring funds in Tables 2 and 3. We use the most recent Form N–PORT filing with the Commission for each fund filed between May 2019 and May 2020 for this analysis (*i.e.,* the first and last month with Form N–PORT data available as of the data collection date). *See supra* footnote 534 for definition of fund categories. Total net assets in Form N–CEN may be different from total net assets in Form N–PORT because Form N–CEN reports average assets estimated over the reporting period while Form N–PORT reports point-in-time assets as of the reporting date.

[542] *See supra* footnote 534.

[543] Hence, acquiring funds in Table 2 includes funds of funds that were structured in reliance on section 12(d)(1)(A), funds of funds that were structured in reliance on section 12(d)(1)(F), funds of funds that were structured in reliance on section 12(d)(1)(G), funds of funds that were structured in reliance on exemptive relief on which rule 12d1–4 is based, and funds of funds that were structured considering Commission staff letters.

[544] The Form N–PORT data allows us to use a broader definition of acquiring funds in Table 2 compared to Table 1 (i) to provide a more complete picture of the fund of funds market; and (ii) for comparability purposes with the acquiring fund statistics in the 2018 FOF Proposing Release.

[545] We define acquiring funds that invest in at least one acquired fund beyond the limits of section 12(d)(1) using Form N–CEN data as of May 2020.

[546] We define 12(d)(1)(G) acquiring funds as open-end funds or UITs that invest at least 10% of their assets in other open-end funds or UITs that are in the same group of investment companies. We identify funds that are in the same group of investment companies using Item B.5 in Form N–CEN filings with the Commission as of May 2020. On one hand, our methodology may overestimate the number of 12(d)(1)(G) acquiring funds to the extent that certain funds rely on exemptive orders rather than 12(d)(1)(G) to invest in funds within the same group of investment companies beyond the limits of section 12(d)(1)(A). On the other hand, our methodology may underestimate the number of 12(d)(1)(G) acquiring funds because the definition of the group of investment companies in Form N–CEN is narrower than the definition under 12(d)(1)(G). In particular, ''[f]amily of investment companies'' is defined in Item B.5 of Form N–CEN as any two or more registered funds that (i) share the same investment adviser or principal underwriter; and (ii) hold themselves out to investors as related companies for purposes of investment and investor services. ''Group of investment companies'' is defined in section 12(d)(1)(G) as any two or more registered funds that hold themselves out to investors as related companies for purposes of investment and investor services. *See* 15 U.S.C. 80a–12(d)(1)(G)(ii).

[547] Based on investment adviser data in Item C.9 of Form N–CEN as of May 2020.

[548] The 2,151 top-tier acquiring funds in multi-tier structures include funds of funds that are structured both within and beyond the limits of section 12(d)(1).

[549] We have not identified any multi-tier structures that are more than 6 tiers.

fund in the sixth-tier acquired funds is practically zero.[550]

When looking at only multi-tier structures in which at least one acquiring fund in each level invests in at least one acquired fund beyond the limits of section 12(d)(1), there are 23 top-tier acquiring funds in structures that are three tiers or more and one top-tier acquiring fund in a structure that is four tiers.[551] In the case of the 23 top-tier acquiring funds in multi-tier structures that are three tiers or more, the average investment of the top-tier acquiring fund in the third-tier acquired funds is equal to 2.93% of the top-tier acquiring fund's assets, and in the case of the one top-tier acquiring fund in a multi-tier structure that is four tiers, the average investment of the top-tier acquiring fund in the fourth-tier acquired funds is equal to 0.00003% of the top-tier acquiring fund's assets.[552]

A commenter also observed that as of 2018, out of the 1,359 funds of funds representing $2.8 trillion in assets under management, 198 funds of funds representing $287 billion in assets under management utilized a multi-tier structure.[553]

Another commenter found that out of the 655 funds of funds[554] that were sponsored by 15 survey respondents, 223, or 34%, hold more than 3% of an acquired fund's shares.[555] The commenter also found that out of the 15 surveyed sponsors, eight sponsors, or 53%, indicated that they employ multi-tier structures.[556] Out of the eight sponsors that employ multi-tier structures, seven sponsors employ three-tiered structures, and one sponsor employs a four-tiered structure. Seven sponsors operate these multi-tier structures pursuant to exemptive orders; three sponsors rely on section 12(d)(1)(G); three sponsors rely on rule 12d1–2; two sponsors rely on section 12(d)(1)(A); two sponsors structure funds considering staff no-action letters; one sponsor relies on section 12(d)(1)(F); and one sponsor relies on rule 12d1–1.[557]

TABLE 2—DESCRIPTIVE STATISTICS FOR FUNDS, ACQUIRING FUNDS, AND ACQUIRED FUNDS USING FORM N–PORT FILINGS

	Funds		Acquiring funds		Acquired funds	
	Number	Net assets (bn $)	Number	Net assets (bn $)	Number	Net assets (bn $)
Panel A: Statistics on Funds, Acquiring Funds, and Acquired Funds						
Open-end funds	11,170	24,458	4,514	8,349	2,925	14,743
ETFs	1,898	6,361	649	2,364	729	6,053
ETMFs	21	18	4	3	3	17
Closed-end funds	600	310	231	115	458	242
ETFs registered as UITs	5	436			4	436
UITs registered as separate accounts					5	50
Management company separate accounts	13	208	5	144		
Total	11,788	25,412	4,750	8,608	3,392	15,471

	Multi-tier structures	
	Number of acquiring funds	Number of acquired funds
Panel B: Statistics on Multi-Tier Structures		
Open-end funds	2,074	813
ETFs	148	278
ETMFs	2	1
Closed-end funds	74	173
ETFs registered as UITs		
UITs registered as separate accounts		

[550] We estimate the top-tier acquiring fund's investment in the bottom-tier acquired funds by accounting for the top-tier acquiring fund's investment in the second-tier acquired funds, the second-tier acquired funds' investments in the third-tier acquired funds, and so on. For example, in the case of three-tier structures, if the top-tier acquiring fund invests 5% of its assets in one second-tier acquired fund, and the second-tier acquired fund invests 5% of its assets in one third-tier acquired fund, then the top-tier acquiring fund's investment in the bottom-tier acquired fund is equal to 0.25% = 5% × 5%.

[551] We define acquiring funds that invest in at least one acquired fund beyond the limits of section 12(d)(1) using Form N–CEN data as of May 2020. There are no multi-tier funds of funds beyond four tiers that are structured beyond the limits of section 12(d)(1). Our data does not allow us to distinguish whether the identified multi-tier structures were structured in reliance on one of the exceptions to the complex structures condition in our exemptive orders.

[552] *See supra* footnote 550.

[553] *See* ICI Comment Letter. The proportion of acquiring funds that are top-tier acquiring funds in multi-tier structures in Table 2 (*i.e.,* 45% = 2,151/4,750) is different from the proportion of acquiring funds that are top-tier acquiring funds in multi-tier structures provided by the commenter (*i.e.,* 15% = 198/1,359) potentially due to different definitions of acquiring funds and top-tier acquiring funds in multi-tier structures. In particular, the commenter defines acquiring funds as funds that invest in at least one other fund in excess of the limits of section 12(d)(1)(A) while Table 2 defines acquiring funds as funds that invest a non-zero percentage of their assets in other funds. The commenter does not provide information on how it defines top-tier acquiring funds in multi-tier structures.

[554] *See supra* footnote 537 for the commenter's definition of funds of funds.

[555] *See* SIFMA AMG Comment Letter. The 34% (= 223/655) of acquiring funds that invest in other funds beyond the limits in section 12(d)(1) provided by the commenter is higher than our 30% (= 1,435/4,750) estimate using Form N–PORT and Form N–CEN data, and the difference may be due to the different samples used for the two analyses.

[556] *See* SIFMA AMG Comment Letter. The commenter provided statistics on multi-tier structures in terms of sponsors (rather than funds), and so we are unable to compare with precision the statistics provided by the commenter to our statistics on multi-tier structures in Table 2. Nevertheless, the 53% of surveyed sponsors employing multi-tier structures is largely consistent with the 45% (= 2,151/4,750) of acquiring funds that are top-tier acquiring funds in multi-tier structures in Table 2.

[557] *See* SIFMA AMG Comment Letter. The data provided by the commenter is sponsor-level (rather than fund-level) data and so we cannot use this data to estimate how many of the multi-tier structures in our sample will be affected by the final rule or the extent to which they will be affected. In addition, our data does not allow us to distinguish whether the multi-tier structures in our sample were created in reliance on sections 12(d)(1)(A), 12(d)(1)(F), 12(d)(1)(G), rule 12d1–2, exemptive orders, or considering staff no-action letters.

	Multi-tier structures	
	Number of acquiring funds	Number of acquired funds
Management company separate accounts	3	
Total	2,151	986

This table reports descriptive statistics for all funds, acquiring funds, and acquired funds using data from Form N–PORT filings with the Commission as of May 2020. Panel A presents statistics on all funds, acquiring funds, and acquired funds, and Panel B presents statistics on multi-tier structures. A fund of funds is a fund that invests a non-zero percentage of its assets in securities issued by other registered investment companies but does not include a fund that solely invests in money market funds. Master-feeder funds, defined as structures where the acquiring fund invests more than 98% of its assets in another registered investment company, are excluded from this analysis. Multi-tier structures are funds of funds with more than two tiers. Acquiring funds in multi-tier structures are the unique top-tier acquiring funds in a multi-tier structure, and acquired funds in multi-tier structures are the unique second-tier acquired funds in multi-tier structures. Total net assets is the sum of total net assets across all funds in the sample during the reporting period (*see* Item B.1.c in Form N–PORT).

Our review of BDC filings show that as of December 2019, there were 83 BDCs with $123 billion in total gross assets, out of which 45 BDCs with 83 billion in total gross assets were listed on a national securities exchange.[558] Approximately 44% of the BDCs were acquiring BDCs and 60% were acquired BDCs in fund of funds structures.[559] We have not granted exemptive relief to BDCs as acquiring funds so we believe that all acquiring BDCs invest in other funds within the 12(d)(1) limits.

Table 3 below shows the percentage of acquiring funds that invest between 0 and 5%, 5 and 10%, 10 and 25%, 25 and 50%, 50 and 75%, 75 and 90%, 90 and 95%, and above 95% of their total assets in other funds as of May 2020.[560] The table shows that the majority of acquiring funds invest either less than 10% or more than 95% of their assets in other funds. The reason for the concentration of acquiring funds below the 10% level is likely that a 10% investment in other funds is within the section 12(d)(1)(A) statutory limits. Funds that invest above the 95% threshold likely rely either on section 12(d)(1)(G) or (F) or on exemptive orders to invest in other funds beyond the section 12(d)(1)(A) statutory limits.

TABLE 3—PERCENTAGE OF ACQUIRING FUNDS THAT INVEST CERTAIN % OF THEIR ASSETS IN OTHER FUNDS

	[0–5%]	(5–10%]	(10–25%]	(25–50%]	(50–75%]	(75–90%]	(90–95%]	above 95%
Open-end funds	47	8	7	8	4	5	3	17
ETFs	70	2	4	6	4	6	2	6
ETMFs	25	25	0	25	25	0	0	0
Closed-end funds	82	6	7	1	2	0	0	0
Management company separate accounts	100	0	0	0	0	0	0	0

This table reports the percentage of acquiring funds by fund type that invest between 0 and 5%, 5 and 10%, 10 and 25%, 25 and 50%, 50 and 75%, 75 and 90%, 90 and 95%, and above 95% of their total assets in other funds using data from Form N–PORT filings with the Commission as of May 2020. UITs, except for ETFs registered as UITs, do not file Form N–PORT filings with the Commission and thus are excluded from this table. We have not identified any ETFs registered as UITs that are acquiring funds. Fund investments in money market funds and master-feeder structures are excluded from this analysis. Percentages may not sum up to 100 due to rounding error.

The total net assets of funds of funds have generally increased over time. According to the 2020 ICI Fact Book, the total net assets of open-end funds of funds increased from $680 billion to $2.54 trillion between December 2009 and December 2019, and the total net assets of exchange-traded funds of funds increased from $824 million to $13,444 million between December 2009 and December 2019.[561]

Table 4 Panel A shows descriptive statistics for the expense ratio, front-end load, and deferred charges for single-tier funds (*i.e.,* all funds excluding acquiring funds), and Table 4 Panel B shows descriptive statistics for the expense ratio, front-end load, and deferred charges for acquiring funds as of July 2020.[562] The expense ratio in Table 4 includes acquired fund fees and

[558] Estimates of the number of BDCs and their gross assets are based on a staff analysis of Form 10–K and Form 10–Q filings as of December 2019, which are the most recent available filings as of the data collection date. Our estimates exclude BDCs that may be delinquent or have filed extensions for their filings, wholly-owned subsidiaries of other BDCs, and BDCs in master-feeder structures. These statistics are generally consistent with statistics on BDCs provided by commenters. *See, e.g.,* SBIA Comment Letter; IPA Comment Letter.

[559] We define acquiring BDCs as BDCs that reported non-zero AFFEs in Forms 497, N–2, or N–2A filed with the Commission between January 2019 and May 2020. 44% = 14 BDCs that reported non-zero AFFEs in Forms 497, N–2, or N–2A filed with the Commission between January 2019 and May 2020/32 BDCs that filed Forms 497, N–2, or N–2A with the Commission between January 2019 and May 2020. Only BDCs traded on an exchange file Forms 497, N–2, or N–2A. The remaining BDCs file Forms 10–K but BDCs are not required to report their AFFEs on Form 10–K. For those BDCs that did not file a Form 497, N–2, or N–2A with the Commission between January 2019 and May 2020, our review of the schedule of investment companies in Forms 10–K filed with the Commission between January 2019 and May 2020 yielded one acquiring BDC additional to the 14 acquiring BDCs identified from our review of Forms 497, N–2, or N–2A. We estimate the number of acquired BDCs using Form N–PORT filings as of May 2020. 60% = 50 BDCs acquired BDCs identified using Form N–PORT data as of May 2020/83 BDCs that filed forms 10–K or 10–Q as of December 2019.

[560] In addition to other funds, acquiring funds may invest in private funds, cash and cash equivalents, derivatives, individual equity and debt securities, asset-backed securities, etc. We do not aggregate fund holdings across advisory groups for the purposes of this analysis.

[561] Open-end funds of funds are open-end funds that invest primarily in other open-end funds. ETF funds of funds are ETFs that invest primarily in other ETFs. *See* 2020 ICI Fact Book, *supra* footnote 4, at 206 and 244.

[562] In Table 4 and Figure 1 of this release (*i.e.,* fee and expense analysis), we identify acquiring funds (excluding BDCs) using Morningstar Holdings data instead of Form N–CEN or Form N–PORT data, similar to Table 3 and Figure 1 of the Proposing Release. The reason is that Form N–CEN and Form N–PORT data only becomes available in 2019 but the analysis in Figure 1 requires identification of acquiring funds starting from 2015. We use the same data to identify acquiring funds in both Table 4 and Figure 1 to allow for data comparability in the fee and expense analysis. We define acquiring BDCs as BDCs that reported non-zero AFFEs in Forms 497, N–2, or N–2A filed with the Commission between January 2019 and May 2020 (*see supra* footnote 559). The number of observations in Table 4 is different than the number of observations in Table 1 because (i) we lack expense data for some of the funds; and (ii) there are differences in the unit of observation in Morningstar and Form N–CEN (*see infra* footnote 564).

expenses. Untabulated analysis based on the expense data in Table 4 shows that the equal-weighted average expense ratio for acquiring open-end funds, UITs, and ETFs is statistically significantly higher than the equal-weighted average expense ratio for single-tier open-end funds, UITs, and ETFs, respectively.[563] For BDCs and registered closed-end funds, there is no statistically significant difference in the operating expenses of acquiring and single-tier funds. There are no acquiring ETMFs with expense data in our sample. Our results are qualitatively similar when we compare the value-weighted (instead of the equal-weighted) average of the expense ratio for single-tier and acquiring funds. Nevertheless, the results of the statistical comparison of the expense ratio for single-tier and acquiring funds should be interpreted with caution because our analysis does not control for differences in the characteristics of single-tier and acquiring funds, such as differences in their investment strategy, which could potentially affect fund fees and expenses.

TABLE 4—EXPENSE RATIO, FRONT-END LOAD, AND DEFERRED CHARGES FOR SINGLE-TIER AND ACQUIRING FUNDS

	Equal-weighted mean	Value-weighted mean	Median	Standard deviation	N
Panel A: Single-Tier Funds					
Expense Ratio:					
Open-end funds	0.92	0.47	0.89	0.47	5,124
UITs[564]	0.32	0.30	0.26	0.30	3,316
ETFs	0.52	0.13	0.49	0.32	2,003
ETMFs	0.74	0.77	0.78	0.25	16
Closed-end funds	2.29	1.96	1.86	1.90	192
Management company separate accounts	0.33	0.35	0.32	0.03	7
BDCs[565]	12.00	11.00	12.20	4.17	18
Front-End Load:					
Open-end funds	1.42	1.67	0.83	1.44	2,490
UITs	3.72	3.16	3.90	1.04	1,342
ETFs					
ETMFs					
Closed-end funds	2.13	1.61	1.57	1.97	19
Management company separate accounts					
BDCs	2.98	2.92	2.00	1.87	9
Deferred Charges;					
Open-end funds	0.05	0.04	0.03	0.07	2,035
UITs	1.86	1.94	2.18	0.56	1,784
ETFs					
ETMFs					
Closed-end funds	0.12	0.16	0.13	0.08	5
Management company separate accounts					
BDCs					
Panel B: Acquiring Funds					
Expense Ratio:					
Open-end funds	0.98	0.56	0.91	0.57	2,837
UITs	1.71	1.56	1.79	0.88	874
ETFs	0.63	0.20	0.54	0.40	503
ETMFs					
Closed-end funds	2.07	1.91	1.91	0.79	79
Management company separate accounts					
BDCs	12.02	10.06	12.98	3.89	14
Front-End Load:					
Open-end funds	1.43	1.28	0.86	1.47	1,359
UITs	1.00	1.00	1.00	0.00	19
ETFs					
ETMFs					
Closed-end funds	1.24	1.08	1.13	1.02	11
Management company separate accounts					
BDCs	2.75	2.00	2.00	1.82	5
Deferred Charges:					
Open-end funds	0.08	0.05	0.04	0.09	1,066
UITs	2.09	2.14	2.25	0.46	872
ETFs					
ETMFs					

[563] We use a two-tailed t-test and a 95% confidence interval to examine whether the differences in the equal-weighted averages of fees and expenses for acquiring and single-tier funds are statistically significant. A 95% confidence interval is frequently used for hypothesis testing in scientific work (*see, e.g.,* David H. Kaye & David A. Freedman, *Reference Guide on Statistics,* in The Reference Manual on Scientific Evidence (2nd ed., 2000), at 83).

[564] The difference in the number of UITs reported in Table 1 compared to Table 4 is likely due to the fact that Form N–CEN data (*i.e.,* Table 1) is aggregated at the trust level while Morningstar (*i.e.,* Table 4) reports unique UIT series, which we are unable to aggregate at the trust level due to data limitations.

[565] The BDC expense ratio statistics are higher in Table 4 of this release compared to Table 3 of the 2018 FOF Proposing Release. In the 2018 FOF Proposing Release we collected BDC expense data from the most recent available Forms 497, N–2, or N–2A, while in this release we collect BDC expense data only from Forms 497, N–2, or N–2A that were filed between January 2019 and May 2020 to avoid using stale data in our analysis.

TABLE 4—EXPENSE RATIO, FRONT-END LOAD, AND DEFERRED CHARGES FOR SINGLE-TIER AND ACQUIRING FUNDS—Continued

	Equal-weighted mean	Value-weighted mean	Median	Standard deviation	N
Closed-end funds	0.30	0.16	0.32	0.16	3
Management company separate accounts					
BDCs					

This table reports descriptive statistics for the expense ratio, front-end load, and deferred charges in percentage points for single-tier funds (*i.e.,* all funds excluding acquiring funds) in Panel A, and for acquiring funds in Panel B as of July 2020. Expense ratio is the percentage of fund assets, net of reimbursements, used to pay for operating expenses and management fees, including 12b-1 fees, administrative fees, and all other asset-based costs incurred by the fund, except brokerage costs. Sales charges are not included in the expense ratio. The expense ratio for acquiring funds is retrieved from the acquiring fund's prospectus and it includes the acquired funds' expense ratio. The front-end load is a one-time deduction from an investment made into the fund. Deferred charges are imposed when investors redeem shares. The analysis is conducted at the fund level using asset-weighted average values for multiple-class portfolios. We exclude funds with zero expense ratios, front-end loads, and deferred charges for the estimation of the descriptive statistics in each respective panel. There are no acquiring ETMFs with expense ratio data in our sample. There are also no acquiring management company separate accounts in our sample. ETFs, ETMFs, and management company separate accounts do not charge front-end loads or deferred charges. BDCs charge a front-end load, which includes selling commissions and dealer management fees, but they do not charge deferred charges. We identify acquiring open-end funds, UITs, ETFs, ETMFs, and closed-end funds using Morningstar Holdings data and acquiring BDCs as BDCs that reported non-zero AFFEs in Forms 497, N–2, or N–2A filed with the Commission between January 2019 and May 2020. Expense data for open-end funds, UITs, ETFs, ETMFs, and closed-end funds is retrieved from Morningstar Direct, and data for BDCs is retrieved from Forms 497, N–2, or N–2A. Data is winsorized at the 1% and 99% levels, with the exception of the BDC data, which is not winsorized because there are no outliers.

There is some evidence of a decrease in the expense ratio for certain funds of funds over time. In particular, according to an ICI report, the equal-weighted (value-weighted) average of the expense ratio of target date open-end funds has decreased from 1.23% (0.67%) in 2008 to 0.78% (0.37%) in 2019.[566]

Figure 1 Panels A–C below show the equal-weighted average of the expense ratio for acquiring open-end funds, ETFs, and closed-end funds between 2015 and 2019.[567] Due to data limitations, the expense ratio in Figure 1 does not include acquired fund fees and expenses. As Panel A shows, the expense ratio for open-end acquiring funds has decreased from 0.91 in 2015 to 0.80 in 2019, but this decrease is not statistically significant.[568] As Panel B shows, the expense ratio for acquiring ETFs has increased from 0.51 in 2015 to 0.53 in 2019, with a peak equal to 0.57 in 2016, but this decrease is not statistically significant. Finally, as Panel C shows, the expense ratio of closed-end acquiring funds has monotonically increased from 1.39 in 2015 to 2.31 in 2019 and this increase is statistically significant at the 1% level. The time-series trends for the expense ratio of acquiring ETFs and closed-end funds are qualitatively similar when we examine the value-weighted (instead of the equal-weighted) average of the expense ratio whereas the trend for the expense ratio of acquiring open-end funds exhibits a slight increase although this is not statistically significant.

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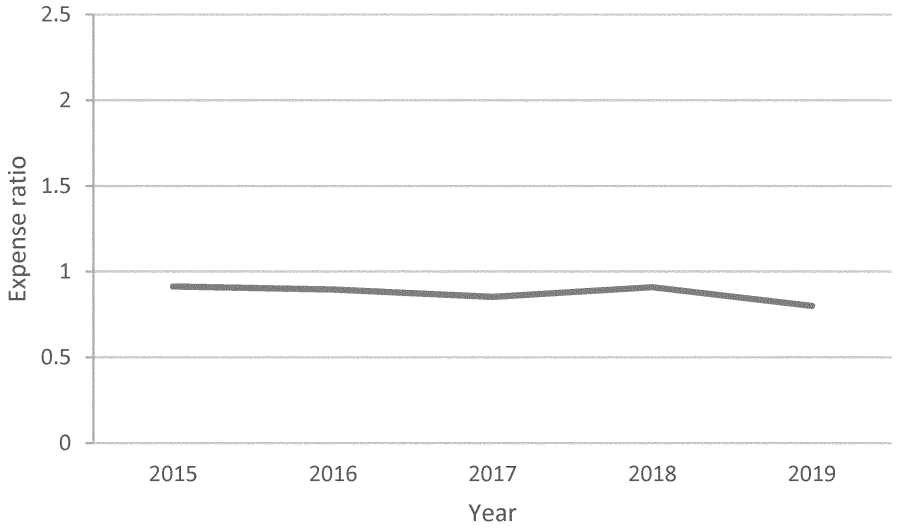
[566] *Trends in the Expenses and Fees of Funds, 2019,* ICI Res. Persp., Mar. 2020, at 13.

[567] *See supra* footnote 552 for definition of acquiring funds.

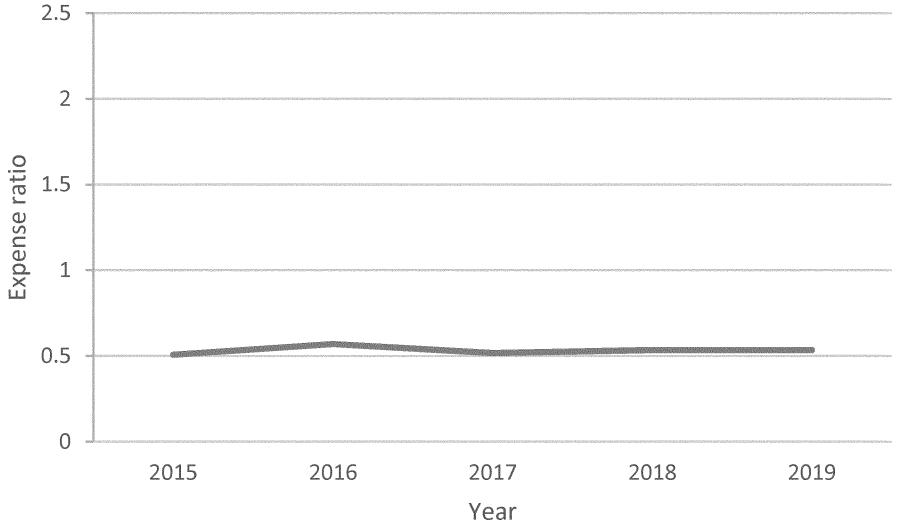
[568] In this and all subsequent analysis, to examine if there is a statistically significant time trend in the data, we regress the variable of interest to a year trend variable, and we test whether the coefficient on the trend variable is statistically different from zero. We use a two-tailed t-test and a 95% confidence interval. *See supra* footnote 563.

Figure 1: Equal-weighted average of acquiring funds' expense ratio over time

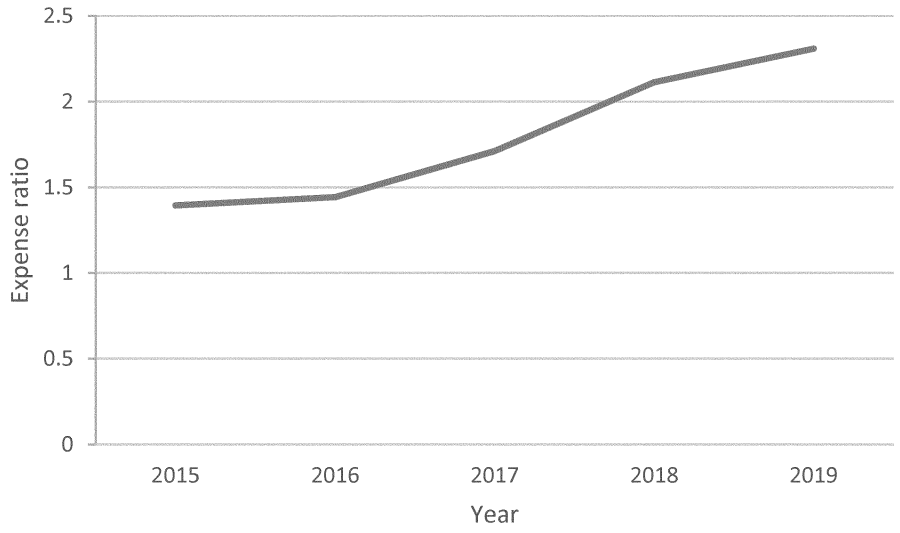
Panel A: Open-end acquiring funds



Panel B: Exchange-traded acquiring funds



Panel C: Closed-end acquiring funds



This figure reports the equal-weighted average of the expense ratio for acquiring funds by fund type between 2015 and 2019. Panel A shows the average expense ratio for open-end funds, Panel B for ETFs, and Panel C for closed-end funds. There are no acquiring ETMFs with expense data in our sample and there is no historical structured data for the expense ratio of UITs and BDCs. The analysis is conducted at the fund level using asset-weighted average values for multiple-class portfolios. Expense ratio is the percentage of fund assets, net of reimbursements, used to pay for operating expenses and management fees, including 12b-1 fees, administrative fees, and all other asset-based costs incurred by the fund, except brokerage costs. The expense ratio is retrieved from the acquiring fund's annual report and it does not include the acquired funds' fees and expenses. We identify acquiring funds using Morningstar Holdings data. Expense data is retrieved from Morningstar Direct and is winsorized at the 1 and 99% levels.

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As a baseline for understanding the effects of the voting provisions of rule 12d1–4 on acquiring funds, we study how frequently funds held shareholder meetings in 2019. Our review of filings with the Commission showed that 12% of all open-end funds, no UITs, 68% of all closed-end funds, and 86% of BDCs held at least one shareholder meeting in 2019.[569] Further, 12% of the acquired open-end funds, no acquired UITs, 92% of the acquired closed-end funds, and 94% of the acquired BDCs held at least one shareholder meeting in 2019.[570]

The final rule will also affect investment advisers to funds. As of March 2020, there were 1,720 investment advisers that provide portfolio management services to registered investment companies and BDCs and these investment advisers managed assets equal to $28,629 billion.[571] Approximately 17% of all investment advisers provided portfolio management services to acquiring funds and 33% to acquired funds.[572]

The final rule will also affect UIT depositors and sponsors. As of May 2020, there are 150 UIT unique depositors and 14 unique UIT sponsors.[573]

Lastly, the final rule will impact current and prospective individual investors that invest in funds. As of December 2019, there were 59.7 million U.S. households and 103.9 million individuals that owned U.S. registered investment companies.[574]

2. Current Regulatory Framework

The existing regulatory framework for funds of funds comprises the current set of statutory provisions and rules governing funds of funds, the exemptive orders we have granted to allow certain funds of funds, and certain industry practices that have developed in connection with staff-level views provided in certain staff no-action letters. Below we discuss in more detail the fund of funds exemptive order process[575] and we list the current set of statutory provisions and rules governing funds of funds as well as relevant staff no-action letters.[576]

[569] We identify funds that held a shareholder meeting in 2019 as funds that filed at least one Form DEF14A with the Commission in 2019. Our sample of funds is the same as in Table 1 above. Acquired funds are defined as in Table 2 above.

Separate accounts are excluded from this analysis because rule 12d1–4 will not include specific voting provisions when an insurance product separate account is part of the acquiring fund advisory group or acquiring fund sub-advisory group.

[570] Our sample of acquired funds is the same as in Table 2 above.

[571] Based on Item 5.D. of Form ADV filed with the Commission as of March 2020.

[572] Based on Item C.9. of Form N–CEN filed with the Commission as of May 2020. Our sample of acquiring funds is the same as in Table 1 above and the sample of acquired funds is the same as in Table 2 above. BDCs do not file Form N–CEN and thus are excluded from this analysis.

[573] Based on Items F.1 and F.4 of Forms N–CEN filed with the Commission as of May 2020. We lack data on acquiring UITs and so we do not provide counts of depositors and sponsors to acquiring UITs (*see supra* Tables 1 and 2).

[574] *See* 2020 ICI Fact Book, *supra* footnote 4.

[575] *See supra* section II.C and *infra* section V.C.1.b for detailed discussion of the exemptive order conditions.

[576] *See supra* section I.A for detailed discussion of the relevant statutory provisions and rules and *supra* sections II.C.3.d and III for detailed discussion of relevant staff no-action and interpretive letters.

a. Exemptive Order Process

Certain funds rely on individual exemptive orders granted by the Commission to invest in other funds beyond the limits of section 12(d)(1). The process of obtaining an exemptive order imposes direct administrative costs on funds associated with the preparation and revision of an application and consultations with Commission staff. We estimate that the administrative cost associated with obtaining an exemptive order permitting an acquiring fund to invest in an acquired fund beyond the limits of section 12(d)(1) is approximately $100,000.[577] Once a fund adviser/sponsor obtains exemptive relief to structure a fund of funds, the adviser/sponsor may apply this relief to multiple funds of funds. The administrative cost associated with the exemptive order process may be shared between the fund adviser/sponsor and the fund, and thus this administrative cost may be passed down to investors in the form of management fees or expenses. Nevertheless, we lack data and the commenters did not provide any data that would allow us to estimate how the administrative cost associated with the exemptive order process is split between the fund adviser/sponsor and the fund.

The exemptive order process also imposes indirect costs on funds and their advisers/sponsors because it introduces delays and uncertainty to fund investments. For non-ETF (ETF) fund of funds applications that received exemptive orders in 2019, the average time from the date a fund filed its initial application for exemptive relief to the date the Commission issued the related exemptive order was 127 (378) days and the average number of total filings (*i.e.,* both initial and amended filings) was 1.5 (3).[578] On July 6, 2020, the Commission adopted amendments to establish an expedited review procedure for applications for orders that are substantially identical to recent precedent as well as a rule to establish an internal timeframe for review of applications outside of such expedited procedure. As a result, we expect that future delays associated with the application process, including for any funds of funds applications, will decrease significantly following the effective date of these amendments.[579]

Until the Commission grants exemptive relief, fund advisers/sponsors are not permitted to create certain funds of funds and so acquiring funds must forgo certain investments in other funds. In addition, the exemptive order process may lead to uncertainty regarding whether the fund will be able to obtain exemptive relief and regarding the exact terms of the exemptive relief.

As a result of the direct and indirect costs of the exemptive order process, acquiring funds might forgo certain investments in other funds or funds of funds might not be launched in the first place because the fund may conclude that the costs of seeking an exemptive order exceed the anticipated benefits of the investment in another fund beyond the limits of section 12(d)(1).

Funds relying on exemptive orders to develop funds of funds also must comply with the terms and conditions of the exemptive relief. These terms and conditions are designed to prevent the historical abuses that led Congress to enact section 12(d)(1). Existing orders include conditions designed to mitigate the risks of undue influence, duplicative and excessive fees, and overly complex structures.[580]

b. Summary of Relevant Statutory Provisions, Rules, and Industry Practices Associated With Staff No-Action Letters

As an alternative to obtaining an exemptive order, some funds have relied on statutory provisions and rules, and have considered staff-level views expressed in staff no-action letters to structure fund of funds arrangements beyond the limits of section 12(d)(1)(A) and (B). In particular, funds of funds can rely on section 12(d)(1)(G) and rule 12d1–2, section 12(d)(1)(E), and 12(d)(1)(F).[581] In addition, the staff of the Division of Investment Management has issued a line of letters stating that the staff would not recommend enforcement action to the Commission under sections 12(d)(1)(A) or (B) of the Act if a fund acquires the securities of other funds in certain circumstances. We understand that certain industry practices have developed in connection with the staff-level views provided in these letters.[582]

C. Benefits and Costs and Effects on Efficiency, Competition, and Capital Formation

Where possible, we have attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the final rule. In some cases, however, we are unable to quantify the economic effects because we lack the information necessary and commenters have not made data available to provide a reasonable estimate. For example, we are unable to estimate the number of new funds of funds that potentially will be created as a result of the adoption of the final rule, because we do not have information about the extent to which the exemptive order application process and the conditions associated with exemptive relief limit the creation of funds of funds. Further, we do not have information needed to estimate likely changes in investor demand for funds of funds following the adoption of the final rule. In those circumstances, in which we do not have the requisite data to assess the impact of the final rule quantitatively, we have qualitatively analyzed the economic impact of the final rule.

[577] The $100,000 estimate reflects the current administrative cost associated with obtaining an exemptive order. This cost may decrease following the adoption of amendments to establish an expedited review procedure for applications for orders that are substantially identical to recent precedent. *See infra* note 579 and associated text.

[578] ETF fund of funds exemptive order applications are typically submitted as part of the applications related to the formation and operation of ETFs, and these unrelated aspects of the applications could bias the cited statistics on the duration and the number of filings of the fund of funds exemptive order process. In addition, the statistics for the processing times and number of filings of ETF fund of funds exemptive order applications are skewed upwards by applications for non-transparent ETFs, which are relatively novel products. When we exclude non-transparent ETF fund of funds applications that received exemptive orders in 2019, the average time from the date a fund filed its initial application for exemptive relief to the date the Commission issued the related exemptive order was 196 days and the average number of filings was 2. There is variation in the duration of the exemptive order process from the date of the initial filing to the date the order is issued. For non-ETF (ETF) fund of funds applications that received exemptive orders in 2019, the duration of the exemptive order process varied from 84 (58) to 155 (2,269) days from the date of the first filing to the date the order was issued, and the number of the filings varied from 1 (1) to 2 (12). Data is retrieved from the Investment Company Act Notices and Orders: Category Listing, *available at https://www.sec.gov/rules/icreleases.shtml* (accessed on July 29, 2020).

[579] The effective date of this rule will be on June 14, 2021. *See* Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940, Investment Company Act Release No. 33921 (July 6, 2020) [85 FR 57089 (Sept. 15, 2020)].

[580] *See supra* section II.C and *infra* section V.C.1.b for detailed discussion of the conditions of the exemptive orders. In addition to the exemptive order conditions, fund investors in management investment companies are protected from potential abusive practices that section 12(d)(1) was designed to prevent as a result of the fiduciary obligations of acquiring and acquired funds' boards of directors and investment advisers.

[581] *See supra* section I.A for detailed discussion of relevant statutory provisions and rules.

[582] *See supra* sections II.C.3.d and III for detailed discussion of relevant staff no-action and interpretive letters.

1. Benefits and Costs

a. General Economic Effects [583]

i. Change in Funds' Investment Flexibility

The final rule will have opposing effects on funds' investment flexibility. On one hand, rule 12d1–4 will expand funds' investment flexibility by expanding the scope of permissible acquiring and acquired funds relative to the current exemptive orders.[584] In particular, our current exemptive orders permit registered funds to invest only in certain other funds beyond the limits of section 12(d)(1), but rule 12d1–4 will expand the scope of permissible acquired funds by permitting both registered funds and BDCs to invest in all other registered funds and BDCs beyond the limits of section 12(d)(1) subject to certain conditions. Hence, relative to current exemptive orders, rule 12d1–4 will additionally allow (i) open-end funds to invest in unlisted BDCs and registered closed-end funds; (ii) UITs to invest in unlisted closed-end funds and listed and unlisted BDCs; (iii) closed-end funds to invest in open-end funds, UITs, and listed and unlisted BDCs and registered closed-end funds; (iv) BDCs to invest in open-end funds, UITs, ETMFs, and listed and unlisted BDCs and registered closed-end funds; and (v) ETFs to invest in ETMFs and unlisted BDCs and registered closed-end funds. By expanding the scope of permissible acquiring and acquired funds, rule 12d1–4 will enhance acquiring funds' investment flexibility and will increase acquired funds' access to financing.[585]

In addition, rule 12d1–4 will expand funds' investment flexibility and, more specifically, their ability to create multi-tier structures in the following way. Our current exemptive orders provide an exception from the three-tier limitation for investments in funds that are wholly-owned and controlled by the acquired fund as long as the investment adviser to the acquired fund is also the investment adviser to the wholly-owned subsidiary, while rule 12d1–4 does not include the requirement that the acquired fund and the wholly-owned subsidiary share the same investment adviser.

Finally, an existing staff no-action letter considers acquired fund investments of up to 10% of its assets in other funds, including ''central funds,'' subject to certain conditions, including a condition that the acquired fund would not exceed the 5% limit in section 12(d)(1)(A)(ii) with respect to an investment in shares of a single central fund.[586] In contrast, rule 12d1–4 will permit an acquired fund to invest up to 10% of its assets in other funds, regardless of the size of the investment in any one fund, the affiliation with the acquired fund, or the purpose of the investment. Hence, rule 12d1–4 will expand funds' investment flexibility relative to the baseline by (i) permitting acquired funds' investments in both affiliated and unaffiliated funds (*i.e.,* compared to the no-action letter, which only regards acquired fund investments in affiliated funds); and (ii) not imposing the 5% limit on investments in any single fund.

On the other hand, the conditions of rule 12d1–4, the rescission of rule 12d1–2, and the withdrawal of certain staff letters [587] will decrease certain funds' investment flexibility by restricting their ability to create certain multi-tier structures, and thus may require certain acquiring funds to change their investments in acquired funds over time compared to the baseline.[588] In particular, our current exemptive orders prohibit an acquired fund from investing in other funds beyond the limits in section 12(d)(1), but they do not expressly prohibit a fund from investing in an acquiring fund beyond the limits of section 12(d)(1). In addition, section 12(d)(1)(G) requires an acquired fund to have a policy that prohibits it from acquiring any securities of a registered open-end fund or UIT in reliance on section 12(d)(1)(G) or (F), but section 12(d)(1)(G) does not require the acquired fund to have a policy that prohibits it from acquiring the securities of a fund in excess of the limits in section 12(d)(1)(A) in reliance on an exemptive order issued by the Commission.[589]

Further, our exemptive orders permit acquired funds to invest in other funds beyond the statutory limits for short-term cash management purposes.[590] Some of these orders have allowed an acquired fund to invest in short-term bond funds for these purposes.[591] Rule 12d1–4 will permit acquired funds to invest in funds in reliance on rule 12d1–1 beyond the statutory limits, regardless of the purpose of the investment.[592] This condition of rule 12d1–4 will increase funds' investment flexibility to create multi-tier structures to the extent that acquired funds invest in funds in reliance on rule 12d1–1 above the statutory limits for purposes other than cash management. An acquired fund could also invest up to 10% of its assets in short-term bond funds pursuant to the 10% Bucket.[593] However, this condition of rule 12d1–4 will decrease funds' flexibility to create multi-tier structures relative to existing exemptive orders to the extent an acquired fund may no longer rely on a cash management exception to invest in excess of the statutory limits in short-

[583] *See supra* footnote 532 for a discussion of the economic effects of the N–CEN reporting requirements.

[584] *See, e.g.,* ICI Comment Letter for similar arguments.

[585] A commenter argued that by expanding the scope of permissible acquiring and acquired funds, rule 12d1–4 will encourage the creation of funds of funds that ''expose investors to excessive costs and poor performance and other risks associated with overly complex structures'' and ''the Commission has proposed this expansion without any serious analysis of what would result from such a sweeping change or explanation of why it would be in investors' best interest.'' *See* CFA Comment Letter. *See supra* section II.A.1 for discussion of this comment letter, including a discussion of why we believe the conditions of rule 12d1–4 will address the concerns raised.

[586] *See* Franklin Templeton No-Action Letter, *supra* footnote 421. Central funds are affiliated funds commonly created by an adviser for the purpose of efficiently managing exposure to a specific asset class.

[587] *See supra* section III.

[588] *See, e.g.,* SBIA Comment Letter; ICI Comment Letter; DPW Comment Letter; PIMCO Comment Letter; Fidelity Comment Letter; Guggenheim Comment Letter; TRP Comment Letter; Dechert Comment Letter; MFS Comment Letter; PGIM Comment Letter; Ropes Comment Letter; SIFMA AMG Comment Letter; ABA Comment Letter; Fidelity Fixed Income Trustees Comment Letter for related discussion that rule 12d1–4, the rescission of rule 12d1–2 and certain exemptive orders, and the withdrawal of certain staff no-action letters as proposed may limit funds' ability to structure certain multi-tier fund of funds arrangements that are currently permissible.

[589] Our analysis shows 73 three-tier structures for which the top-tier acquiring fund is a 12(d)(1)(G) fund and the second-tier acquired fund invests in the third tier beyond the 12(d)(1)(A) limits. *See supra* footnote 545 for methodology used to identify 12(d)(1)(G) funds. The results of this analysis should be interpreted with caution because our data does not allow us to distinguish whether the second-tier acquired fund invests in the third tier beyond the 12(d)(1)(A) limits in reliance on exemptive orders.

[590] *See, e.g.,* Federated Investment Management Company, Investment Company Act Release Nos. 30093 (June 1, 2012) [77 FR 34095 (June 8, 2012)] (notice) and 30123 (Jun. 26, 2012) (order); Diamond Hill Capital Management, Inc., et al., Investment Company Act Release Nos. 31433 (Jan. 28, 2015) [80 FR 5825 (Feb. 3, 2015)] (notice) and 31472 (Feb. 24, 2015) (order).

[591] *See supra* footnote 590. Relatedly, the staff stated in the Thrivent No-Action letter that it would not recommend enforcement action if an acquired fund invested, solely for short-term cash management purposes, up to 25% of its assets in a central fund that is a fixed-income fund that could have a dollar-weighted average portfolio maturity of up to 3 years. *See supra* footnote 423.

[592] *See* rule 12d1–4(b)(3)(ii)(B).

[593] An acquired fund may wish to invest in money market funds, short-term bond funds, or other cash management funds for various portfolio management purposes, including for cash management, liquidity management, to seek a higher level of return on investments used to collateralize derivatives (or other) positions, and to achieve greater diversification and trading efficiency. *See* Guggenheim Comment Letter.

term bond funds.[594] Accordingly, on balance, the rule preserves substantial flexibility for acquired funds to invest in underlying funds for cash management purposes with an exception for investments in underlying funds pursuant to rule 12d1–1 and a separate 10% Bucket for investments in underlying funds that do not comply with the terms of rule 12d1–1.

Our analysis shows 23 multi-tier structures in which at least one acquiring fund in each level invests in at least one acquired fund beyond the section 12(d)(1) limits, and thus may be affected by the final rule.[595] Nevertheless, our analysis of multi-tier structures should be interpreted with caution because we lack data that would allow us to identify whether existing multi-tier structures that were created under the complex structures conditions in our exemptive orders or in consideration of the existing no-action letters will comply with the conditions of rule 12d1–4. Further, like the limits under section 12(d)(1) of the Act, the complex structures investment prohibitions of rule 12d1–4 are applicable at acquisition. Accordingly, only funds that seek to increase their investments in other funds beyond the statutory limits will be limited by the rule's complex structures prohibitions.[596]

Several commenters argued that the rescission of rule 12d1–2 will decrease the investment flexibility of funds that currently rely on section 12(d)(1)(G) and rule 12d1–2 to structure affiliated fund of funds arrangements.[597] Funds that currently rely on section 12(d)(1)(G) and rule 12d1–2 can now rely on rule 12d1–4 to structure the same arrangements instead. In particular, rule 12d1–4, unlike section 12(d)(1)(G), does not limit acquiring funds' ability to invest in securities other than securities issued by affiliated funds. Thus, a fund that wishes to invest in affiliated funds beyond the limits of section 12(d)(1) can also invest in (i) unaffiliated fund securities up to the limits in section 12(d)(1)(A) or (F); (ii) securities of money market funds in reliance on rule 12d1–1; and (iii) stocks, bonds, and other securities subject to the conditions of rule 12d1–4, rather than section 12(d)(1)(G) and rule 12d1–2. The funds that will choose to operate in accordance with rule 12d1–4, however, will need to comply with the rule's conditions and incur the costs associated with these conditions.[598] In addition, we believe that many of the commenter concerns related to potential changes in funds' investment flexibility as a result of the rescission of rule 12d1–2 will be alleviated because we are not adopting the proposed redemption limit.

The final rule will require some existing funds of funds to change their portfolios to ensure compliance with the final rule, and these portfolio changes may impose the following costs on acquiring funds: (i) Legal and transaction costs to restructure their portfolios; (ii) sale of the shares of acquired funds at potentially depressed prices; (iii) tax implications, which will depend on whether the acquiring fund will sell shares of acquired funds at a gain or a loss; (iv) disruption in the acquiring funds' investment strategy; and (v) disclosure costs to the extent that funds will change their investment strategy.[599] The prohibition of certain multi-tier structures may also result in less efficient fund of funds structures (*i.e.,* funds of funds with fewer investment options, higher administrative costs, higher transaction costs, and/or lower returns) to the detriment of acquiring fund investors.[600]

The final rule will also impose costs on acquired funds that will lose the investments of the acquiring funds in them. As a result, acquired funds may be unable to achieve economies of scale in portfolio management, resulting in decreased efficiencies and increased operating costs for acquired fund shareholders. Acquired funds will also bear costs associated with selling assets in their portfolios to meet any redemptions by acquiring funds, assuming that acquiring fund redemptions are not made in kind. Finally, certain funds may opt for more complex, costly, and unregulated structures to avoid the rule 12d1–4 conditions.[601] For example, some funds may opt to invest directly in multiple securities, rather than investing in other funds that hold such securities, which may increase the funds' complexity and cost of operations. Nevertheless, we believe that any such costs to funds and their investors will be moderated by benefits associated with improved investor protection, and a more efficient regulatory framework for funds of funds, under the final rule.[602]

ii. Eliminate the Need To Apply for an Exemptive Order

Rule 12d1–4 will permit prospective acquiring funds to acquire the securities of other funds beyond the limits of section 12(d)(1)(A) of the Act and will permit prospective acquired funds to sell their shares to acquiring funds beyond the limits of section 12(d)(1)(B) of the Act without the expense and delay of obtaining an exemptive order, subject to certain conditions.[603] Assuming that the number of exemptive orders granted by the Commission

[594] As a result of this restriction in funds' investment flexibility, acquired funds may (i) invest more in money market funds instead of short-term bond funds, which may reduce fund returns; (ii) invest in funds that charge separate advisory fees or cease to waive their own fees, potentially resulting in higher costs for fund investors; and/or (iii) make direct investments in short-term bonds, which may increase transaction costs and decrease those funds' ability to diversify. The remaining enumerated exceptions to the complex rule condition of rule 12d1–4 (*i.e.,* rule 12d1–4(b)(3)(ii)(A)–(E)) are similar to the conditions in our exemptive orders and thus likely will not materially affect funds' ability to create multi-tier structures.

[595] *See supra* footnote 551.

[596] *See supra* footnote 416.

[597] *See, e.g.,* Allianz Comment Letter; PIMCO Comment Letter; Thrivent Comment Letter; Hancock Comment Letter; Fidelity Comment Letter; NYC Bar Comment Letter; Nuveen Comment Letter; Chapman Comment Letter; Russell Comment Letter; SIFMA AMG Comment Letter; ABA Comment Letter; Fidelity Fixed Income Trustees Comment Letter.

[598] *See infra* section V.C.1.b for detailed discussion of the costs and benefits associated with the conditions of rule 12d1–4. Funds that currently rely on section 12(d)(1)(G) and rule 12d1–2 will only be required to restructure their portfolio if they choose to continue relying on section 12(d)(1)(G) to avoid compliance with the conditions of rule 12d1–4. *See, e.g.,* Allianz Comment Letter (stating that funds ''may be compelled to restructure to avoid the most challenging aspects of the Proposal.'').

[599] We do not quantify these costs because we lack data that would allow us to provide meaningful estimates of the costs and commenters did not provide any relevant data. Some additional difficulties with quantification are: (i) The magnitude of certain costs depends on market conditions and market conditions are unpredictable (*e.g.,* sale of shares at depressed prices); (ii) certain costs are inherently difficult to quantify because they are not well defined (*e.g.,* disruption in the acquiring funds investment strategy); and (iii) funds have some discretion as to whether and when they will incur the costs associated with the restructuring of their portfolios (*i.e.,* the rule imposes an acquisition test) and so it is difficult to predict the magnitude of the costs associated with restructuring.

[600] *See, e.g.,* PIMCO Comment Letter; ABA Comment Letter for similar arguments.

[601] *See, e.g.,* Hancock Comment Letter (noting that ''[S]ome of these structures may be unregulated or may be more complex or have higher costs. For example, we believe that some investment managers may elect to rely more heavily upon unregistered products or may use multiple portfolio sleeves within a single registered fund, which could potentially introduce additional costs and administrative complexities'').

[602] For example, rule 12d1–4 will impose the undue influence finding requirement on both affiliated and unaffiliated funds, which may enhance investor protection. *See infra* sections V.C.1.b and V.C.2.i for detailed discussion of the effects of the final rule on regulatory efficiency and investor protection.

[603] Existing funds of funds that currently rely on exemptive orders that provide relief similar to rule 12d1–4 have already incurred the cost of the exemptive order process. Hence, these funds will not benefit from eliminating the need to apply for an exemptive order under rule 12d1–4.

would stay the same absent the final rule, we estimate that by removing the need to obtain an exemptive order, the final rule will eliminate annual aggregate administrative costs to prospective acquiring and acquired funds of approximately $4.2 million relative to the baseline.[604] Any cost savings to prospective acquiring and acquired funds derived from eliminating the need to apply for an exemptive order likely will be more pronounced for smaller funds or smaller fund complexes because (i) the administrative cost of the exemptive order application process likely does not vary with fund size, and thus may constitute a higher percentage of a smaller fund's assets; and (ii) the same exemptive order can be used by multiple funds within a fund complex, and there may be fewer funds to benefit from an exemptive order within smaller fund complexes.[605]

Rule 12d1–4 also will remove the delay incurred by funds and their sponsors when applying for an exemptive order. As mentioned above, the average time it took a non-ETF (ETF) fund to obtain exemptive relief in 2019 was 127 (378) days.[606] If funds are not required to apply for an exemptive order, prospective acquiring funds will not be required to forgo investments in other funds while awaiting exemptive relief, which ultimately will permit these funds to achieve an efficient allocation of fund assets sooner and will permit these funds to better time their investments in other funds (*i.e.,* potentially purchase shares at more favorable prices). Further, by removing the delay associated with the exemptive order process, prospective acquiring funds will be able to bring new products to the market faster, which will expand investors' investment opportunities and may therefore foster capital formation.[607] Prospective acquired funds also will benefit because the acquiring funds' investments in them will increase their assets more quickly, and as a result the acquired funds may achieve economies of scale more quickly, ultimately benefitting the existing and future shareholders of the acquired funds, which may also foster capital formation.[608]

Rule 12d1–4 also will remove the uncertainty associated with the exemptive order process.[609] Uncertainty related to the exemptive order process may negatively affect fund investment decisions, thus potentially suppressing fund investment and growth.[610] Nevertheless, the effects of the final rule on uncertainty likely will be limited by the fact that the terms of exemptive relief for funds of funds have become to a large extent standardized and the approval of applications for exemptive relief has become somewhat routine.

Investors may benefit from these direct and indirect cost reductions. For example, prospective fund advisers, sponsors, and other service providers may pass cost savings associated with no longer having to request exemptive relief through to investors by lowering fees and expenses. The degree of potential reduction of fund fees and expenses depends on the level of competition in the fund industry. To the extent that the fund industry is competitive, we believe that fund advisers, sponsors, and other service providers will pass on to investors a higher percentage of cost savings arising from the final rule. Conversely, if the level of competition is low, fund advisers, sponsors, and other service providers will retain a higher percentage of cost savings arising from the final rule rather than passing these cost savings on to investors. Academic literature provides conflicting evidence regarding the level of competition in the fund industry. On one hand, several papers provide some evidence that the U.S. fund industry is competitive and that greater competition in the fund industry is associated with lower fund fees and expenses.[611] On the other hand, several papers suggest that price competition is not prevalent in the fund industry.[612] We believe there are two potential explanations as to why prior literature provides conflicting evidence on the level of competition in the fund industry. First, prior literature uses different sample periods, focuses on different market segments, and uses different units of observation (*i.e.,* individual funds versus fund families). Second, it is possible that funds do not compete solely on fees, but instead compete on performance and services.

Further, the cost savings to prospective funds associated with avoiding the exemptive order process under rule 12d1–4 may potentially increase the rate at which new funds of funds become available to investors.[613] The Commission granted 4 non-ETF fund of funds orders and 38 ETF fund of funds orders in 2019.[614] We are unable to estimate the number of new funds of funds that will be created following the adoption of the final rule, but we believe that the number of new funds of funds will be higher than the number of funds of funds that were created as a result of the exemptive orders granted in 2019 because the final rule permits the establishment of funds

[604] In 2019, the Commission granted 4 non-ETF fund of funds orders and 38 ETF fund of funds orders (*see supra* footnote 578 for the source of the exemptive order data). Hence, the final rule could result in annual aggregate administrative cost savings to funds of funds equal to $4,200,000, *i.e.,* $4,200,000 = (4 non-ETF fund of funds orders + 38 ETF fund of funds orders) × $100,000 administrative cost per exemptive order. The cost savings associated with removing the need to apply for exemptive relief for ETF fund of funds arrangements as discussed here are separate from the cost savings associated with removing the need to apply for exemptive relief for ETFs as discussed in the ETF adopting release. *See* 2019 ETF Adopting Release, *supra* footnote 25, at 57207. The direct administrative costs associated with the need to apply for an exemptive order are one-time costs and each exemptive order can be used by multiple funds within the same fund complex.

[605] *See, e.g.,* MFDF Comment Letter for a similar argument.

[606] *See supra* footnote 578 for the source of the exemptive order data.

[607] *See infra* section V.C.2.iii for detailed discussion of the effect of the final rule on capital formation.

[608] *See supra* footnote 607.

[609] *See supra* section V.B.2.a for detailed discussion of costs associated with the exemptive order process.

[610] Academic literature provides evidence consistent with the idea that uncertainty has negative effects on investment and growth. *See, e.g.,* Nicholas Bloom, Stephen Bond, & John Van Reenen, *Uncertainty and Investment Dynamics,* 74 Rev. Econ. Stud. 391 (2007); Nicholas Bloom, *The Impact of Uncertainty Shocks,* 77 Econometrica 623 (2009); Scott R. Baker, Nicholas Bloom, & Steven J. Davis, *Measuring Economic Policy Uncertainty,* 131 Q. J. Econ. 1593 (2016). The cited studies examine the effect of uncertainty on the economy in general, rather than the effect of uncertainty on funds.

[611] *See, e.g.,* John C. Coates, IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy* (Harvard John M. Olin Ctr. for L., Econ., and Bus., Discussion Paper No. 592, Aug. 2007); Sunil Wahal & Albert (Yan) Wang, *Competition among Mutual Funds,* 99 J. Fin. Econ. 40 (2011); Ajay Khorana & Henri Servaes, *What Drives Market Share in the Mutual Fund Industry,* 16 Rev. Fin. 81 (2012); Burton G. Malkiel, *Asset Management Fees and the Growth of Finance,* J. Econ. Persp., Spring 2013, at 97. Further, an ICI study suggests that the fund of funds industry is competitive: ''Mutual fund expense ratios also have fallen because of economies of scale and competition.'' *See* 2020 ICI Fact Book, *supra* footnote 4, at 121.

[612] *See, e.g.,* John P. Freeman & Steward L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest,* 26 J. Corp. L. 609 (2001) (arguing that there is lack of price competition in the fund industry). *See also* Brad M. Barber, Terrance Odean, & Lu Zheng, *Out of Sight, Out of Mind: The Effects of Expenses on Mutual Fund Flows,* 78 J. Bus. 2095 (2005) (finding no relation between fund operating expenses and fund flows); Javier Gil-Bazo & Pablo Ruiz-Verdú, *The Relation between Price and Performance in the Mutual Fund Industry,* 64 J. Fin. 2153 (2009) (showing that funds with worse before-fee performance charge higher fees).

[613] We expect that the effect of the final rule on the number of acquiring BDCs will be limited because BDCs are prohibited from making any investment unless, at the time of the investment, at least 70% of the BDC's total assets are invested in securities of certain specific types of companies, which do not include funds (*see supra* footnote 39).

[614] *See supra* footnote 604.

of funds without the cost of the exemptive order process.

Academic research suggests that investment decisions are sensitive to the number of available investment opportunities.[615] Hence, investor demand for funds of funds may increase as a result of the increased number of funds of funds under the final rule. In particular, investors may increase their investments in funds of funds by either decreasing their investments in other asset classes or increasing their investment rate. More specifically, as an alternative to investing in funds of funds, investors may meet their investment objectives by assembling a portfolio of funds through non-discretionary or discretionary separate accounts with a broker/dealer or investment adviser or by investing directly in funds without the intermediation of broker/dealers or investment advisers. Nevertheless, funds of funds may represent an efficient alternative to such a strategy because fund of funds investors can avoid minimum investment requirements, invest in funds that have been closed to new investors, invest in funds that are restricted to a particular investor type, avoid certain transaction costs, and enjoy lower recordkeeping and monitoring costs relative to investors that directly invest in multiple funds.[616] As a result, the entry of new funds of funds that do not replicate existing investment opportunities may increase investor demand for funds of funds because those funds will provide investors the opportunity to obtain diversified exposure to different asset classes through a single, professionally managed portfolio at a potentially lower cost compared to investing in a portfolio of funds through discretionary or non-discretionary separate accounts.

iii. Assess Compliance With the Final Rule

Existing acquired and acquiring funds relying on exemptive orders on which rule 12d1–4 is based will incur a one-time administrative cost to assess whether their operations are consistent with rule 12d1–4 by examining differences between the exemptive order conditions they are currently required to meet and the conditions of rule 12d1–4. Further, existing acquiring funds currently relying on section 12(d)(1)(G) and rule 12d1–2 to structure funds of funds will be required to decide whether to continue relying on section 12(d)(1)(G) and amended rule 12d1–1 or instead operate in accordance with rule 12d1–4 and comply with the rule's conditions. We believe this assessment will result in a one-time cost equal to $3,315 per fund and an aggregate one-time cost of $7.6 million for all affected funds.[617]

b. Effects of New and Omitted Conditions

Rule 12d1–4 will include new conditions relative to the conditions in our current exemptive orders and rule 12d1–2, and will omit certain conditions contained in our exemptive orders that are not necessary in light of the new conditions of rule 12d1–4. The new conditions of rule 12d1–4 are designed to limit the acquiring funds' undue influence over the acquired funds, limit duplicative fees for acquiring fund investors, limit the creation of complex fund structures, and ultimately encourage effective oversight of fund of funds structures. The rule 12d1–4 conditions augment certain conditions in our exemptive orders, which will likely enhance investor protections. We expect, however, that the implementation and monitoring of these new conditions will impose certain incremental one-time and ongoing costs on funds and their investors.[618] We discuss the benefits and costs of each of the new conditions of rule 12d1–4 and the conditions of existing exemptive orders that rule 12d1–4 omits in detail below.[619]

[615] *See* Shlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans,* Am. Econ. Rev., Mar. 2001, at 79 (presenting survey evidence and plan-level statistics that support the idea that retirement plan investors practice ''1/n'' diversification across all available investment alternatives). *But see* Gur Huberman & Wei Jiang, *Offering versus Choice in 401(k) Plans: Equity Exposure and Number of Funds,* 61 J. Fin. 763 (2006) (demonstrating that individual-level analysis of 401(k) plan data yields different results from plan-level analysis, showing that individuals are less sensitive to the overall number of investment alternatives, but may practice ''1/n'' within a smaller subset of alternative investments).

[616] *See, e.g.,* Edwin J. Elton et al., *Target Date Funds: Characteristics and Performance,* 5 Rev. Asset Pricing Stud. 254 (2015) (showing that ''additional expenses charged by TDFs are largely offset by the low-cost share classes they hold, not normally open to their investors.'').

[617] We estimate that assessing the requirements of rule 12d1–4 will require 5 hours of a compliance manager ($304 per hour) and 5 hours of a compliance attorney ($359 per hour), resulting in a cost of $3,315 (= 5 hours × $304 + 5 hours × $359) per fund. The Commission's estimates of the relevant wage rates in the tables below are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013. The estimated wage figures are modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, overhead, and adjusted to account for the effects of inflation. *See* Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2013 (''SIFMA Report'') for the source of salary data. The total cost for the 1,211 acquiring and 1,069 acquired funds that will be subject to rule 12d1–4 will thus be $7.6 million. $7.6 million = (1,211 acquiring funds that may be required to assess compliance with the rule + 1,069 acquired funds that may be required to assess compliance with the rule) × $3,315 one-time costs to assess compliance with the final rule per fund. Our estimate is likely an upper bound of the cost associated with assessing compliance with the final rule because we count separately the cost for acquiring and acquired funds but certain acquiring funds may also be acquired funds that will be subject to the final rule, and vice versa, and there may be synergies to assess compliance with the final rule for those funds. 1,211 acquiring funds that will be subject to rule 12d1–4 = [1,719 acquiring registered investment companies that invest in other funds beyond the section 12(d)(1) limits (*see* Table 1 in *supra* section V.B.1) + 37 acquiring BDCs (*see supra* footnotes 558 and 559 and associated text)] × 69% of acquiring funds that invest in other funds beyond the section 12(d)(1) limits and will be subject to rule 12d1–4 as estimated by a commenter (*see supra* footnote 537 and associated text). Our calculation assumes that the commenter's sample is representative of the acquiring funds in Table 1. 1,069 acquired funds that will be subject to rule 12d1–4 = [3,392 acquired registered investment companies that have a non-zero investment from other funds (*see* Table 2 in *supra* section V.B.1) + 50 acquired BDCs (*see supra* footnotes 558 and 559 and associated text)] × 45% of acquired funds for which there is at least one acquiring fund that invests in them beyond the 3% limit of section 12(d)(1) × 69% of acquired funds that have investments from other funds in them beyond the 3% limit of section 12(d)(1) and will be subject to rule 12d1–4 as estimated by a commenter (*see supra* footnote 537 and associated text). Our calculation assumes that the commenter's estimate of acquiring funds that will be subject to rule 12d1–4 is also applicable to acquired funds.

[618] *See also* Guggenheim Comment Letter (noting that the conditions of rule 12d1–4 will ''likely result in significant additional compliance, investment and practical costs and burdens that ultimately may result in increased fund expenses. We note that the proposed conditions would necessitate meaningful investments in technology, personnel, training and other compliance-related resources to monitor holdings of acquired funds, particularly when such 'advisory groups' involve large diversified financial services institutions.''). Some of the costs discussed by the commenter may be no longer relevant given the changes in the rule's conditions relative to the 2018 FOF Proposing Release.

[619] *See supra* section II.C for discussion of the rule's conditions. In this section, we compare the conditions of rule 12d1–4 to the conditions of our current exemptive orders. Hence, the discussion in this section describes the effects of rule 12d1–4 on (i) funds that currently rely on our exemptive orders to invest in other funds beyond the limits of section 12(d)(1) but will be subject to rule 12d1–4 following the rescission of our exemptive orders; and (ii) funds that would otherwise choose to rely on our exemptive orders in the future to invest in other funds beyond the limits of section 12(d)(1) but will be subject to rule 12d1–4 following the final rule adoption. Any effects discussed in this section will be more pronounced for funds that currently rely on section 12(d)(1)(G) and rule 12d1–2 to invest in affiliated funds beyond the limits of section 12(d)(1) but will be subject to rule 12d1–4 following the final rule adoption, because the conditions of section 12(d)(1)(G) and rule 12d1–2 are less costly than the conditions in our current exemptive orders. In particular, in contrast to our exemptive

Continued

i. Undue Influence—Control

Rule 12d1–4 mandates that the acquiring fund and its advisory group will not control (individually or in the aggregate) an acquired fund. Control is presumed when a fund owns more than 25% of the voting securities of another fund. The control condition does not apply to affiliated fund of funds structures. The control condition of rule 12d1–4 is consistent with the conditions of our current exemptive orders and thus will not have an economic effect relative to the baseline.[620]

ii. Undue Influence—Voting Conditions

Rule 12d1–4 will require an acquiring fund and its advisory group to vote their shares of an acquired fund using mirror voting if the acquiring fund and its advisory group (in the aggregate): (i) Hold more than 25% of the outstanding voting securities of an acquired open-end fund or UIT due to a decrease in the outstanding securities of the acquired fund; or (ii) hold more than 10% of the outstanding voting securities of an acquired closed-end fund or BDC.[621]

Acquired open-end funds and UITs. Our current exemptive orders require an acquiring fund and its advisory group to vote their shares of an acquired open-end fund or UIT using mirror voting only if the acquiring fund and its advisory group hold more than 25% of the acquired fund's outstanding voting securities due to a decrease in the outstanding securities of the acquired fund. Hence, for acquiring funds that hold shares of open-end funds or UITs beyond the section 12(d)(1) limits, the voting condition of rule 12d1–4 is the same as the voting condition in our exemptive orders, and so we expect that this aspect of the rule will not impose additional costs on funds relative to the exemptive orders.

Acquired BDCs and registered closed-end funds. Rule 12d1–4 differs from our current exemptive orders for acquiring funds that invest in acquired registered closed-end funds or BDCs beyond the limits of section 12(d)(1) because (i) it imposes a 10% (instead of 3% in the exemptive orders) voting threshold; and (ii) it only allows mirror voting (instead of either mirror or pass-through voting in the exemptive orders) for all funds within the acquiring funds' advisory group.[622] Hence, rule 12d1–4 is less restrictive than our current exemptive orders in terms of the voting threshold but more restrictive than our current exemptive orders in terms of permissible voting methods for acquiring funds that invest in acquired BDCs and registered closed-end funds.

The voting conditions of rule 12d1–4 with respect to acquired BDCs and registered closed-end funds may have the following costs. First, we estimate that all acquiring funds that invest in registered closed-end funds or BDCs in reliance on rule 12d1–4 will incur a one-time cost to update their proxy voting policies to reflect that the fund is potentially subject to the voting provisions of the rule. Our analysis shows that only one of the existing acquiring funds invests in at least one registered closed-end fund beyond the 10% voting threshold.[623] Hence, for funds that invest in registered closed-end funds or BDCs in reliance on rule 12d1–4, we expect that the one-time cost to update their proxy voting policies will be immaterial. Nevertheless, we estimate that the one-time cost for acquiring funds that invest in BDCs and registered closed-end funds beyond the 10% voting threshold to update their proxy voting policies will be equal to $1,257 per fund.[624]

Second, the cost of the more restrictive voting methods (*i.e.,* the rule generally permits only mirror voting) of rule 12d1–4 relative to our current exemptive orders is that the rule may increase economic distortions in the voting process since mirror voting requires the acquiring fund to vote in the same proportion as the vote of all other holders of the acquired fund shares.[625] The economic effect of any distortions in the voting process is unclear and will depend on: (i) The percentage of acquired fund shares that are held by non-fund shareholders and funds that are not subject to the voting conditions; (ii) the composition of the acquiring fund shareholders (*e.g.,* retail versus institutional investors);[626] and (iii) how frequently votes are close and so the acquiring fund's voting may determine the outcome of the vote.

Relatedly, the mirror voting requirement applicable to acquiring fund holdings in excess of 10% of an acquired BDC or registered closed-end fund may require advisers to revise existing proxy voting policies and procedures, including those of other members of the advisory group and their respective clients.[627] Additionally, a more restrictive voting method may require an acquiring fund and its advisory group to follow a less flexible proxy voting policy, subject to the other legal requirements that are applicable to an investment adviser's proxy voting responsibilities.[628] However, this effect

orders, funds relying on section 12(d)(1)(G) and rule 12d1–2 to invest in affiliated funds beyond the limits of section 12(d)(1) are not required to enter into a participation agreement or make certain findings and adopt procedures to prevent overreaching and undue influence by the acquiring fund and its affiliates. Further, the conditions aimed at mitigating excessive and duplicative fees under section 12(d)(1)(G) are more limited in scope than the fee conditions in our exemptive orders. *See, e.g.,* Invesco Comment Letter for a discussion of compliance burdens associated with the rescission of rule 12d1–2 and the potential reliance of affiliated funds of funds on rule 12d1–4 instead of section 12(d)(1)(G) and rule 12d1–2.

[620] Commenters agreed with the assertion that the control condition of rule 12d1–4 is consistent with the conditions of the existing orders. *See, e.g.,* ICI Comment Letter. A commenter argued that ''many advisers already have systems in place to monitor holdings at the 'advisory group level,' '' which would decrease any potential compliance costs associated with this aspect of the final rule. *See* Invesco Comment Letter.

[621] The voting condition of rule 12d1–4 is not applicable when an acquiring fund is within the same group of investment companies as an acquired fund or the acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as the acquired fund's investment adviser or depositor. *See* rule 12d1–4(b)(1)(iii). In circumstances where all holders of the outstanding voting securities of the acquired fund are required by rule 12d1–4 or otherwise under section 12(d)(1) to mirror vote the securities of the acquired fund, the acquiring fund may use pass-through instead of mirror voting. *See* rule 12d1–4(b)(1)(ii). Our exemptive orders do not include such a condition. Our analysis shows no existing acquired funds that will be subject to this rule condition (*i.e.,* acquired funds that are only held by acquiring funds that are subject to the voting conditions of rule 12d1–4). Hence, we expect that the economic effects of this aspect of the rule will be immaterial.

[622] Similar to the rule's voting condition, our current exemptive orders require non-fund entities within the advisory group to use mirror voting.

[623] Results are the same when aggregating fund holdings across funds sharing the same adviser or sub-adviser. We lack structured data on BDCs' outstanding shares and so BDCs are excluded from this analysis. Our data does not allow us to identify whether acquiring funds hold voting or non-voting securities of the acquired funds, which may result in misestimation of the number of acquiring funds that hold an investment in at least one closed-end fund or BDC beyond the 10% voting threshold. This data limitation applies to all analysis in section V that uses voting share information.

[624] *See* Table 5 in *infra* section VI.B.1.

[625] *See, e.g.,* ICI Comment Letter; Nuveen Comment Letter; Schwab Comment Letter; TPG Comment Letter; SIFMA AMG Comment Letter noting that both pass-through and mirror voting can introduce distortions in the shareholder voting process, but those distortions are more pronounced in the case of mirror voting.

[626] There are significant differences in voting involvement by institutional investors compared to retail investors (*see, e.g.,* Broadridge & PwC, 2019 Proxy Season Review, *available at https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2019-review.pdf*).

[627] *See supra* footnote 161 and associated text for related discussion.

[628] *See generally* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Investment Advisers Act Release No. 5325 (Aug. 21, 2019), at 5–6 [84 FR 47420, 42421 (Sept. 10, 2019)]; id. at 12, Question No. 2 [84 FR 47423]; Supplement to Commission Guidance Regarding Voting Responsibilities of Investment Advisers, Investment Advisers Act Release No. 5547 (July 22, 2020) [85 FR 55155 (September 3, 2020)]. *See also* Exemptions from the Proxy Rules for Proxy Voting Advice, Securities Exchange Act Release No. 89372 (Jul. 22, 2020) [85

would be mitigated by the fact that, as discussed below, we believe that the majority of acquiring funds that invest in registered closed-end funds or BDCs beyond the limits of section 12(d)(1) in reliance on our exemptive orders already use mirror voting.

Third, the more restrictive voting methods will impose more voting restrictions on acquiring funds, and thus may decrease funds' incentives to acquire larger blocks of shares (*i.e.,* blocks of shares in excess of the section 12(d)(1) limits but below the 10% threshold of the rule) and thereby potentially support value-increasing actions through their voting.[629]

The voting conditions of rule 12d1–4 for acquired BDCs and registered closed-end funds may have the following benefits. First, the less restrictive voting threshold of rule 12d1–4 relative to the exemptive orders (*i.e.,* 10% instead of 3%) may decrease economic distortions in the voting process since the voting provision will not apply until an acquiring fund holds a greater percentage of the voting securities of an acquired fund.

Second, the less restrictive voting threshold of rule 12d1–4 relative to the exemptive orders will impose fewer voting restrictions on acquiring funds, and thus may increase funds' incentives to acquire larger blocks of shares and thereby potentially support value-increasing actions through their voting.[630]

Third, assuming no difference between the permissible voting methods under the rule and the exemptive orders, the voting threshold of the rule may decrease ongoing costs associated with voting because it is less restrictive than the voting threshold in existing exemptive orders (*i.e.,* 10% under the rule versus 3% under the exemptive orders). Similarly, holding the voting threshold constant, the more restrictive voting methods of the rule may decrease ongoing costs for funds associated with voting because pass-through voting is more costly to implement than mirror voting.[631] Nevertheless, we expect any such cost decreases to be small because we believe that the majority of acquiring funds that invest in registered closed-end funds or BDCs beyond the limits of section 12(d)(1) in reliance on our exemptive orders already use mirror voting, and we expect those funds to continue using mirror voting following the final rule adoption.[632]

Fourth, the additional restriction on voting methods (*i.e.,* only allow mirror voting) may enhance the protection of the acquired fund investors from the acquiring funds' undue influence. Pass-through voting may not provide the same level of protection from acquiring funds' undue influence as mirror voting because acquiring fund investors may vote in line with the recommendations of the acquiring fund investment adviser and board when the acquiring fund uses pass-through voting.[633]

iii. Undue Influence—Findings[634]

To prevent overreaching and undue influence, current exemptive orders typically require (i) acquired fund boards to make certain findings and adopt procedures at least annually to prevent overreaching and undue influence by the acquiring fund and its affiliates; (ii) acquiring funds to take measures to prevent the acquiring fund from influencing the terms of any services or transactions between the acquiring fund and an unaffiliated acquired fund or causing an unaffiliated acquired fund to purchase a security in any affiliated underwriting; and (iii) acquiring fund boards to adopt procedures reasonably designed to assure that the acquiring fund's investment adviser does not take into account consideration received from an unaffiliated acquired fund. These requirements in the exemptive orders are only applicable to unaffiliated funds of funds and they are only applicable to acquiring and acquired funds that are management companies.

To mitigate concerns of overreaching and undue influence, if an acquired fund is a management company, rule 12d1–4 will require the acquired fund's investment adviser, prior to the initial acquisition of the acquired fund's shares in excess of the limits in section 12(d)(1)(A)(i) of the Act, to find that any undue influence concerns associated with the acquiring fund's investment in the acquired fund are reasonably addressed. As part of this consideration, the acquired fund's investment adviser must consider, at a minimum, the following factors: (i) The scale of contemplated investments by the acquiring fund and any maximum investment limits; (ii) the anticipated timing of redemption requests by the acquiring fund; (iii) whether and under what circumstances the acquiring fund will provide advance notification of investments and redemptions; and (iv) the circumstances under which the acquired fund may elect to satisfy redemption requests in kind rather than in cash and the terms of any such redemptions in kind. The acquired fund's investment adviser must report its findings and the basis for those findings to the fund's board of directors no later than the next regularly scheduled board of directors meeting

FR 55082 (September 3, 2020)] (reaffirming an investment adviser's fiduciary duty to vote in the best interest of its client).

[629] Academic literature provides some evidence that shareholder activism has a positive effect on target funds (*see, e.g.,* Martin Cherkes, Jacob S. Sagi, & Z. Jay Wang, *Managed Distribution Policies in Closed-End Funds and Shareholder Activism,* 49 J. Fin. & Quantitative Analysis 1311 (2014); Michael Bradley et al., *Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Funds,* 95 J. Fin. Econ. 1 (2010)). Academic literature provides mixed evidence on whether funds are activist investors, *i.e.,* tend to vote with or against the management of the target companies (*see, e.g.,* Dragana Cvijanovic, Amil Dasgupta, & Konstantinos E. Zachariadis, *Ties that Bind: How Business Connections Affect Mutual Fund Activism,* 71 J. Fin. 2933 (2006); Rasha Ashraf, Narayanan Jayaraman, & Harley E. Ryan, Jr., *Do Pension-Related Business Ties Influence Mutual Fund Proxy Voting? Evidence from Shareholder Proposals on Executive Compensation,* 47 J. Fin. & Quantitative Analysis 567 (2012); Gerald F. Davis & E. Han Kim, *Business Ties and Proxy Voting by Mutual Funds,* 85 J. Fin. Econ. 552 (2007)). There is some evidence, however, of increased activism by funds, other than hedge funds, over time (*see, e.g.,* J.P. Morgan, 2019 Proxy Season Review (Aug. 2019), *available at https://www.jpmorgan.com/jpmpdf/1320747618625.pdf*). The abovementioned studies are not solely focused on acquiring fund activism targeted at acquired funds but also study fund activism targeted at non-funds and non-fund activism targeted at funds.

[630] *See supra* footnote 629 and associated text.

[631] *See* Table 5 in *infra* section VI.B.1. Under pass-through voting, acquiring funds must seek voting instructions from their security holders and vote such proxies in accordance with their instructions. Under mirror voting, acquiring funds must vote the acquired fund shares in the same proportion as the vote of all other holders of the acquired fund.

[632] Two commenters noted that mirror voting is generally preferable to pass-through voting, and other commenters noted that the expense and logistical challenges associated with pass-through voting make pass-through voting impractical. *See* Invesco Comment Letter (noting that mirror voting is ''typically preferable to pass-through voting''); SIFMA AMG Comment Letter (noting that ''registered funds would likely mirror vote shares held in any [closed-end funds] subject to the voting condition''). *See also* ICI Comment Letter (noting that ''[i]n some situations, the expense and logistical challenges of pass though voting also may be undesirable.''); Voya Comment Letter (noting that ''the use of pass-through voting would increase the costs and logistical challenges of proxy solicitations. . . . If these acquiring funds determine to implement pass-through voting, the costs of obtaining approvals of shareholder proposals could increase significantly, without corresponding benefit to [the acquiring] fund's shareholders.''); Charles Schwab Comment Letter (noting that ''[g]enerally speaking, the expense and logistical challenges make pass-through voting impractical'').

[633] *See, e.g.,* Advent Comment Letter; Comment Letter of Franklin Square Holdings (May 2, 2019) (''Franklin Comment Letter''); Skadden Comment Letter; ABA Comment Letter (arguing that pass-through voting does not provide the same level of protection from undue influence as mirror voting).

[634] *See infra* section V.C.1.b.iv for discussion of the condition of rule 12d1–4 related to layering of fees and expenses and complex structures for management companies, UITs, and separate accounts (*i.e.,* rule 12d1–4(b)(2)(i), (ii), and (iii)).

following the acquiring fund's initial investment in the acquired fund.[635]

Hence, rule 12d1–4 will differ from the undue influence conditions in our exemptive orders in the following main ways. First, the undue influence requirement of rule 12d1–4 will only apply to acquired funds, while the policies and procedures requirement in our exemptive orders is applicable to both acquiring and acquired funds.[636] Second, the undue influence requirement of rule 12d1–4 will apply to both affiliated and unaffiliated funds of funds, while the policies and procedures requirement in our exemptive orders only applies to unaffiliated funds of funds. Third, the undue influence requirement of rule 12d1–4 will only apply prior to the initial acquisition of the acquired fund shares, while the policies and procedures requirement for acquired funds in our exemptive orders applies periodically (*i.e.,* at least annually). Fourth, the undue influence requirement of rule 12d1–4 will apply to funds' investment advisers, while the policies and procedures requirement in our exemptive orders applies to funds' boards of directors.

Rule 12d1–4 imposes the undue influence requirement only on acquired funds. The benefit of such an approach is that it will reduce ongoing costs to acquiring funds relative to our exemptive orders because acquiring funds will not be required to adopt policies and procedures to prevent undue influence over the acquired fund. Such an approach, however, may be weaker from an investor protection standpoint to the extent that acquiring funds are no longer required to make findings to prevent undue influence over the acquired fund. We believe that these concerns are mitigated by the rule's additional conditions related to undue influence, including voting requirements, the fund of funds investment agreement requirement, and the fact that the rule will prohibit an acquiring fund and its advisory group from controlling an acquired fund.

Rule 12d1–4 will impose the undue influence requirement on both affiliated and unaffiliated funds of funds, which may enhance investor protection.[637] At the same time, by imposing the undue influence requirement to both affiliated and unaffiliated funds of funds, the undue influence requirement of rule 12d1–4 will be more costly to implement than the policies and procedures in our exemptive orders because a larger number of acquired funds (*i.e.,* both affiliated and unaffiliated funds) will be required to incur the costs associated with the undue influence requirement.[638]

In contrast, by requiring an undue influence finding only at initial acquisition, rule 12d1–4 will reduce costs for acquired funds relative to our exemptive orders because acquired funds will no longer be required to periodically make findings and adopt procedures related to undue influence. While this rule condition does not require periodic evaluation of acquiring funds' investments in acquired funds, the board may require more frequent subsequent reporting under the fund's compliance program.

Rule 12d1–4 also allocates the responsibility of making undue influence findings to the acquired fund's investment adviser, subject to the board's oversight.[639] As discussed above, our current exemptive orders require the board to approve certain procedures to prevent overreaching and undue influence by the acquiring fund and its affiliates.[640] While rule 12d1–4 does not require the adoption of specific procedures, rule 38a–1 requires funds to adopt written compliance policies and procedures reasonably designed to prevent a violation of the federal securities laws by the fund.[641] Accordingly, we believe that the economic effect of this difference between our exemptive orders and rule 12d1–4 will be limited because funds will be required to maintain similar policies and procedures, and compliance with the exemptive orders is generally facilitated by the fund's investment adviser at the direction of the board.[642] We believe investor protection concerns that had been addressed by the conditions in our exemptive orders will be more effectively addressed by the protective conditions of the final rule, such as the requirement that an acquiring fund investment adviser evaluate the complexity of the structure and find that the acquiring fund's fees and expenses do not duplicate the fees and expenses of the acquired fund and that certain funds enter into a fund of funds investment agreement.[643]

The undue influence finding requirement of rule 12d1–4 will impose one-time costs on acquired funds to review the rule's requirement and modify, as necessary, their policies and procedures to comply with the rule, and these costs may be borne by investors in acquired funds.[644] These estimated

[635] Under our exemptive orders, in cases when the investment adviser to the fund assists the board with the findings and procedures to prevent overreaching and undue influence by the acquiring fund and its affiliates, the investment adviser periodically reports its findings to the fund's board of directors. Hence, the reporting requirement in rule 12d1–4 likely is no more burdensome than reporting practices under our exemptive orders.

[636] *See* rule 12d1–4(b)(2)(i)(B). Acquiring funds are nevertheless subject to other rule conditions, such as the requirement to enter into a fund of funds investment agreement and the evaluation of the complexity of the structure and findings regarding the aggregate fees and expenses associated with the acquiring fund's investment in the acquired fund.

[637] Several commenters stated that affiliated funds of funds do not raise the concerns that section 12(d)(1) was enacted to address. *See, e.g.,* PIMCO Comment Letter; Allianz Comment Letter; Thrivent Comment Letter. Academic literature, however, provides results of empirical analysis consistent with the idea that affiliated funds of funds suffer from conflicts of interest. *See, e.g.,* Utpal Bhattacharya, Jung H. Lee, & Veronika K. Pool, *Conflicting Family Values in Mutual Fund Families,* 68 J. Fin. 173 (2013); Jung Hoon Lee, *Information Flows in Mutual Fund Families* (Working Paper, Sept. 2014), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148075. See also, e.g.,* Diane Del Guercio, Egemen Genc, & Hai Tran, *Playing Favorites: Conflicts of Interest in Mutual Fund Management,* 128 J. Fin. Econ. 535 (2018); Jose-Miguel Gaspar, Massimo Massa, & Pedro Matos, *Favoritism in Mutual Fund Families?Evidence on Strategic Cross-Fund Subsidization,* 61 J. Fin. 73 (2006); Luis Goncalves-Pinto, Juan Sotes-Paladino, & Jing Xu, *The Invisible Hand of Internal Markets in Mutual Fund Families,* 89 J. Banking & Fin. 105 (2018) for evidence consistent with the idea of conflicts of interest in affiliated fund complexes in general (*i.e.,* not necessarily affiliated funds of funds). *See also* CFA Comment Letter for similar arguments. Any such conflicts of interest are, at least partially, mitigated to the extent that the investment adviser owes a fiduciary duty both to the acquiring and acquired funds and the acquiring and acquired funds share the same board of directors that exercise oversight over both funds.

[638] *See also* Guggenheim Comment Letter (noting that the finding requirement of rule 12d1–4 will ''give rise to the need to incorporate attorneys and accounting staff to assist in documenting the cost of the fund investment and the complexity of the structure prior to making the investment and in preparing a document for review by the board.'').

[639] Rule 12d1–4(b)(2).

[640] For example, our orders require an unaffiliated acquired fund board to adopt procedures reasonably designed to monitor purchases by the unaffiliated acquired fund in an underwriting in which an affiliate of the acquiring fund is the principal underwriter. In addition, the acquiring fund's board of directors, including a majority of its independent directors, is required by our orders to adopt procedures reasonably designed to assure that the acquiring fund's investment adviser does not take into account consideration received from an unaffiliated acquired fund (or certain of the unaffiliated acquired fund's affiliates).

[641] *See supra* footnote 59 and associated text.

[642] Some commenters argued that allocating more responsibilities to the fund's investment adviser subject to the board's oversight will be beneficial to fund investors because this approach is consistent with the board's current oversight responsibilities. *See* IDC Comment Letter; Hancock Comment Letter; MFDF Comment Letter; ABA Comment Letter.

[643] In addition, the acquired fund's board and adviser are subject to ongoing fiduciary obligations and the acquired fund's board must determine an appropriate level of subsequent reporting under the acquired fund's compliance program.

[644] Acquired funds will bear the costs associated with rule 12d1–4 only if they permit acquiring fund investments in excess of the section 12(d)(1) limits

costs are attributable to the following activities: (i) Reviewing the rule's finding requirement; (ii) developing new (or modifying existing) policies and procedures to align with the finding requirement of rule 12d1–4; (iii) integrating and implementing those policies and procedures into the rest of the funds' activities; and (iv) preparing new training materials and administering training sessions for staff in affected areas.

The undue influence requirement of rule 12d1–4 also will impose ongoing costs on an acquired fund's investment adviser each time a new acquiring fund invests in the acquired fund. Our current exemptive orders require fund boards to make certain findings and adopt procedures to prevent overreaching and undue influence by the acquiring fund and its affiliates, and some of those processes and procedures may be similar to the rule's requirements. Consequently, to the extent that investment advisers can leverage some of the existing board processes and procedures to comply with the rule's requirements, any ongoing costs will be mitigated. We generally believe that the undue influence finding of rule 12d1–4 is as comprehensive as the policies and procedures in our exemptive orders because both rule 12d1–4 and our exemptive orders allow funds flexibility to determine the undue influence concerns, and to consider factors applicable to those concerns, that may be relevant to each fund of funds structure.[645]

Our staff estimates that the annual costs necessary to comply with the undue influence finding requirement of rule 12d1–4 for acquired management companies will be equal to $45,193 per acquired management company and will result in an aggregate ongoing burden equal to $131 million for all affected acquired management companies.[646]

We expect that the costs associated with the finding requirement of rule 12d1–4 will be incurred by the acquired fund's investment adviser and the acquired fund's board of directors but, depending on market competition and other factors, may partially or fully be borne by the acquired fund shareholders in the form of higher management fees and/or operating expenses.

iv. Layering of Fees and Expenses

Our current exemptive orders contain a set of conditions designed to prevent duplicative and excessive fees and expenses in fund of funds structures. In particular, for management companies, our exemptive orders: (i) Limit sales charges and service fees charged by the acquiring fund to those set forth in the FINRA's sales charge rule; (ii) require an acquiring fund's adviser to waive fees otherwise payable to it by the acquiring fund in an amount at least equal to any compensation received from an acquired fund that is not part of the same group of investment companies by the adviser, or an affiliated person of the adviser, other than advisory fees paid to the adviser or its affiliated person by such an acquired fund, in connection with the investment by the acquiring fund in such acquired fund; and (iii) require the acquiring fund board to find that advisory fees are based on services provided that are in addition to, rather than duplicative of, the services provided by an adviser to an acquired fund. For UITs, our exemptive orders: (i) Limit sales charges and service fees charged by the acquiring fund to those set forth in FINRA's sales charge rule; and (ii) require UIT depositors to deposit only acquired funds that do not assess a sales load or that waive any sales loads. The conditions in our exemptive orders apply to both investments in affiliated and unaffiliated funds of funds.

Rule 12d1–4 will replace the above-mentioned conditions with the following requirements that will also apply to both affiliated and unaffiliated funds of funds. For management companies, rule 12d1–4 will require the acquiring fund's adviser to evaluate the complexity of the structure and the aggregate fees and expenses associated with the acquiring fund's investment in acquired funds and find that the acquiring fund's fees and expenses do not duplicate the fees and expenses of the acquired fund. As part of this evaluation, the acquiring fund's adviser should consider, among others, whether such fees incurred by the acquiring fund are based on services that are in addition to, rather than duplicative of, services provided by the acquiring fund's investment adviser. For UITs, rule 12d1–4 will require the principal underwriter or depositor of a UIT to analyze the complexity of the structure associated with the UIT's investment in acquired funds, and find that the arrangement does not result in duplicative fees and expenses. For all acquiring funds, similar to the finding requirement related to undue influence,[647] rule 12d1–4 will require the evaluation of aggregate fees and expenses prior to the initial acquisition of an acquired fund in excess of the limits in section 12(d)(1).

Management companies. In the case of management companies, rule 12d1–4 will replace the specific conditions in our exemptive orders with a broader requirement that the investment adviser to the acquiring fund consider both the complexity and the aggregate fees and expenses of the fund of funds arrangement. We believe that the omission of the specific conditions in our exemptive orders will not compromise investor protection for the following reasons.

First, the omission of the FINRA sales charge limitation from rule 12d1–4

in reliance on rule 12d1–4 and therefore must comply with the rule's conditions. Acquired funds may be able to pass through some of the costs associated with the rule's conditions to acquiring funds through higher operating expenses. The ability of acquired funds to pass through some of the costs depends on the market power of acquired funds, which ultimately depends on the availability of investment options for acquiring funds.

[645] In particular, rule 12d1–4 requires acquired funds to consider (i) the scale of the acquiring fund's investment in the acquired fund; and (ii) the timing and circumstances of the acquiring fund's redemptions of the acquired fund shares. Our exemptive orders require acquiring funds to consider (i) any services or transactions between the acquiring fund and an unaffiliated acquired fund; (ii) any purchases by the acquired fund of securities in affiliated underwritings; and (iii) any compensation that the acquiring fund investment adviser received from an unaffiliated acquired fund. Rule 12d1–4 requires advisers to consider certain factors at a minimum but does not dictate the particular terms or how advisers must evaluate or weigh the various factors. *See also* Dechert Comment Letter (recommending that the Commission should not set forth specific factors that an adviser should consider when making such a finding).

[646] This estimate is based on the following calculation: $131 million = $45,193 initial and annual internal and external burden per fund × 2,900 acquired management companies that will be subject to rule 12d1–4. $45,193 = [$14,994 initial and annual internal burden per fund + $35,220 initial external burden per fund (*see* Table 7 in *infra* section VI.B.3.)] × (1—10% of the total burden that is associated with the recordkeeping requirements of rule 12d1–4). This and all subsequent cost estimates in this section that rely on per fund dollar cost estimates from section VI below are an upper bound of the costs imposed by the final rule because they capture the total rather than the incremental cost of the rule's requirements. 2,900 acquired management companies that will be subject to rule 12d1–4 = 4,203 acquired management companies × 69% of acquired management companies that will be subject to rule 12d1–4 as estimated by a commenter (*see supra* footnote 537 and associated text). Our calculation assumes that the commenter's estimate of acquiring funds that will be subject to rule 12d1–4 is also applicable to acquired funds. 4,203 acquired management companies = 3,392 acquired registered investment companies (*see supra* Table 2) × 14,605 registered investment companies (*see* Table 1 in *supra* section V.B.1)/11,788 management companies (*see* Table 2 in *supra* section V.B.1). This estimate assumes that acquired management companies with investments from acquiring funds beyond the limits of section 12(d)(1) will be subject to rule 12d1–4 at the same rate as the acquired management companies with investments from acquiring funds within the limits of section 12(d)(1) following the rule adoption.

[647] *See supra* section V.C.1.b.iii.

likely will not have an economic effect because the FINRA sales charge rule remains applicable to certain funds (*i.e.,* open-end funds and certain closed-end funds) regardless of the rule's requirements.[648] Second, rule 12d1–4 will replace the requirements in our exemptive orders that (i) the acquiring fund's adviser should waive advisory fees under certain circumstances; and (ii) the acquiring fund's board should make certain findings regarding advisory fees, with a broader requirement that the investment adviser should consider whether fees and expenses are duplicative. We believe that the fee waiver condition of the existing orders is unnecessary in light of the existing duties and obligations of the fund boards of directors.[649] In addition, the requirement in the exemptive orders that the acquiring fund board find that advisory fees are based on services provided that are in addition to, rather than duplicative of, the services provided by an adviser to an acquired fund is covered by a fund board's fiduciary duties and statutory obligations.

The benefit of the broader fee and expense conditions of rule 12d1–4 relative to the more specific conditions of the exemptive orders is that the acquiring fund's investment adviser will be able to tailor the evaluation of the complexity and the findings regarding aggregate fees and expenses of the fund of funds structure to the needs of each structure, including the consideration of any additional factors that may be appropriate under the circumstances. As a result, the fee conditions of rule 12d1–4 may better protect acquiring fund shareholders from duplicative fees than the conditions in the exemptive orders.[650]

At the same time, the broader fee and expense conditions of rule 12d1–4 relative to the exemptive orders may be more costly to implement and monitor relative to the conditions in the exemptive orders. In particular, rule 12d1–4 will impose one-time costs on funds to review the rule's requirement and modify, as necessary, their policies and procedures to comply with this aspect of rule 12d1–4.

The incremental initial and ongoing costs that management companies will incur whenever they invest for the first time in an acquired fund under rule 12d1–4 include: (i) Advisers' initial evaluation of the complexity of the structure and analysis supporting the finding regarding aggregate fees and expenses associated with their investments in acquired funds; (ii) advisers' preparation and reporting of their evaluations, findings, and the basis for their evaluations or findings to the acquiring funds' board of directors; (iii) board time to review the reports prepared by the investment advisers; and (iv) costs of counsel to the independent directors to review the reports prepared by the investment advisers.

The Commission staff estimates that the one-time and ongoing annual costs necessary to comply with the fee and expense conditions of rule 12d1–4 for acquiring management companies will be equal to $45,193 per acquiring management company and will result in an aggregate ongoing burden equal to $148.1 million for all affected acquiring management companies.[651]

UITs. With respect to acquiring UITs, rule 12d1–4 will replace the specific conditions related to sales charges in the exemptive orders with a broader requirement that on or before the date of initial deposit of portfolio securities, the UIT's principal underwriter or depositor evaluate the complexity of the structure and find that the UIT's fees and expenses do not duplicate the fees and expenses of the acquired funds that the UIT holds or will hold at the date of deposit. Similar to the fee and expense conditions of rule 12d1–4 for management companies, the benefit of the broader requirement of rule 12d1–4 for UITs relative to the more specific conditions of the exemptive orders is that the acquiring UIT's depositor or underwriter will be able to tailor the evaluation of the complexity and finding regarding the aggregate fees and expenses of the fund of funds structure to the needs of each structure and augment, whenever appropriate, the exemptive order conditions with additional appropriate factors. As a result, the UIT fee and expense conditions of rule 12d1–4 may better protect acquiring fund shareholders from duplicative fees than the conditions in the exemptive orders.

At the same time, the broader UIT fee and expense conditions of rule 12d1–4 relative to the exemptive orders may be more costly to implement and monitor relative to the conditions in the exemptive orders. In particular, rule 12d1–4 will impose one-time costs on funds to review the rule's requirement and modify, as necessary, their policies and procedures to comply with the rule. Our staff estimates that the one-time costs necessary to comply with the finding requirement related to fees and expenses of rule 12d1–4 will be equal to $13,187 per acquiring UIT and will result in an aggregate ongoing burden equal to $2.6 million for all affected acquiring UITs.[652] UITs will not bear any ongoing implementation or monitoring costs because they are only required to evaluate the complexity of the structure and make a finding regarding the aggregate fees and expenses associated with the UIT's investment in an acquired fund at the time of initial deposit.

To the extent that the fee and expense conditions of rule 12d1–4 will increase operating costs for management

[648] *See* FINRA rule 2341. FINRA rule 2341 does not apply to registered closed-end funds (other than interval funds relying on rule 23c–3 under the Act), BDCs, or UITs (other than ''single payment'' investment plans that are issued by a UIT). *See* FINRA rule 2341(d).

[649] *See supra* footnotes 309–313 and accompanying text; *see also* 2018 FOF Proposing Release, *supra* footnote 6, at nn.146–147 and accompanying text.

[650] A commenter argued that an additional benefit of the fee and expense conditions of rule 12d1–4 relative to the baseline is that rule 12d1–4 will ''lower administrative burden, and appropriately shift the decision-making to the party (the adviser) in the best position to make the assessment'' whether the fees and expenses of the fund of funds are reasonable. *See* Invesco Comment Letter.

[651] This estimate is based on the following calculation: $148.1 million = [$14,994 initial and annual internal burden per fund + $35,220 initial external burden per fund (*see* Table 7 in *infra* section VI.B.3.)] × (1—10% of the total burden that is associated with the recordkeeping requirements of rule 12d1–4) × 3,278 acquiring management companies that will be subject to rule 12d1–4. 3,278 acquiring management companies that will be subject to rule 12d1–4 = 4,750 acquiring management companies (*see* Table 2 in *supra* section V.B.1) × 69% of acquiring management companies that will be subject to rule 12d1–4 as estimated by a commenter (*see supra* footnote 537 and associated text). This estimate assumes that acquiring management companies with current investments in other funds beyond the limits of section 12(d)(1) will be subject to rule 12d1–4 at the same rate as the acquiring management companies with current investments in other funds within the limits of section 12(d)(1) following the rule adoption.

[652] This estimate is based on the following calculation: $2.6 million = $13,187 initial internal and external burden per fund × 200 acquiring UITs that will be subject to rule 12d1–4. $13,187 initial internal and external burden per fund = [$12,253 initial internal burden per fund + $2,400 initial external burden per fund (*see* Table 8 in *infra* section VI.B.4.)] × (1—10% of the total burden associated with the recordkeeping requirements of rule 12d1–4). 200 acquiring UITs that will be subject to rule 12d1–4 = 720 UITs (*see* Table 1 in *supra* section V.B.1) × 40% of funds that are acquiring funds × 69% of acquiring UITs that will be subject to rule 12d1–4 as estimated by a commenter (see supra footnote 534 and associated text). 40% of funds that are acquiring funds = 4,750 acquiring funds (*see* Table 2 in *supra* section V.B.1)/11,788 funds (*see* Table 2 in *supra* section V.B.1). This estimate assumes that acquiring UITs with current investments in other funds beyond the limits of section 12(d)(1) will be subject to rule 12d1–4 at the same rate as the acquiring UITs with current investments in other funds within the limits of section 12(d)(1) following the rule adoption. This estimate also assumes that the percentage of management companies that are acquiring funds is the same as the percentage of UITs that are acquiring funds.

companies and UITs, management companies and UITs could pass through to investors any such cost increases in the form of higher operating expenses.

Variable Annuity Separate Accounts. With respect to separate accounts funding variable insurance contracts,[653] the rule's fees and expenses requirement is the same as the requirement in our current exemptive orders, and thus will not have a significant economic effect. However, to the extent that some insurance companies currently do not provide the same certification to acquiring funds (*e.g.,* because the acquiring funds are able to rely upon section 12(d)(1)(G) and rule 12d1–2 or their orders permit certifications with a different scope), acquiring funds will incur costs to request and insurance companies will incur costs to provide this certification.[654] We lack data that would allow us to estimate how many insurance companies currently do not provide this certification. Relatedly, a commenter stated that its exemptive order requires that the insurance company make a representation to the Commission, rather than the acquiring fund, that the aggregate fees and expenses of the structure are reasonable.[655] We believe that providing a certification to the acquiring fund rather than the Commission will impose minimal additional costs on insurance companies.[656]

v. Fund of Funds Investment Agreement

Our current exemptive orders require a participation agreement between unaffiliated acquiring and acquired funds under which the funds agree to fulfill their responsibilities under the exemptive order. Unless the acquiring and acquired funds have the same investment adviser, rule 12d1–4 will require the acquiring and acquired funds to enter into a fund of funds investment agreement before the acquiring fund acquires securities of the acquired fund in excess of the limits of section 12(d)(1). The investment agreement must include: (i) Any material terms necessary for the adviser, underwriter, or depositor to have made the finding regarding the acquiring fund's investment in the acquired fund; (ii) a termination provision whereby either party can terminate the agreement with advance written notice within a period no longer than 60 days;[657] and (iii) a provision whereby the acquired fund must provide the acquiring fund with fee and expense information to the extent reasonably requested. Hence, the fund of funds investment agreement in rule 12d1–4 is more comprehensive than the participation agreement in our exemptive orders because it (i) applies to both affiliated and unaffiliated fund of funds structures (unless the acquiring and acquired funds share the same primary investment adviser) while the participation agreement in our exemptive orders only applies to unaffiliated funds; and (ii) encompasses a broader set of conditions.[658]

The benefit of a more comprehensive fund of funds investment agreement relative to the participation agreement is that it will enhance investor protection. First, the fund of funds investment agreement will protect investors in both certain affiliated and unaffiliated fund of funds structures from acquiring funds' undue influence, duplicative fees, and complex fund of funds structures. Second, it will allow acquiring and acquired fund boards to monitor better investment advisers' conflicts of interest and the findings of the acquiring and acquired fund investment advisers in the context of the fund of funds arrangement.[659] Third, the fund of funds investment agreements will provide a mechanism for acquiring and acquired funds to terminate the arrangement if it is no longer in their respective best interest. Finally, the fund of funds investment agreement will require acquired funds to provide fee and expense information to the acquiring fund, which will assist the acquiring fund's adviser with assessing the impact of fees and expenses associated with an investment in an acquired fund.

By requiring fund of funds investment agreements for both affiliated and unaffiliated funds of funds, rule 12d1–4 will level the playing field for small and large fund complexes relative to the exemptive orders. Funds in smaller complexes are less likely to have sufficient investment opportunities within the fund complex than funds in larger complexes, and thus are more likely to structure unaffiliated funds of funds and bear the costs associated with a participation agreement. Under our current exemptive orders, participation agreements are only required in the case of unaffiliated funds of funds, which may impose a relatively higher burden on funds in smaller complexes. Rule 12d1–4 will require funds to enter into a fund of funds investment agreement both in the case of unaffiliated and affiliated funds of funds (except when the acquiring and acquired funds share the same primary adviser), which will level the playing field for funds that are more likely to structure unaffiliated funds of funds, that is, smaller fund complexes.

The disadvantage of a more comprehensive set of conditions in the fund of funds investment agreements relative to the participation agreements is that fund of funds investment agreements will be more costly to implement and monitor than the participation agreements.[660] In addition, funds of funds will bear incremental ongoing costs to implement the terms of and monitor compliance with the fund of funds investment agreements. Hence, the one-time and ongoing annual costs borne by acquiring and acquired funds as a result of the requirement to enter into fund of funds investment agreements will be $12,142 for each fund that enters into a fund of funds investment agreement and will result in an aggregate burden equal to $112.2 million for all funds that enter into a fund of funds investment agreement.[661]

[653] *See* rule 12d1–4(b)(2)(iii).

[654] *See* PGIM Comment Letter.

[655] *See* Nationwide Comment Letter.

[656] *See* Table 9, *infra* section VI.B.5, for relevant cost estimates.

[657] Our exemptive orders do not mandate a specific termination right in the participation agreement. However, the exemptive orders allow acquired funds to terminate the participation agreement subject solely to the giving of notice to a Fund of Funds and the passage of a reasonable notice period and some of the current participation agreements contain a 60-day termination provision. *See supra* footnote 356.

[658] Similar to the participation agreement in our exemptive orders, the fund of funds investment agreement in rule 12d1–4 will allow acquired funds to block the acquisition of their shares by certain acquiring funds beyond the limits of section 12(d)(1) by refusing to enter into a fund of funds investment agreement with the acquiring fund.

[659] *See* rule 12d1–4(c)(1) recordkeeping requirements.

[660] As noted above, fund of funds investment agreements entered into under the rule will be considered material contracts and thus must be filed as exhibits to each fund's registration statement. *See supra* footnote 359 and accompanying text. While we believe currently that some funds may similarly file participation agreements that are entered into under our exemptive orders as exhibits, this certainty regarding fund of funds investment agreements could result in increased costs to ensure that they are filed. Several commenters argued that the cost of entering into a participation agreement is small, especially because of the standardization of terms and the broad use of participation agreements in the industry. *See, e.g.,* Fidelity Comment Letter; Hancock Comment Letter. We expect that the costs associated with preparing and monitoring the fund of funds investment agreements may decrease over time as the fund of funds investment agreements become more standardized.

[661] This estimate is based on the following calculation: $112.2 million = [$9,364 internal burden per fund + $2,778 external burden per fund (*see infra* Table 6 in section VI.B.2.)] × 9,240 acquiring-acquired fund pairs that that do not share the same investment adviser and will be subject to rule 12d1–4. 9,240 acquiring-acquired fund pairs that that do not share the same investment adviser and will be subject to rule 12d1–4 = 13,391 acquiring-acquired fund pairs that do not share the same investment adviser × 69% of acquiring-

Continued

vi. Complex Structures

The current exemptive orders prohibit an acquired fund from investing in other investment companies beyond the limits in section 12(d)(1), but they do not prohibit a fund from investing in an acquiring fund beyond the limits in section 12(d)(1). In line with our current exemptive orders, rule 12d1–4 will prohibit an acquired fund from investing beyond the statutory limits in both registered funds and private funds subject to limited exceptions.[662] Nevertheless, the final rule will also expand the complex structures prohibitions included in the exemptive orders in the following ways. First, rule 12d1–4 will prohibit a fund from acquiring in excess of the limits in section 12(d)(1)(A) of the Act (either in reliance on section 12(d)(1)(G) or rule 12d1–4) the outstanding voting securities of an acquiring fund.[663] Second, the rescission of the current exemptive orders will result in the prohibition of multi-tier structures formed in reliance on section 12(d)(1)(G) and those exemptive orders.[664]

The additional complex structures prohibitions of the final rule will limit the creation of multi-tier structures that historically were associated with investor confusion and duplicative and excessive fees before the enactment of section 12(d)(1).[665] Hence, the complex structures conditions of the final rule will enhance investor protection.

At the same time, the final rule will impose costs on funds that may be required to reallocate their portfolio to ensure compliance with the rule. In particular, multi-tier structures that have been formed in reliance on exemptive orders or a combination of exemptive orders and section 12(d)(1)(G) will need to be restructured to the extent that the acquiring fund chooses to invest additional amounts in the existing acquired funds in reliance on this rule. In particular, the top-tier acquiring funds will be required to reallocate their investments to funds that do not invest in underlying funds beyond the 10% limit of rule 12d1–4. Alternatively, the top-tier acquiring funds can invest in the same acquired funds, but those acquired funds will incur costs to reduce their investments in other funds to comply with the limits of rule 12d1–4. Our analysis shows 23 multi-tier structures that are at least three tiers and one multi-tier structure that is four-tiers, for which there is at least one acquiring fund in each level that invests beyond the limits of section 12(d)(1) in at least one acquired fund.[666] For those 23 top-tier acquiring funds, 3.56% of their assets are invested in the second-tier acquired funds that invest in a third-tier acquired fund, and 2.93% of their assets are invested in the third-tier acquired funds, on average. Our analysis, however, should be interpreted with caution because our data does not allow us to distinguish how many of these 23 multi-tier structures are consistent with the exceptions to the complex structures prohibitions of rule 12d1–4.

Section VI.C.1.a above provides a detailed discussion of the costs associated with portfolio reallocations. Any costs that funds will incur to restructure their investments will be moderated by the fact that funds will have a period to bring their operations into compliance with the final rule.[667]

In addition, funds that will operate in accordance with rule 12d1–4 to create fund of funds structures will need to implement policies and procedures to monitor their investments in other funds beyond the limits of section 12(d)(1) to ensure compliance with the complex structures conditions of rule 12d1–4. We believe that any such additional costs may be mitigated to the extent that many of the complex structures conditions of rule 12d1–4 are similar to the complex structures conditions in our exemptive orders and funds already have policies and procedures to monitor their investments in other funds for compliance with the terms of the exemptive orders. Those policies and procedures may be leveraged to monitor compliance with the complex structures conditions of rule 12d1–4.

Finally, as discussed in detail in Section V.C.1.i above, the restrictions on multi-tier structures will affect both current and prospective funds by restricting their investment flexibility, thus reducing investment options available to fund investors.

vii. Recordkeeping

Our exemptive orders generally require the unaffiliated acquiring and acquired funds to maintain (i) records of the exemptive order; (ii) records of the participation agreement; and (iii) a list of the names of each fund of funds affiliate and underwriting affiliate. Further, our exemptive orders require the unaffiliated acquired funds to maintain a written copy of the policies and procedures (and any modifications to such policies and procedures) that the acquired funds put in place to monitor any purchases of securities from the acquiring fund or its affiliates. The recordkeeping requirements in our exemptive orders are for a period of not less than six years, and the records must be maintained in an easily accessible place in the first two years.

Rule 12d1–4 will require both affiliated and unaffiliated acquiring and acquired funds to maintain (i) a copy of each fund of funds investment agreement; (ii) for management companies and UITs, a written record of the acquiring and acquired funds' evaluations and findings, and the basis for such evaluations and findings; and (iii) for separate accounts funding variable insurance contracts, the certification provided by the insurance company. Rule 12d1–4 will require 5 years of recordkeeping and, similar to the orders, it will require records to be maintained in an easily accessible place in the first two years.

The recordkeeping requirements of rule 12d1–4 are more extensive than the recordkeeping requirements in our

acquired fund pairs that will be subject to rule 12d1–4 as estimated by a commenter (*see supra* footnote 534 and associated text). 13,391 acquiring-acquired fund pairs that do not share the same investment adviser = 30,548 acquiring-acquired fund pairs × 44% of the acquiring-acquired fund pairs that do not share the same investment adviser. We use data from Item C.9 of Form N–CEN to identify a fund's investment adviser. 30,548 acquiring-acquired fund pairs = 24,689 acquiring-acquired fund pairs identified using Form N–PORT data × [14,605 registered investment companies (*see* Table 1 in *supra* section V.B.1) + 83 BDCs (*see supra* footnotes 558 and 559 and associated text)]/[11,788 management companies (*see* Table 2 in *supra* section V.B.1) + 83 BDCs (*see supra* footnotes 558 and 559 and associated text)]. We lack data that would allow us to identify acquiring-acquired fund pairs, for which the acquiring fund is a BDC or a registered investment company that is not a management company. Hence, we assume that acquiring BDCs and acquiring registered investment companies that are not management companies invest in the same number of unique acquired funds as the management companies. Our estimate also assumes that acquiring-acquired fund pairs that are structured beyond the limits of section 12(d)(1) will be subject to rule 12d1–4 at the same rate as acquiring-acquired fund pairs that are structured within the limits of section 12(d)(1) following the rule adoption. Our estimate is likely an upper bound of the cost associated with fund of funds investment agreements because funds of funds that currently have participation agreements in place will only be required to enter into a fund of funds investment agreement if the acquiring fund purchases additional shares of the acquired fund in reliance on the rule.

[662] *See* rule 12d1–4(b)(3)(ii).

[663] *See* rule 12d1–4(b)(3)(i).

[664] As discussed above, an acquiring fund relying on section 12(d)(1)(G) currently can invest in an acquired fund that invests in another fund beyond the limits of section 12(d)(1) in reliance on an exemptive order.

[665] As discussed above in section II.C.3.b, multi-tier structures may be difficult for investors to understand even with comprehensive disclosures. Accordingly, the rule includes a general prohibition on three-tier structures, subject to enumerated exceptions and the 10% Bucket for acquired fund investments in other investment companies. *See* rule 12d1–4(b)(3).

[666] *See supra* footnote 551 and associated text.

[667] *See supra* section III.

exemptive orders because (i) they apply to both affiliated and unaffiliated funds of funds while the recordkeeping requirements in our exemptive orders only apply to unaffiliated funds of funds; and (ii) they apply to both acquiring and acquired funds while only certain of the recordkeeping requirements in our exemptive orders apply to both acquiring and acquired funds.[668] At the same time, the recordkeeping requirements of rule 12d1–4 have a shorter duration than the recordkeeping requirements of our exemptive orders (*i.e.,* five years under the rule instead of six years under the orders). Further, the undue influence findings of rule 12d1–4 are only required prior to the initial acquisition of the acquired fund shares while the determinations in our exemptive orders apply periodically (*i.e.,* at least annually). Consequently, the associated recordkeeping of rule 12d1–4 will be less burdensome than the associated recordkeeping in our exemptive orders.

The benefit of any more extensive recordkeeping requirements is that they will allow for Commission examinations of investment advisers' investing decisions, which may ultimately benefit fund investors. The disadvantage of any more extensive recordkeeping requirements of rule 12d1–4 relative to our exemptive orders is that it will impose higher costs on funds and their investors. We estimate that each acquiring and acquired management company will bear annual recordkeeping costs equal to $5,021, each acquiring UIT will bear annual recordkeeping costs equal to $1,465, each separate account will bear annual recordkeeping costs equal to $65, and each fund that enters into a fund of funds investment agreement will bear annual recordkeeping costs equal to $954, which will result in aggregate ongoing annual recordkeeping costs equal to $40.1 million.[669]

2. Effects on Efficiency, Competition, and Capital Formation

i. Efficiency

Efficiency of current and prospective acquiring funds' asset allocation. The final rule will have opposing effects on the efficiency of current and prospective acquiring funds' asset allocation. More specifically, the final rule may promote the efficiency of funds' asset allocation for the following reasons. First, the final rule will eliminate the need for funds to apply for an exemptive order to structure certain funds of funds.[670] By eliminating the need for funds of funds to apply for an exemptive order, the final rule will reduce certain frictions in funds' asset allocation that are caused by the expense and delays associated with the exemptive order process, and thus may promote the efficient allocation of funds' assets.[671]

Second, rule 12d1–4 may increase the efficiency of certain funds' asset allocation. This is because rule 12d1–4 may increase funds' investment flexibility by expanding the scope of permissible acquiring and acquired funds relative to the current exemptive orders and broadening some of the exemptions to the complex structures prohibitions relative to the current exemptive orders and staff no-action letters, and thus may make it easier for funds to create an investment portfolio that better meets their investors' risk-return preferences.

Third, the final rule will create a more consistent and efficient regulatory framework for funds of funds than the existing regulatory framework for the following reasons.[672] First, rule 12d1–4 provides the same investment flexibility to all registered funds and BDCs. Second, under the existing regulatory framework, substantially similar funds of funds are subject to different conditions. For example, an acquiring fund currently can rely on section 12(d)(1)(G) and rule 12d1–2 to invest in an acquired fund within the same group of investment companies or, alternatively, can rely on relief provided by the Commission to achieve the same investment objectives. The final rule will eliminate the existing overlapping and potentially inconsistent conditions for funds of funds and harmonize conditions across different fund arrangements.[673] This may remove obstacles to funds' investments and operations to the extent that regulatory consistency and efficiency decreases compliance and operating costs. By reducing compliance and operating costs, the final rule will further reduce frictions in asset allocation and may

[668] The recordkeeping requirements in our exemptive orders related to purchases in affiliated underwritings only apply to acquired funds.

[669] This estimate is based on the following calculation: $40.1 million = $14.6 million recordkeeping cost associated with the undue influence finding of rule 12d1–4 for acquired management companies + $16.5 million recordkeeping cost associated with the fee and expense finding of rule 12d1–4 for acquiring management companies + $0.3 million recordkeeping cost associated with the fee and expense finding for acquiring UITs + $0.01 million recordkeeping cost associated with the recordkeeping requirement for separate accounts + $8.8 million recordkeeping cost associated with the fund of funds investment agreement. $14.6 million recordkeeping cost associated with the undue influence finding of rule 12d1–4 for acquired management companies = [$14,994 initial and annual internal burden per fund + $35,220 initial external burden per fund (*see* Table 7 in *infra* section VI.B.3.)] × 10% of the total burden that is associated with the recordkeeping requirements of rule 12d1–4 × 2,900 acquired management companies that will be subject to rule 12d1–4 (*see supra* footnote 646). $16.5 million recordkeeping cost associated with the fee and expense finding of rule 12d1–4 for acquiring management companies = [$14,994 initial and annual internal burden per fund + $35,220 initial external burden per fund (*see* Table 7 in *infra* section VI.B.3.)] × 10% of the total burden that is associated with the recordkeeping requirements of rule 12d1–4 × 3,278 acquiring management companies that will be subject to rule 12d1–4 (*see supra* footnote 651). $0.3 million recordkeeping cost associated with the fee and expense finding for acquiring UITs = [$12,253 initial internal burden per fund + $2,400 initial external burden per fund (*see* Table 8 in *infra* section VI.B.4.)] × 10% of the total burden that is associated with the recordkeeping requirements of rule 12d1–4 × 200 acquiring UITs that will be subject to rule 12d1–4 (*see supra* footnote 652). $0.01 million recordkeeping cost associated with the recordkeeping requirement for separate accounts = $649 internal burden per fund (*see* Table 9 in *infra* section VI.B.5) × 10% of the total burden that is associated with the recordkeeping requirements of rule 12d1–4 × 191 acquiring separate accounts that will be subject to rule 12d1–4. 191 acquiring separate accounts that will be subject to rule 12d1–4 = [430 variable annuity separate accounts registered as UITs (*see* Table 1 in *supra* section V.B.1) + 243 variable life insurance separate accounts registered as UITs (*see* Table 1 in *supra* section V.B.1) + 14 management company separate accounts (*see* Table 1 in *supra* section V.B.1)] × 40% of funds that are acquiring funds (*see supra* footnote 652) × 69% of acquiring separate accounts that will be subject to rule 12d1–4 as estimated by a commenter (*see supra* footnote 534 and associated text). This estimate assumes that acquiring separate accounts with current investments in other funds beyond the limits of section 12(d)(1) will be subject to rule 12d1–4 at the same rate as the acquiring separate accounts with current investments in other funds within the limits of section 12(d)(1) following the rule adoption. This estimate also assumes that the percentage of management companies that are acquiring funds is the same as the percentage of separate accounts that are acquiring funds. $8.8 million recordkeeping cost associated with the fund of funds investment agreement = $954 recordkeeping cost associated with the fund of funds investment agreements (*see* Table 6 in *infra* section VI.B.2.) × 9,240 acquiring-acquired funds pairs that that do not share the same investment adviser and will be subject to rule 12d1–4 (*see supra* footnote 661).

[670] *See supra* section V.B.2.a for discussion of the costs associated with the exemptive orders.

[671] *See, e.g.,* Morningstar Comment Letter.

See supra section V.B.2.a for discussion of costs associated with the exemptive order process.

[672] *See, e.g.,* Nationwide Comment Letter; Invesco Comment Letter; ICI Comment Letter; Advent Comment Letter; Hancock Comment Letter; Clifford Chance Comment Letter; Schwab Comment Letter; Blackrock Comment Letter; Morningstar Comment Letter for commenters agreeing with our assessment that rule 12d1–4 will create a more efficient regulatory framework for funds of funds.

[673] In particular, affiliated funds of funds currently can be structured either under section 12(d)(1)(G) and rule 12d1–2 or under exemptive orders, and each alternative subjects affiliated funds of funds to different conditions. In addition, funds that are structured under different exemptive orders may be subject to somewhat different conditions. Finally, unlike rule 12d1–4, our exemptive orders provide relief from section 12(d)(1) to a subset of registered investment companies and BDCs, and thus provide different levels of flexibility depending on the fund type.

promote the efficient allocation of funds' assets.

At the same time, the final rule may decrease the efficiency of certain funds' asset allocation by prohibiting certain existing funds of funds and requiring the restructuring of additional investments in other funds to ensure compliance with the rule. The new prohibition on certain fund structures may leave certain funds less able to diversify their investment portfolio or efficiently determine the funds in which they invest or their allocation of assets.

In addition, the new conditions of rule 12d1–4, and the rule's omission of certain conditions contained in our exemptive orders, will also affect the cost of operations of funds of funds.[674] Nevertheless, the net effect of the new and omitted conditions on the funds' cost of operations is unclear because we are unable to quantify the effect of many of these conditions. To the extent that the net effect of the new and omitted conditions will be to increase the cost of operations for funds of funds,[675] those conditions may ultimately reduce the efficient allocation of acquiring fund assets.

Efficiency of the asset allocation of current and prospective acquiring fund investors. The final rule may promote the efficiency of investors' asset allocation. First, rule 12d1–4 will reduce the cost of setting up a fund of funds by eliminating the need to apply for an exemptive order. To the extent that the fund industry is competitive,[676] fund advisers/sponsors might pass through to investors the cost savings associated with eliminating the need to apply for an exemptive order, which might result in lower fees and expenses for acquiring fund investors. Lower fees and expenses, in turn, might result in improved efficiency of investors' asset allocation because investors can achieve the same investment objectives at a potentially lower cost. Similarly, the final rule will create a more consistent and more efficient regulatory framework. Fund advisers/sponsors might also pass through to investors any cost savings associated with a more consistent and efficient regulatory framework, which might result in lower fees and expenses, and more efficient allocation of acquiring fund investors' assets.

Second, rule 12d1–4 may increase funds' investment flexibility by expanding the scope of permissible acquiring and acquired funds relative to the current exemptive orders and broadening some of the exemptions to the complex structures prohibitions relative to the current exemptive orders and staff no-action letters. The rule will therefore increase the diversity of available funds of funds and may promote the efficient allocation of acquiring fund investors' assets because investors will be better able to achieve their investment objectives.[677]

Third, having one uniform rule that applies to registered investment companies and BDCs may improve acquiring fund investors' ability to efficiently allocate their assets because it will be easier for these investors to understand fund of funds operations and it will simplify across-fund comparisons of various fund characteristics (*e.g.,* liquidity) because investors will no longer be required to adjust for differences in regulatory requirements across funds when making cross-fund comparisons for investment decision-making purposes.[678]

On the other hand, there are ways in which the final rule might reduce the efficiency of investors' asset allocation. In particular, the final rule may increase the costs of operations for acquiring and acquired funds because the cost of implementation and monitoring of the rule's conditions may be higher than the cost of implementation and monitoring of the conditions in our current exemptive orders. To the extent that any increased costs are passed through to investors, the fees and expenses for acquiring and acquired fund investors may increase. Higher fees and expenses, in turn, might negatively affect the efficiency of investors' asset allocation. In addition, rule 12d1–4 might decrease the diversity of funds of funds' investment strategies because it might reduce acquiring funds' investment flexibility by decreasing their ability to create certain multi-tier structures. A decrease in the diversity of available funds of funds may reduce the efficient allocation of investors' assets because investors may be less able to achieve their investment objectives.

Efficiency of prices of acquired funds and their underlying assets. The final rule may have opposing effects on the efficiency of prices of acquired funds and their underlying assets. In particular, the final rule may have a positive impact on the efficiency of the prices of acquired funds and their underlying assets. More specifically, rule 12d1–4 may (i) increase the diversity of certain funds of funds by expanding the scope of permissible acquiring and acquired funds;[679] (ii) increase the number of available funds of funds by eliminating the need to apply for an exemptive order and by creating a more consistent and more efficient regulatory framework; and (iii) enhance investor protection against acquiring funds' undue influence, duplicative fees, and complex structures. The potential increase in the diversity and number of funds of funds and the enhancement of investor protection may increase the attractiveness of funds of funds, and thus might increase investors' demand for funds of funds. The increased investor demand for funds of funds may increase investment rates, increase investments in acquiring funds, and thus increase investments in the acquired funds and the acquired funds' underlying assets (*i.e.,* stocks, bonds, etc.). An increased investment in the acquired funds and the acquired funds' underlying assets may increase trading interest for those assets. Higher trading interest might lead to higher liquidity, lower trading costs, improved information production, and thus more efficient prices for those assets.[680]

In addition, the final rule may increase the price efficiency of listed acquired funds *(i.e.,* ETFs, ETMFs, listed closed-end funds, and listed BDCs) because investors may increase their investments in those funds through investments in funds of funds rather than investing directly in those funds. Consequently, the funds' investor base may shift from individual investors to acquiring funds. A shift of certain funds' investor base to more financially sophisticated investors may in turn result in more efficient prices for listed acquired funds.[681] Financially

[674] *See supra* section V.C.1.b for a detailed discussion of the costs and benefits of the new and omitted conditions.

[675] We believe that the new and omitted conditions of rule 12d1–4 may increase certain funds' cost of operations but at the same time will enhance investor protection.

[676] *See supra* footnotes 611 and 612.

[677] Rule 12d1–4 may also increase innovation in the fund industry by allowing funds and advisers seeking exemptions to focus resources on novel products or arrangements rather than preparing and reviewing exemptive orders.

[678] *See, e.g.,* Morningstar Comment Letter.

[679] As discussed in section V.C.1.a.i. above, the net effect of the final rule on funds' investment flexibility is unclear. To the extent that the final rule will decrease funds' investment flexibility, it could decrease the diversity of available funds of funds.

[680] *See, e.g.,* Anat R. Admati & Paul Pfleiderer, *A Theory of Intraday Patterns: Volume and Price Variability,* 1 Rev. Fin. Stud. 3 (1988); Tarun Chordia, Richard Roll, & Avanidhar Subrahmanyam, *Liquidity and Market Efficiency,* 87 J. Fin. Econ. 249 (2008). For ETFs, there is mixed evidence on the effects of ETF ownership on the liquidity and price efficiency of underlying assets. *See* 2019 ETF Adopting Release, *supra* footnote 25, at 57219 for a more detailed discussion.

[681] *See, e.g.,* Eli Bartov, Suresh Radhakrishnan, & Itzhak Krinsky, *Investor Sophistication and Patterns in Stock Returns after Earnings Announcements,* 75

sophisticated investors may improve price efficiency through both aggressive and passive trading.[682] For example, financially sophisticated investors may tend more frequently to trade based on information obtained through their research and analysis (*i.e.,* aggressive trading). To the extent they perceive a potentially profitable trading opportunity, they must execute their trades while the security remains potentially mispriced before their information gets impounded into prices. Hence, financially sophisticated investors that trade on information may tend to place aggressive orders that move prices closer to fundamentals. Financially sophisticated investors may also improve price efficiency by providing liquidity to uninformed traders (*i.e.,* passive trading). More specifically, to the extent financially sophisticated investors may be able to distinguish between informed and uninformed investors, financially sophisticated investors may be more willing to provide liquidity to uninformed investors, and thus improve price efficiency by enhancing market liquidity.

On the other hand, any potential increase in acquiring and acquired funds' cost of operations as a result of the more comprehensive conditions of rule 12d1–4 relative to the conditions in the exemptive orders and rule 12d1–2, and any potential decrease in available fund of funds structures due to additional prohibitions on multi-tier structures, will have the opposite effect on the efficiency of prices of acquired funds and their underlying assets.

ii. Competition

Certain aspects of the final rule may have opposing effects on fund competition. On one hand, the final rule might promote competition in the fund industry for the following reasons. First, to the extent that rule 12d1–4 increases acquiring funds' investment flexibility, the final rule might promote competition in the fund industry because it will increase the diversity of available funds of funds.[683] Second, the final rule will level the playing field for funds by expanding the scope of permissible acquiring and acquired funds, mandating the same conditions for similar funds of funds, and imposing more similar conditions on affiliated and unaffiliated fund of funds structures.[684] A more level playing field might increase competition in the fund industry because it will allow various funds to operate under similar regulatory restrictions and thus funds will bear similar costs associated with regulatory restrictions. To the extent that regulatory inefficiencies and inconsistencies might hamper funds' investment and growth, an increase in regulatory consistency and efficiency might result in the creation of more funds of funds, which might increase competition in the fund industry. Fourth, rule 12d1–4 will remove the need to apply for an exemptive order and thus will decrease the cost of setting up a fund of funds. To the extent that a decrease in the cost of setting up a fund of funds may lower the barriers to entry for new funds of funds, it thus might increase competition in the fund industry.[685]

At the same time, to the extent that the final rule will decrease certain funds' investment flexibility or increase the cost of operations for certain funds that will operate in accordance with rule 12d1–4, it might reduce competition among funds of funds because it will decrease the diversity of available funds of funds.

iii. Capital Formation

The impact of the final rule on capital formation is unclear. On one hand, the final rule might have a positive effect on capital formation if it causes investors to commit more of their financial resources to investments in securities in aggregate. Specifically, the potential increase in fund investment flexibility, the potential leveling of the playing field as a result of the final rule, the increase in regulatory consistency and efficiency, and the potential decrease in the operating costs of prospective funds of funds as a result of removing the need to apply for an exemptive order may increase the number and diversity of funds of funds. An increase in the number and diversity of funds of funds may attract additional investment in funds of funds, and ultimately increase demand for the funds of funds' underlying securities. Investor demand for funds of funds also may increase as a result of the new conditions of rule 12d1–4, which will enhance investor protection. As a result of the increased demand for the firms' equity and debt securities, companies might be able to issue new debt and equity at higher prices, and therefore decrease the cost of capital of firms, thus facilitating capital formation.[686]

On the other hand, to the extent that single-tier funds and funds of funds are purely substitute investments, an increase in investors' demand for funds of funds may decrease the demand for single-tier fund structures, leaving aggregate demand for the underlying securities unchanged. Consequently, under this scenario, there will be no change in the amount of money that flows to issuers and there will be no impact on capital formation as a result of the final rule. In addition, a potential increase in the operating costs of acquiring and acquired funds as a result of the rule's conditions may reduce capital formation to the extent that there is a decrease in the amount of money available to be employed in value-generating activities.

At the same time, the potential decrease in fund investment flexibility and the potential increase in the funds' cost of operations as a result of the final rule may have the opposite effect on capital formation. In particular, the potential decrease in fund investment flexibility and the potential increase in the funds' cost of operations may decrease the number and diversity of funds of funds. A decrease in the number and diversity of funds of funds may discourage investments in funds of

Acc. Rev. 43 (2000); Joseph D. Piotroski & Darren T. Roulstone, *The Influence of Analysts, Institutional Investors, and Insiders on the Incorporation of Market, Industry, and Firm-Specific Information into Stock Prices,* 79 Acc. Rev. 1119 (2004); Ekkehart Boehmer & Eric K. Kelley, *Institutional Investors and the Informational Efficiency of Prices,* 22 Rev. Fin. Stud. 3563 (2009) (''Boehmer & Kelley (2009)''). *See also* Franklin Comment Letter (arguing that the final rule will increase institutional ownership for BDCs, which ''would support BDC share prices, trading volume and the depth and liquidity of the BDC market . . . promote better corporate governance and management oversight as well as more insightful analysis of the BDC market through increased third-party analyst coverage and research reports . . . [and] support capital formation while decreasing BDCs' cost of capital, meaning that BDCs could invest more, and on better terms, in the portfolio companies that rely on them.'').

[682] Boehmer & Kelley (2009), *supra* footnote 681.

[683] Funds can choose to compete through prices or through product differentiation. *See, e.g.,* Avner Shaked & John Sutton, *Relaxing Price Competition Through Product Differentiation,* 49 Rev. Econ. Stud. 3 (1982).

[684] *See, e.g.,* Morningstar Comment Letter. As discussed in *supra* section I, the combination of statutory exemptions, Commission rules, and the exemptive orders has created a regime where substantially similar funds of funds are subject to different conditions. The final rule will level the playing field for funds because it will create a regime where similar funds of funds are subject to the same conditions. At the same time, any effects of leveling the playing field will be limited by the fact that different funds face different levels of restrictions on their investments that are unrelated to rule 12d1–4 (*see, e.g., supra* footnote 39 for restrictions on BDC investments).

[685] Any beneficial effects of the rule on competition may be muted to the extent that existing funds of funds may incur costs to comply with the rule conditions (*e.g.,* costs associated with portfolio restructuring).

[686] Academic literature provides evidence consistent with the idea that higher demand for a firm's securities could lead to lower cost of capital. *See, e.g.,* Douglas W. Diamond & Robert E. Verrecchia, *Disclosure, Liquidity, and the Cost of Capital,* 46 J. Fin. 1325 (1991).

funds, and ultimately decrease demand for the funds of funds' underlying securities. As a result of the decreased demand for the firms' equity and debt securities, companies may be forced to issue new debt and equity at lower prices, and therefore increase the cost of capital of firms, thus impeding capital formation.

Nevertheless, we do not expect that the final rule will have significant effects on investors' investment rates.

D. Reasonable Alternatives

1. Retain Existing Exemptive Relief

As discussed in section III above, we are rescinding, as proposed, the exemptive relief permitting fund of funds arrangements that fall within the scope of rule 12d1–4. Alternatively, we could allow existing funds of funds to choose whether to operate indefinitely under the existing exemptive relief or rule 12d1–4, and require only new funds of funds to comply with rule 12d1–4.[687] The benefit of such an alternative would be that existing funds of funds would not incur the one-time switching costs from the exemptive order conditions to the conditions of rule 12d1–4 and will not incur costs associated with reduced investment flexibility as a result of the complex structure conditions of the rule relative to the exemptive orders,[688] which could ultimately benefit those funds' investors. At the same time, however, this alternative would subject existing funds of funds and new funds of funds to different sets of conditions. For example, existing funds of funds would be exempt from the rule's new requirements relating to fund of funds investment agreements, findings, and multi-tier structures. Consequently, unlike the final rule, this alternative would establish a less uniform regulatory framework governing fund of funds arrangements and would not include the benefit of enhanced investor protection that is afforded by the rule's conditions.

2. Retain Rule 12d1–2

We considered not rescinding rule 12d1–2 but instead allowing funds to operate under either rule 12d1–4 or section 12(d)(1)(G) and rule 12d1–2.[689] The advantage of such an approach would be that funds that choose to operate in accordance with section 12(d)(1)(G) and rule 12d1–2 will not be required to modify their operations to comply with the conditions of rule 12d1–4 and incur the associated costs or potentially restructure their investments to comply with the amended regulatory framework.[690] The main disadvantages of such an alternative would be that (i) various funds would not operate under a consistent and efficient regulatory framework because similar funds of funds would operate under different conditions; and (ii) investors in affiliated funds of funds would not enjoy the enhanced investor protection afforded by the conditions of rule 12d1–4.

3. Allow Private and Unregistered Investment Companies To Rely on Rule 12d1–4

As discussed above, rule 12d1–4 will permit certain registered investment companies and BDCs to invest in certain registered investment companies and BDCs beyond the limits in section 12(d)(1). Alternatively, we could expand the scope of rule 12d1–4 to allow private funds and unregistered investment companies to rely on the rule as acquiring funds.[691] Expanding rule 12d1–4 in this manner would (i) increase investment flexibility for private and unregistered acquiring funds and their investors; (ii) level the playing field across registered and private and unregistered acquiring funds because they would enjoy the same investment flexibility and be subject to the same conditions; and (iii) benefit acquired registered investment companies and BDCs by increasing private and unregistered funds' investments in them, thus enhancing their liquidity and increasing their scale, which would result in efficiency gains for those acquired funds.[692]

Nevertheless, we continue to believe that there are risks associated with expanding rule 12d1–4 to acquiring private funds and unregistered investment companies. First, private funds and unregistered investment companies are not registered with the Commission and would not be subject to the same reporting requirements (*i.e.,* Forms N–CEN and N–PORT) as registered investment companies.[693] Accordingly, the Commission does not receive routine reporting on the amount and duration of private fund or unregistered investment company investments in registered funds. Without imposing reporting requirements on private funds and unregistered investment companies, it would be difficult for the Commission to monitor potential undue influence by such funds, or to monitor their compliance with rule 12d1–4. Second, private funds and unregistered investment companies are not subject to the governance and compliance requirements under the Investment Company Act, which are designed to protect investors and reduce conflicts of interest that are inherent in a fund structure and are integral to the oversight and monitoring provisions of rule 12d1–4 for registered funds. Third, unregistered foreign funds' investments in U.S. registered funds have raised concerns of abuse and undue influence in the past, which gave rise to Congress's amendments to section 12(d)(1) in 1970. Finally, as commenters noted, the Commission does not have experience with this type of fund of funds arrangement because it has not yet extended exemptive relief allowing such funds to acquire other investment companies in excess of the section 12(d)(1) limits.[694] Without that experience, the Commission is not able to determine at this time that the rule's conditions and protections would apply as appropriately to private funds and unregistered investment companies or be properly tailored to prevent the abuses that led Congress to enact section 12(d)(1).

4. Codify Current Conditions in Existing Exemptive Orders

As discussed above, rule 12d1–4 will not include certain conditions contained in current exemptive orders that we believe are not necessary to prevent the abuses that section 12(d)(1) seeks to curtail in light of the new conditions being adopted. Rule 12d1–4 also will include new conditions to address the potential for undue influence, complex structures, or duplicative fees. Alternatively, we could

[687] *See supra* footnote 493.

[688] *See supra* section V.C.1.a.i for a comparison of the complex structure conditions of rule 12d1–4 relative to the exemptive orders.

[689] *See supra* footnote 450. Our analysis shows that there are 954, or 20%, of all acquiring funds that currently rely on section 12(d)(1)(G) and rule 12d1–2 to structure affiliated funds of funds. *See supra* section V.B.1.

[690] Many commenters opposed the rescission of rule 12d1–2. *See, e.g.,* Allianz Comment Letter; Invesco Comment Letter; Thrivent Comment Letter, PIMCO Comment Letter; Fidelity Rutland Comment Letter; Schwab Comment Letter; NYC Bar Comment Letter; PGIM Comment Letter, BlackRock Comment Letter; ABA Comment Letter; SIFMA AMG Comment Letter; Capital Group Comment Letter. *See supra* section II.D.1 for detailed discussion of arguments raised by commenters. Some of the commenter concerns may have been addressed given that the rule will not include a redemption limit and the rule will permit acquired funds to invest up to 10% of their assets in other funds.

[691] *See supra* footnote 47 for commenters supporting this alternative.

[692] *See, e.g.,* MFA Comment Letter; Parallax Comment Letter; NYC Bar Comment Letter; Dechert Comment Letter; Blackrock Comment Letter discussing the benefits of expanding the scope of rule 12d1–4 to private funds and unregistered investment companies.

[693] *See supra* section II.A.2.

[694] *See supra* footnote 53.

codify the conditions contained in existing exemptive orders rather than replacing certain conditions with alternative conditions as contained in rule 12d1–4.[695]

This alternative approach would not impose the costs associated with the new conditions in rule 12d1–4, but it might impose costs to the extent that the conditions in the orders on which some funds of funds rely might not be identical to the conditions in this alternative rule because of cross-sectional variation in the conditions of the exemptive orders. We also believe that this alternative approach would not be as effective at preventing the abuses that section 12(d)(1) seeks to curtail while eliminating conditions that are not necessary in light of the new conditions of rule 12d1–4. In particular, we believe that the conditions in rule 12d1–4 may enhance investor protection relative to the exemptive orders by imposing certain requirements (*i.e.,* findings and fund of funds investment agreement) on both affiliated and unaffiliated funds of funds and by prohibiting certain multi-tier structures.

5. Restrict the Ability of an Acquiring Fund and its Advisory Group To Invest in an Acquired Fund Above a Lower or Higher Limit Than the Adopted Control Limit

As discussed in section II.C.1.a above, to address concerns about one fund exerting undue influence over another fund, rule 12d1–4 is not available when an acquiring fund together with its advisory group controls the acquired fund. Rule 12d1–4 relies on the definition of ''control'' in the Act, including the rebuttable presumption that any person who directly or indirectly beneficially owns more than 25% of the voting securities of a company controls that company. Rule 12d1–4 includes an exception for funds that are in the same group of investment companies. Rule 12d1–4 also includes an exception when the acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as the acquired fund's investment adviser or depositor.

As an alternative means of preventing undue influence, we could instead restrict the ability of an acquiring fund and its advisory group to invest in an acquired fund above a lower limit than the 25% limit used to define ''control'' in the Act.[696] A lower limit could provide additional assurance that rule 12d1–4 would protect investors from the abusive practices that section 12(d)(1) was designed to prevent because a lower percentage of ownership would reduce the risk that the acquiring fund could exercise undue influence over the acquired fund's strategy, management, or governance.[697] However, a lower limit could hamper the acquiring fund's ability to achieve its investment strategy in an efficient and cost effective manner.[698]

We also could impose a lower limit while narrowing the scope of entities that would be assessed for the purposes of the ownership threshold.[699] In particular, the ownership limit could apply only to the acquiring fund and other funds advised by the same adviser or by the adviser's control affiliates. As a result, acquiring funds would not be required to consider their non-fund affiliates' holdings when assessing whether they control an acquired fund, which would lessen compliance burdens for the acquiring funds. Nevertheless, our exemptive orders define control in terms of a fund and its advisory group. Consequently, funds likely already have established policies and procedures to monitor compliance with the aggregation requirement embedded in the rule's definition of an acquiring fund's ''advisory group.'' In addition, other provisions of the Act and our rules also extend to affiliated persons of an investment adviser, and so funds (or their advisers) have experience developing compliance policies and procedures in those circumstances. Lastly, the risk of undue influence over an acquired fund will be more effectively addressed by requiring all entities within an advisory group to aggregate their holdings for purposes of the control condition because entities in the same advisory group could potentially coordinate to exercise undue influence over the acquired funds.[700]

Similarly, we could impose a limit higher than 25%, which would provide acquiring funds with greater investment flexibility. However, we believe that a limit higher than 25% would be more likely to give rise to the abuses that section 12(d)(1) was designed to prevent because it would make it more likely that the acquiring fund could control the acquired fund and thus potentially influence the acquired fund for the benefit of the acquiring fund's shareholders, advisers, or sponsors to the detriment of acquired fund investors.

6. Permit Multi-Tier Fund Structures

As discussed above, rule 12d1–4 will limit the creation of certain multi-tier structures. As an alternative, we could allow all multi-tier fund structures that are currently permissible.[701] While this alternative would provide greater flexibility to funds to meet their investment objectives, the organizational complexity of multi-tier fund structures could make it difficult for acquired fund investors to understand who controls the fund and acquiring fund investors may find it difficult to understand the true asset exposure of the acquiring fund.[702] It could also raise concerns associated with duplicative and excessive fees. Additionally, we believe that the rule's exceptions to the multi-tier structures prohibition and 10% Bucket provide sufficient investment and funding flexibility to acquiring and acquired funds.

7. Alternative Control Conditions

a. Redemption Limit

We proposed a redemption limit that would prohibit an acquiring fund that acquires more than 3% of an acquired fund's outstanding shares from

[695] *See supra* footnote 488.

[696] Some commenters argued that the control condition should be lower than 25% for acquired closed-end funds because closed-end funds are frequently subject to investor activism. *See, e.g.,* Gabelli Comment Letter; Comment Letter of John Birch (April 22, 2019); Comment Letter of Kuni Nakamura (April 25, 2020); Advent Comment Letter. *See also supra* footnotes 121 and 122. Other commenters, however, argued that the 25% threshold is appropriate because investor activism can be beneficial to fund investors. *See, e.g.,* Saba Comment Letter; City of London Comment Letter. As a response to commenters that argued that investor activism for closed-end funds is harmful, we note that academic literature provides evidence consistent with the idea that investor activism can be beneficial for closed-end fund investors because it has the potential to increase the market value of closed-end funds and mitigate managerial entrenchment. *See, e.g.,* Matthew E. Souther, *The Effects of Takeover Defenses: Evidence from Closed-End Funds,* 119 J. Fin. Econ. 420 (2016); Michael Bradley et al., *Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Funds,* 95 J. Fin. Econ. 1 (2010).

[697] As discussed in section II.B above, section 17 of the Act generally restricts a fund's ability to enter into transactions with affiliated persons and thus provides some protection to acquired funds from acquiring funds' undue influence. Rule 12d1–4 also contains a number of conditions aimed at protecting acquired funds from acquiring funds' undue influence.

[698] The control condition could, for example, limit an acquiring fund from obtaining the optimal level of risk exposure to another fund. Acquiring funds potentially could obtain similar levels of risk exposure at a higher cost by investing in multiple funds.

[699] *See supra* footnotes 106–110.

[700] For example, a family of target date funds tends to invest in different proportional allotments of the same underlying funds.

[701] *See supra* footnotes 369, 370, 371, and 373.

[702] Alternatively, concerns of investor confusion could be addressed by increasing disclosure requirements regarding multi-tier structures. However, we believe that enhanced disclosure requirements may not be sufficient to mitigate concerns of investor confusion.

redeeming, submitting for redemption, or tendering for repurchase more than 3% of an acquired fund's total outstanding shares in any 30-day period. The purpose of this prohibition was to address concerns that an acquiring fund could threaten large-scale redemptions to unduly influence an acquired fund. Using data from Form N–PORT filings that were filed with the Commission between May 2019 and July 2020, we find that 1,304 funds out of a total of 3,654 held more than 3% of any acquired fund's shares at the end of a reporting period, and thus could have been affected by the proposed redemption limit. Our analysis also shows that the average (median) 30-day redemption was 0.32% (0.011%): The average (median) 30-day redemption for listed acquired funds was 0.13% (0.003%) and for unlisted acquired funds was 0.45% (0.027%). Finally, there were 1,961 instances in which an acquiring fund redeemed more than 3% of an acquired fund's shares in any 30-day period, representing 578 unique funds.[703] When looking at fund redemptions in March 2020, a presumed period of market stress, the average (median) 30-day redemption was 0.69% (0.033%).

An acquiring fund that holds 25% of the outstanding shares of an acquired fund (*i.e.,* up to the control limit) and can only redeem 3% of the acquired fund shares in every 30-day period (*i.e.,* up to the redemption limit) would take 10 months to fully unwind its investment in the acquired fund, assuming no other concurrent changes in the number of acquired fund shares outstanding that are unrelated to the acquiring fund's redemptions. It would take longer than 10 months for an acquiring fund to redeem the acquired fund shares if other investors were concurrently redeeming the shares of the acquired fund due to, for example, changes in market conditions or if the acquiring fund held more than 25% of the shares of an affiliated acquired fund.[704]

Various commenters provided statistics showing that the redemption limit would be frequently binding.[705] We summarize those statistics in the table below.

Commenter	Sample period for number of funds or instances exceeding redemption limit	Number of acquiring funds holding > 3% of at least one acquired fund's outstanding shares	Number of acquiring funds or instances of redemptions > 3% limit within a 30-day period
Nationwide[706]	January 1, 2016–December 31, 2018.	32 acquiring funds	all 32 acquiring funds in at least one instance and some on as many as four separate instances.
ICI[707]	2016–2018	516 acquiring funds with $1.8 trillion in assets under management.	228 acquiring funds in 1,399 instances[708].
John Hancock[709]	January 1, 2016–December 31, 2018.		among all funds sponsored by commenter, 350 instances.
JP Morgan[710]	past 3 years		among all commenter funds, more than 100 instances.
TRP[711]	2016–2018		for a subset of commenter's funds, 6 acquiring funds in 17 instances[712].
MFS[713]	January 1, 2016–March 31, 2019.		for one surveyed commenter fund, in 25% of the months surveyed.
Voya[714]	2016–2018		among all commenter funds, 13 acquiring funds in 64 instances.
Fidelity[715]	2016–2018		for one of the commenter fund of funds categories consisting 14 acquiring funds, in 149 instances[716].
Allianz[717]	since December 2016		at least 7 out of the 13 acquiring funds in the commenter's fund complex at least once, and most on a number of occasions.
SIFMA[718]	January 1, 2018–March 1, 2019.	223 out of 655 surveyed acquiring funds[719].	over 500 of the acquiring funds sponsored by the survey respondents[720].
Morningstar[721]		1,591 acquiring funds with $1 billion in assets.	

[703] Our analysis is limited by data availability. In particular, we only have monthly data on acquiring funds' holdings and our sample period is primarily a stable period of rising market prices (with the exception of the March to July 2020 period of market stress). Any effects of the redemption limit would be more pronounced during periods of market stress. *See* also 2018 FOF Proposing Release, *supra* footnote 6, at n.125 and accompanying text for similar statistics using data from Morningstar Holdings. Some commenters argued that the low frequency of large-scale redemptions suggests that the redemption limit is unnecessary because funds do not engage frequently in large-scale redemptions that would raise undue influence concerns. *See, e.g.,* Dechert Comment Letter.

[704] *See, e.g.,* Vanguard Comment Letter (stating that ''by way of example, Vanguard offers an acquiring fund that would be subject to the Proposed Rule, but not subject to the control condition, that holds approximately 60% of an underlying Vanguard fund. We estimate that it would take approximately 2.5 years for this acquiring fund to fully unwind its investment in the underlying fund, assuming there was no other shareholder activity during the period.'').

[705] A commenter stated that ''[f]or three of the five [funds of funds in its group], a majority of each such Fund's investments in Underlying Funds represent more than three-percent of the Underlying Fund's outstanding shares.'' *See* Russell Comment Letter.

[706] *See* Nationwide Comment Letter.

[707] The survey sample included 1,359 funds of funds with $2.8 trillion in assets under management, out of which 936 funds of funds with $2 trillion in assets under management would be subject to rule 12d1–4 and be required to comply with the rule's conditions. The reported survey statistics excluded holdings and redemptions of money market funds. *See* ICI Comment Letter.

[708] Out of all survey respondents, 394 funds of funds with $1.7 trillion in assets under management were able to provide complete or partial information on their fund redemptions for the period 2016–2018. 122 funds of funds with $147 billion in assets under management were unable to provide any information on their redemptions. Further, some complexes were able to analyze only some of their funds (*e.g.,* larger or affiliated) or were able to analyze a shorter time frame (*e.g.,* a quarter rather than three years).

[709] *See* John Hancock Comment Letter.

[710] *See* JP Morgan Comment Letter.

[711] *See* TRP Comment Letter.

[712] Statistics exclude redemptions from affiliated money market funds.

[713] *See* MFS Comment Letter.

[714] *See* Voya Comment Letter.

[715] *See* Fidelity Comment Letter.

[716] Approximately one third of the 149 redemptions were out of unaffiliated acquired funds (non-ETFs). During the same period, another of the commenter's fund of funds categories redeemed more than 3% of an affiliated fund's total outstanding shares in a rolling 30-day period a total of 172 times. All redemptions were out of affiliated open-end funds.

[717] *See* Allianz Comment Letter.

[718] *See* SIFMA AMG Comment Letter.

[719] For purposes of this survey, a fund of funds is a fund that invests substantially all of its assets (*i.e.,* > 85% of fund assets) in shares of other investment companies. In the same survey, there are 59 funds that invest less than 85% of their assets in other funds, and for these funds of funds there have been ''dozens of redemptions of more

Most of the commenters' statistics do not distinguish between fund redemptions in the secondary market, which would not have been subject to the redemption limit, and fund redemptions directly with the acquired fund. We are unable to reconcile our statistics with the statistics provided by commenters because we only have monthly data on fund holdings while commenters' holdings information likely is more granular, and we lack complete information regarding commenters' research design choices (*e.g.,* whether the statistics include money market funds).

Commenters raised a number of issues associated with the proposed redemption limit, some of which we discussed in the 2018 FOF Proposing Release.[722] These concerns included (1) operational or administrative challenges; (2) the redemption limit's potential effects on the acquiring fund's investment objectives and its ability to respond timely to changing economic or market conditions; (3) the impact on competition and innovation; (4) whether funds in the same group of investment companies should be subject to the requirements; (5) concerns relating to liquidity; and (6) the cost of the proposed limits.

We have addressed the issues raised by commenters by not adopting the redemption limit and instead imposing alternative conditions to guard against undue influence.

b. Uniform Voting Conditions for all Funds

We proposed to impose the same voting conditions on all funds. In particular, proposed rule 12d1–4 would have required the same ownership threshold that would trigger the voting condition (*i.e.,* 3% of outstanding voting securities of the acquired fund) and the same manner of voting (*i.e.,* pass-through or mirror voting) for all funds that would be subject to rule 12d1–4. One advantage of uniform voting conditions would be a less complex rule, which would facilitate rule compliance. Another advantage would be imposing the same conditions on all acquired funds, which would level the playing field across acquired funds because all acquired funds would enjoy the same levels of protection from acquiring funds' undue influence. The disadvantage of such an approach would be that it would not consider the unique characteristics of each fund category.[723] In particular, open end funds and UITs hold shareholder meetings infrequently and are rarely the subject of investor activism, while closed-end funds may be required to hold shareholder meetings annually and historically have been the target of activist investors. Hence, concerns of undue influence may differ across fund categories. For this reason, rule 12d1–4 will impose different voting thresholds with respect to acquired funds that are open-end funds and UITs versus BDCs and registered closed-end funds.[724]

c. Disclosure Requirement

We proposed to require a fund that operates in accordance with rule 12d1–4 to disclose in its registration statement that it is (or at times may be) an acquiring fund for purposes of the rule. The advantage of such a disclosure would be that it would put other funds seeking to operate in accordance with rule 12d1–4 on notice that a fund they seek to acquire is itself an acquiring fund, and thus prevent the creation of complex fund of funds structures. This requirement would impose some ongoing costs on funds to prepare and provide those disclosures. Commenters generally opposed the proposed disclosure requirement, predicting that (i) funds would prophylactically disclose that they may rely upon rule 12d1–4, which would reduce the number of available potential acquired funds; (ii) it would be costly for acquiring funds to monitor continuously the disclosure of potential acquired funds; and (iii) time lags between when an acquired fund decides to operate in accordance with the rule and become an acquiring fund and when it updates its registration statement could cause violations of the rule.[725] Further, commenters suggested that such an approach could reduce the number of funds willing to become acquired funds and create fewer investment opportunities for funds of funds.[726]

As mentioned above, the proposed disclosure requirement was designed to put funds on notice that a fund would be subject to rule 12d1–4 as an acquiring fund. Under rule 12d1–4, this function will be filled by the fund of funds investment agreement, which an acquiring fund and acquired fund must execute before the acquiring fund may invest in the acquired fund in excess of the limits imposed by section 12(d)(1). Since rule 12d1–4 imposes the fund of funds investment agreement condition, it does not include such a disclosure requirement.

VI. Paperwork Reduction Act

A. Introduction

Rule 12d1–4 will result in a new ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[727] In addition, the adoption of rule 12d1–4 will affect the current collection of information burden of rule 0–2 under the Act.[728] The amendments to Form N–CEN also will affect the collection of information burden under that form.[729]

The title for the new collection of information for rule 12d1–4 will be: ''Rule 12d1–4 Under the Investment Company Act of 1940, Fund of Funds Arrangements.'' The titles for the existing collections of information are: ''Rule 0–2 under the Investment Company Act of 1940, General Requirements of Papers and Applications'' (OMB Control No. 3235–0636); and ''Form N–CEN'' (OMB Control No. 3235–0730). The Commission is submitting these collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

We published notice soliciting comments on the collection of information requirements in the 2018 FOF Proposing Release and submitted the proposed collections of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.[730] We received one comment on the collection of information requirements.[731]

than 3% of an acquired fund's shares during the period from January 1, 2018 through March 1, 2019.''

[720] The survey included both affiliated and unaffiliated funds of funds arrangements and 90% of the redemptions occurred in affiliated funds of funds.

[721] *See* Morningstar Comment Letter.

[722] *See supra* section II.C.2.a for detailed discussion of issues raised by commenters regarding the proposed redemption limit. *See also* 2018 FOF Proposing Release, *supra* footnote 6, at 1325–26 for discussion of costs of the proposed redemption limit.

[723] *See supra* footnote 145.

[724] *See supra* section II.C.1.b.

[725] *See supra* footnotes 242 and 243.

[726] *See supra* footnote 244.

[727] 44 U.S.C. 3501 through 3521.

[728] 17 CFR 270.0–2.

[729] Form N–CEN [referenced in 17 CFR 274.101] under the Investment Company Act.

[730] *See* 2018 FOF Proposing Release, *supra* footnote 6. We also published a notice soliciting comments on the collection of information requirements in the 2008 ETF Proposing Release. We similarly did not receive comments on the collection of information requirements. *See id.* at n.339 and accompanying text.

[731] *See* Guggenheim Comment Letter (stating that lawyers and accounting personnel would need to be involved with the proposed findings requirement).

B. Rule 12d1–4

Rule 12d1–4 will permit certain registered funds and BDCs that satisfy certain conditions to acquire shares of another fund in excess of the limits of section 12(d)(1) of the Act without obtaining an exemptive order from the Commission. These conditions include (1) adherence to certain voting provisions, (2) for most funds, entering into a fund of funds investment agreement, (3) for management companies, certain evaluations and findings that are reported to a fund's board, (4) for UITs, an evaluation by the principal underwriter or depositor, and (5) for separate accounts funding variable insurance contracts, the acquiring fund obtaining a certification by the insurance company offering the separate account. These requirements are collections of information for purposes of the PRA. These are the same collections we identified in the 2018 FOF Proposing Release, with two exceptions based upon changes to the rule from the proposal. We have removed the disclosure requirements that were included in the proposed estimate and added the fund of funds investment agreement element of the collection.

The respondents to rule 12d1–4 will be registered funds or BDCs.[732] The collection of information will be mandatory only for entities that wish to operate in accordance with the new rule. Information provided to the Commission in connection with staff examinations or investigations will be kept confidential subject to the provisions of applicable law.

[732] *See supra* footnote 617 for the source of salary data.

1. Voting Provisions

Under rule 12d1–4, where an acquiring fund and its advisory group (in the aggregate) hold more than 25% of the outstanding voting securities of an acquired fund that is a registered open-end investment company or registered UIT, the acquiring fund will be required to vote those securities using mirror voting, unless certain exceptions apply.[733] If the acquired fund is a closed-end fund, the acquiring fund and its advisory group must vote its securities using mirror voting if they, in the aggregate, hold more than 10% of the outstanding voting securities, unless certain exceptions apply.[734] We estimate that 450 acquiring funds will be subject to these requirements, 440 of which will be utilizing mirror voting and 10 of which will be utilizing pass-through voting in limited circumstances.[735]

Table 5 summarizes the final PRA estimates for internal and external burdens associated with this requirement. This estimate is as proposed, except that we (1) lowered the relative amount of funds that are expected to use pass-through voting given the changes to that requirement, (2) lowered the amount of funds estimated to be subject to these provisions due to the raised threshold of when pass-through or mirror voting will be required and (3) also lowered the expected number of votes per year based upon updated analysis.[736]

[733] *See* rule 12d1–4(b)(1)(ii) and (iv). As described above, in mirror voting, the acquiring fund votes the shares it holds in the same proportion as the vote of all other holders. In circumstances where acquiring funds are the only shareholders of an acquired fund, however, pass-through voting may be used.

[734] *See* rule 12d1–4(b)(1)(iii) and (iv).

[735] 450 acquiring funds that will invest in open-end funds or UITs in reliance on rule 12d1–4 and beyond the 25% voting threshold = 4,086 acquiring funds that will invest in other funds in reliance on rule 12d1–4 × 11% of acquiring funds that invest in at least one open-end fund or UIT beyond the 25% voting threshold of the rule. 4,086 acquiring funds that will invest in other funds in reliance on rule 12d1–4 = 5,922 acquiring registered investment companies and BDCs × 69% of acquiring funds that will be subject to rule 12d1–4 as estimated by a commenter (see supra footnote 533 and associated text). This estimate assumes that acquiring funds with current investments in other funds beyond the limits of section 12(d)(1) will be subject to rule 12d1–4 at the same rate as the acquiring funds with current investments in other funds within the limits of section 12(d)(1) following the rule adoption. 5,922 acquiring registered investment companies and BDCs = [4,750 acquiring management companies (*see supra* Table 2 in section V.B.1) + 37 acquiring BDCs (*see supra* footnotes 558 and 559 and accompanying text)] × [14,605 registered investment companies (*see supra* Table 1 in section V.B.1) + 83 BDCs (*see supra* footnotes 554 and 555 and associated text)]/[11,788 management companies (see supra Table 2) + 83 BDCs (*see supra* footnotes 558 and 559 and accompanying text)]. We lack structured data that would allow us to estimate the percentage of acquiring funds that are within the same group of investment companies as the acquired fund or the acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as the acquired fund's investment adviser or depositor, and thus will be subject to the rule's voting condition. To avoid underestimating the costs associated with this aspect of rule 12d1–4, we assume that all 450 acquiring funds will be subject to this rule's conditions. Further, the circumstances of an acquiring fund utilizing pass-through voting in the final rule are limited and may be only for certain investments. *See supra* footnote 621 and accompanying text.

[736] The 2018 FOF Proposing Release contemplated that 809 funds would be subject to this requirement based upon a 3% threshold, rather than the 25% and 10% threshold we are adopting. *See* 2018 FOF Proposing Release, *supra* footnote 6, at n.349 and accompanying text. *See also supra* footnotes 735 and 621 and footnotes 569 through 570 and accompanying text (outlining updated voting analysis).

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Table 5: Voting Provisions PRA Estimates

	Internal Hour Burden[1]		Wage Rate[2]	Internal Time Costs	Annual External Cost Burden
PROPOSED ESTIMATES FOR MIRROR VOTING					
Update proxy voting policies and disclosures	3 hours	×	$392 (in-house attorney)	$1,176	–
Evaluate other votes and vote accordingly (per vote x 3.6 votes)	3 hours × 3.6 = 10.8 hours	×	$392 (in-house attorney)	$1,176 × 3.6 = $4,233.60	$400 × 3.6 = $1,440
Total burden per fund	13.8 hours			$5,409.60	$1,440
Total number of affected funds	× 793			× 793	× 793
Total proposed burden for mirror voting	**10,943.4 hours**			**$4,289,812.80**	**$1,141,920**
PROPOSED ESTIMATES FOR PASS-THROUGH VOTING					
Update proxy voting policies and disclosures	3 hours	×	$392 (in-house attorney)	$1,176	–
Communicate with shareholders and vote accordingly (per vote x 3.6 votes)	30 hours × 3.6 = 108 hours	×	$392 (in-house attorney)	$11,760 × 3.6 = $42,336.00	$4,000 × 3.6 = $14,400
Total burden per fund	111 hours			$43,512	$14,400
Total number of affected funds	× 16			× 16	× 16
Total proposed burden for pass-through voting	**1,776 hours**			**$696,192**	**$230,400**
FINAL ESTIMATES FOR MIRROR-VOTING					
Update proxy voting policies and disclosures	3 hours	×	$419 (in-house attorney)	$1,257	–
Conduct voting procedure (per vote x 1 vote)	3 hours × 1 = 3 hours	×	$419 (in-house attorney)	$1,257 × 1 = $1,257	$400 × 1 = $400
Total burden per fund	6 hours			$2,514	$400
Total number of affected funds	× 440			× 440	× 440
Total final burden for mirror voting	**2,640 hours**			**$1,106,160**	**$176,000**
FINAL ESTIMATES FOR PASS-THROUGH VOTING					
Update proxy voting policies and disclosures	3 hours	×	$419 (in-house attorney)	$1,257	–
Communicate with shareholders and vote accordingly (per vote x 1 vote)	30 hours × 1 = 30 hours	×	$419 (in-house attorney)	$12,570 × 1 = $12,570	$4,000 × 1 = $4,000
Total burden per fund	33 hours			$12,570	$4,000
Total number of affected funds	× 10			× 10	× 10
Total final burden for pass-through voting	**330 hours**			**$125,700**	**$40,000**
TOTAL ESTIMATED BURDENS FOR VOTING PROVISIONS					

Proposed burden estimates	12,719.4 hours	$4,986,004.80	$1,372,320
Proposed total respondents	809		
Revised burden estimates	2,970 hours	$1,231,860	$216,000
Proposed total respondents	450		

Notes:
1. Includes initial burden estimates annualized over a three-year period.
2. *See* SIFMA Report, *supra* footnote 617.

2. Fund of Funds Investment Agreements

As discussed in section II.C.2.4 above, unless the acquiring fund's adviser acts as the acquired fund's investment adviser, the rule will require that the acquiring fund enter into an agreement containing certain provisions with the acquired fund effective for the duration of the funds' reliance on the rule. Funds subject to this requirement must maintain a copy of these agreements.[737] We estimate that 9,240 fund pairs will be subject to this requirement.[738]

Table 6 summarizes the final PRA estimates for internal and external burdens associated with this requirement. This element of the rule was not included in the proposal.

Table 6: Fund of Funds Investment Agreements PRA Estimates

	Internal Hour Burden[1]		Wage Rate[2]	Internal Time Costs	Annual External Cost Burden
ESTIMATES FOR FUND OF FUNDS INVESTMENT AGREEMENTS					
Negotiating and memorializing agreement	20 hours	×	$444.33 (blended rate for in-house attorney, deputy general counsel, and compliance manager)[3]	$8,886.6	$978
Establishing recordkeeping policies and procedures	3 hours	×	$63 (general clerk)	$189	$1,800
	3 hours	×	$96 (senior computer operator)	$288	
Recordkeeping	6 hours	×	$63 (general clerk)	$378	–
	6 hours	×	$96 (senior computer operator)	$576	
Total burden per fund	38 hours			$10,317.6	$2,778
Total number of affected funds	× 9,240			× 9,240	× 9,240
Total burden	**351,120 hours**			**$95,334,624**	**$25,668,720**

Notes:
1. Includes initial burden estimates annualized over a three-year period.
2. *See* SIFMA Report, *supra* footnote 617.
3. The $444.33 wage rate reflects current estimates of the blended hourly rate for an in-house attorney ($419), deputy general counsel ($602) and compliance manager ($312). $444.33 is based on the following calculation: ($419+$602+$312) / 3 = $444.33.

3. Management Companies—Fund Findings

In cases where the acquiring fund is a management company, rule 12d1–4 will require, prior to the initial acquisition of an acquired fund in reliance on the rule, the acquiring fund's investment adviser to evaluate the complexity of the structure and fees and expenses associated with the acquiring fund's investment in the acquired fund, and find that the acquiring fund's fees and expenses do not duplicate the fees and expenses of the acquired fund. In cases where the acquired fund is a management company, rule 12d1–4 will require, prior to the initial acquisition of the acquired fund in reliance on the rule, the acquired fund's investment adviser to find that any undue influence concerns associated with the acquiring fund's investment in the acquired fund are reasonably addressed and, as part of this finding, the investment adviser must consider at a minimum certain enumerated factors. The rule will

[737] Rule 12d1–4(b)(2)(iv) and (c).

[738] *See supra* footnote 661 and accompanying text.

further require that each investment adviser report its evaluation, finding, and the basis for its evaluation or finding to the fund's board of directors no later than the next regularly scheduled meeting of the board of directors. The rule also will require the acquiring and acquired funds participating in fund of funds arrangements in accordance with the rule to maintain and preserve a copy of each fund of funds investment agreement that is in effect, or was in effect in the past five years, and a written record of the relevant Fund Findings (and the basis for the Fund Findings) made under the rule.[739] We estimate 6,178 funds will be subject to this requirement.[740]

Table 7 summarizes the final PRA estimates for internal and external burdens associated with this requirement. We have made some changes to the estimate from the proposal based upon changes to the rule as adopted.[741] We increased the number of funds responding to this collection since the final rule will require both the acquiring and acquired funds to make certain findings under the rule. We have also increased our estimated burdens regarding initial hour and cost burdens due to the increased amount of factors that advisers would need to consider as part of this collection. In response to a commenter,[742] we adjusted our estimates regarding the hours and wage rates to conduct evaluations and the creation, review, and maintenance of written materials. Lastly, we reduced the estimates regarding annual hour burdens, and eliminated the estimate of external annual costs, due to the elimination of the requirement to conduct on-going evaluations.

Table 7: Management Company Findings PRA Estimates

	Initial Internal Burden Hours		Annual Internal Hour Burden		Wage Rate[1]	Internal Time Costs	Initial External Cost Burden	Annual External Cost Burden
PROPOSED ESTIMATES								
Conduct evaluations and creation, review, and maintenance of written materials	15 hours	+	6 hours	×	$352 (compliance attorney)	$7,392	$17,610	$5,870
	10 hours			×	$317 (senior portfolio manager)	$3,170		
	5 hours			×	$511 (chief compliance officer)	$2,555		
			5 hours	×	$61 (general clerk)	$305		
			5 hours	×	$94 (senior computer operator)	$470		
Total burden per fund	30 hours		10 hours			$13,892	$17,610	$11,740
Total number of affected funds	× 3,373		× 3,373			× 3,373	× 3,373	× 3,373
Total proposed burden	**101,190 hours**		**33,730 hours**			**$46,857,716**	**$59,398,530**	**$39,599,020**
FINAL ESTIMATES								
Conduct evaluations and creation, review, and maintenance of written materials	20 hours	+	8 hours	×	$293 (blended rate for compliance attorney and senior accountant)[2]	$8,204	$35,220	$0
	10 hours			×	$332 (senior portfolio manager)	$3,320		
	5 hours			×	$535 (chief compliance officer)	$2,675		

[739] Rule 12d1–4(b)(2)(i) and (c).

[740] *See supra* footnotes 651 and 646.

[741] *See* 2018 FOF Proposing Release, *supra* footnote 6, at nn.365–369 and accompanying text.

[742] *See* Guggenheim Comment Letter.

		5 hours	×	$63 (general clerk)	$315		
		5 hours	×	$96 (senior computer operator)	$480		
Total burden per fund	35 hours	13 hours			$14,994	$35,220	$0
Total number of affected funds	× 6,178	× 6,178			× 6,178	× 6,178	× 6,178
Total final burden	**216,230 hours**	**80,314 hours**			**$92,632,932**	**$217,589,160**	**$0**
TOTAL ESTIMATED BURDENS FOR FUND FINDINGS							
Proposed burden estimates	**101,190 hours**	**33,730 hours**			**$46,857,716**	**$59,398,530**	**$39,599,020**
Proposed total respondents	3,373						
Revised burden estimates	**216,230 hours**	**80,314 hours**			**$92,632,932**	**$217,589,160**	**$0**
Revised total respondents	6,178						

Notes:
1. *See* SIFMA Report, *supra* footnote 617.
2. The $293 wage rate reflects current estimates of the blended hourly rate for a compliance attorney ($368) and senior accountant ($218). $293 is based on the following calculation: ($368+$218) / 2 = $293.

4. UITs—Principal Underwriter or Depositor Evaluations

The rule will require that, in cases where the acquiring fund is a UIT, the UIT's principal underwriter or depositor must evaluate the complexity of the structure associated with the UIT's investment in acquired funds, and find that the UIT's fees and expenses do not duplicate the fees and expenses of the acquired funds that the UIT holds or will hold at the date of deposit. The UIT is also required to keep records of the finding, and any basis for the finding.[743] We estimate 200 funds will be subject to this requirement.[744]

Table 8 summarizes the final PRA estimates for internal and external burdens associated with this requirement. We decreased the total number of respondents to this item based upon updated analysis as described above. Also, in response to a commenter,[745] we adjusted our estimates regarding the hours and wage rates to conduct evaluations and the creation, review, and maintenance of written materials.[746]

[743] Rule 12d1–4(b)(2)(ii) and (c).

[744] *See supra* footnote 652.

[745] *See* Guggenheim Comment Letter.

[746] *See* 2018 FOF Proposing Release, *supra* footnote 6, at nn.373–377 and accompanying text.

Table 8: UIT Evaluation PRA Estimates

	Initial Internal Burden Hours	Annual Internal Hour Burden		Wage Rate[1]	Internal Time Costs	Initial External Cost Burden	Annual External Cost Burden
PROPOSED ESTIMATES							
Conduct evaluations and creation, review, and maintenance of written materials	15 hours		×	$352 (compliance attorney)	$5,280	$2,400	–
	10 hours		×	$317 (senior portfolio manager)	$3,170		
	5 hours		×	$511 (chief compliance officer)	$2,555		
		2.5 hours	×	$61 (general clerk)	$152.50		
		2.5 hours	×	$94 (senior computer operator)	$235		
Total burden per fund	30 hours	5 hours			$11,392.50	$2,400	–
Total number of affected funds	× 306	× 306			× 306	× 306	
Total proposed burden	**9,180 hours**	**1530 hours**			**$3,486,105**	**$734,400**	**–**
FINAL ESTIMATES							
Conduct evaluations and creation, review, and maintenance of written materials	20 hours		×	$293 (blended rate for compliance attorney and senior accountant)[2]	$5,860	$2,400	$0
	10 hours		×	$332 (senior portfolio manager)	$3,320		
	5 hours		×	$535 (chief compliance officer)	$2,675		
		2.5 hours	×	$63 (general clerk)	$157.50		
		2.5 hours	×	$96 (senior computer operator)	$240		
Total burden per fund	35 hours	5 hours			$12,252.50	$2,400	$0
Total number of affected funds	× 200	× 200			× 200	× 200	
Total final burden	**7,000 hours**	**1,000 hours**			**$2,450,500**	**$480,000**	**–**
TOTAL ESTIMATED BURDENS FOR UIT EVALUATIONS							
Proposed burden estimates	9,180 hours	1,530 hours			$3,486,105	$734,400	$
Proposed total respondents	306						

Revised burden estimates	7,000 hours	1,000 hours	$2,450,500	$480,000	$
Revised total respondents	200				

Notes:
1. *See* SIFMA Report, *supra* footnote 617
2. The $293 wage rate reflects current estimates of the blended hourly rate for a compliance attorney ($368) and senior accountant ($218). $293 is based on the following calculation: ($368+$218) / 2 = $293.

5. Separate Accounts Funding Variable Insurance Contracts—Certification

Lastly, the rule will require that, with respect to a separate account funding variable insurance contracts that invests in an acquiring fund, the acquiring fund must obtain a certification from the insurance company offering the separate account. The certification must state that the insurance company has determined that the fees and expenses borne by the separate account, acquiring fund, and acquired fund, in the aggregate, are consistent with the standard set forth in section 26(f)(2)(A) of the Act. The acquiring fund will be required to keep a record of this certification.[747] We estimate 191 funds will be subject to this requirement.[748]

Table 9 summarizes the final PRA estimates for internal and external burdens associated with this requirement. We decreased the total number of respondents to this item based upon updated analysis as described above. Also, we increased the proposed internal hour burden and time costs to account for likely attorney and compliance review of the required certification.[749]

Table 9: Separate Account Certification PRA Estimates

	Internal Hour Burden[1]		Wage Rate[2]	Internal Time Costs	Annual External Cost Burden
PROPOSED ESTIMATES					
Obtain certificates and maintain records	1 hour	×	$61 (general clerk)	$61	–
	1 hour	×	$94 (senior computer operator)	$94	
Total burden per fund	2 hours			$155	–
Total number of affected funds	× 663			× 663	
Total proposed burden	**1,326 hours**			**$102,765**	**–**
FINAL ESTIMATES					
Obtain certificates and maintain records	1 hour	×	$419 (in-house attorney)	$419	
	1 hour	×	$71 (compliance clerk)	$71	
	1 hour	×	$63 (general clerk)	$63	–
	1 hour	×	$96 (senior computer operator)	$96	
Total burden per fund	4 hours			$649	–
Total number of affected funds	× 191			× 191	
Total final burden	**764 hours**			**$123,959**	**–**
TOTAL ESTIMATED BURDENS FOR SEPARATE ACCOUNT CERTIFICATION					
Proposed burden estimates	1,326 hours			$102,765	–
Proposed total respondents	663				
Revised burden estimates	764 hours			$123,959	–
Revised total respondents	191				

Notes:
1. Includes initial burden estimates annualized over a three-year period.
2. *See* SIFMA Report, *supra* footnote 617.

[747] Rule 12d1–4(b)(2)(iii) and (c).

[748] *See supra* footnote 669.

[749] *See* 2018 FOF Proposing Release, *supra* footnote 6, at nn.373–377 and accompanying text. The rule will not subject an insurance company to a collection of information as section 26(f)(2)(A) of the Act already requires insurance companies to collect this information.

6. Rule 12d1–4 Total Estimated Burden

As summarized in Table 10 below, we estimate that the total hour burdens and time costs associated with rule 12d1–4, amortized over three years, would result in an average aggregate annual burden of 578,084 hours and an average aggregate annual monetized time cost of $191,773,875. We also estimate that, amortized over three years, there would be external costs of $243,953,880 associated with this collection of information. Therefore, each fund operating in accordance with the rule will incur an average annual burden of approximately 35.55 hours, at an average annual monetized time cost of approximately $11,794.94, and an external cost of $15,004.24 to comply with it.

Table 10: Rule 12d1-4 Total PRA Estimates

	Internal hour burden	Internal burden time cost	External cost burden
Voting Provisions	2,970 hours	$1,231,860	$216,000
Fund of Funds Investment Agreements	351,120 hours	$95,334,624	$25,668,720
Management Company Findings	216,230 hours	$92,632,932	$217,589,160
UIT Evaluations	7,000 hours	$2,450,500	$480,000
Separate Account Certificates	764 hours	$123,959	$0
Total annual burden	**578,084**	**$191,773,875**	**$243,953,880**
Number of funds	÷ 16,259	÷ 16,259	÷ 16,259
Average annual burden per fund	**35.55 hours**	**$11,794.94**	**$15,004.24**

C. Rule 0–2

Rule 0–2 under the Act, entitled ''General Requirements of Papers and Applications,'' prescribes general instructions for filing an application seeking an order from the Commission under any provision of the Act.[750] Rule 12d1–4 will alleviate some of the burdens associated with rule 0–2 because it will reduce the number of entities that require exemptive relief in order to operate.

Table 11 summarizes the final PRA estimates for internal and external burdens associated with this requirement. We reduced our estimated burdens from what we proposed because of the intervening adoption of rule 6c–11, which also reduced the number of entities that require exemptive relief in order to operate.[751]

Table 11: Rule 0-2 PRA Estimates

	Number of Responses	Annual hours	Annual internal time cost	Annual external cost burden
2016 approved inventory	184	5,340	$2,029,200.60	$14,090,000
2018 FOF Proposing Release estimate	122	3,551	$1,349,418	$9,369,850
Approved inventory after rule 6c-11	184	3,738	$1,420,440.42	$9,863,000
	- 0.3	- 0.3	- 0.3	- 0.3
Revised estimate	**129**	**2,617 hours**	**$994,308.29**	**$6,904,100**

D. Form N–CEN

Form N–CEN is a structured form that requires registered funds to provide census-type information to the Commission on an annual basis.[752] We are amending Form N–CEN to require management companies and UITs to report whether they relied on section 12(d)(1)(G) or rule 12d1–4 during the reporting period.[753]

Table 12 summarizes the final PRA estimates for internal and external burdens associated with this requirement. We have adjusted these estimates due to the intervening adoption of rule 6c-11, which also added items to Form N–CEN.[754]

[750] *See* Supporting Statement of Rule 0–2 under the Investment Company Act of 1940, General Requirements of Paper Applications (Mar. 3, 2020) (summarizing how applications are filed with the Commission in accordance with the requirements of rule 0–2), *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201912-3235-002.*

[751] We proposed an approximate reduction of one-third from the 2016 approved burdens. *See* 2018 FOF Proposing Release, *supra* footnote 6, at nn.381–386 and accompanying text. In the 2019 ETF Adopting Release, we reduced the 2016 approved burdens by 30%. *See* 2019 ETF Adopting Release, *supra* footnote 25, at nn.691–692 and accompanying text. We are reducing the estimates from the 2019 ETF Adopting Release a further 30% as rule 12d1–4 will reduce a different type of application than those addressed by rule 6c–11.

[752] *See* Reporting Modernization Adopting Release, *supra* footnote 56.

[753] *See supra* Section III.1.

[754] We proposed an increase of 0.1 hours per response. *See* 2018 FOF Proposing Release, *supra* footnote 6, at nn.387–395 and accompanying text. The 2019 ETF Adopting Release also added 0.1 hours, but per ETF, to the estimated burden. *See* 2019 ETF Adopting Release, *supra* footnote 25, at nn.691–692 and accompanying text.

Table 12: Form N-CEN PRA Estimates

	Number of Responses	Annual hours		Wage Rate[1]	Annual internal time cost	Annual external cost burden
2016 approved inventory	3,113	74,425	×	$324 (blended rate of senior programmer and compliance attorneys)	$19,204,128	$2,088,176
2018 FOF Proposing Release estimate	3,038	74,729	×	$335.50 (blended rate of senior programmer and compliance attorneys)	$25,070,000	$2,088,176
Approved inventory after rule 6c-11	3,113	74,598				$2,088,176
		+311.3 (+0.1 hours/response)				
Revised estimate	**3,113**	**74,909.3 hours**	×	**$335.50 (blended rate of senior programmer and compliance attorneys**	**$25,132,070.20**	**$2,088,176**

Notes:
1. *See* SIFMA Report, *supra* footnote 617.

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VII. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with section 4(a) of the Regulatory Flexibility Act (''RFA'').[755] It relates to final rule 12d1–4 and the amendments to Form N–CEN under the Investment Company Act. In connection with the new rule, the Commission is rescinding rule 12d1–2 under the Act and certain exemptive relief that has been granted from sections 12(d)(1)(A), (B), (C), and (G) of the Act. Finally, the Commission is adopting related amendments to rule 12d1–1 under the Act. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and is included in the 2018 FOF Proposing Release.[756]

A. Need for and Objectives of the Rule and Form Amendments

As described more fully above, rule 12d1–4 will permit registered funds and BDCs that satisfy certain conditions to acquire shares of another fund in excess of the limits of section 12(d)(1) of the Act without obtaining an exemptive order from the Commission. The rule is designed to streamline and enhance the regulatory framework applicable to fund of funds arrangements. In addition, we are rescinding rule 12d1–2 under the Act and certain exemptive relief that has been granted from sections 12(d)(1)(A), (B), (C), and (G) of the Act to create a more consistent and efficient rules-based regime for the formation and oversight of funds of funds. We also are amending rule 12d1–1 to allow funds that rely on section 12(d)(1)(G) to invest in money market funds that are not part of the same group of investment companies in reliance on that rule. Finally, our amendments to Form N–CEN will allow the Commission to better monitor funds' reliance on rule 12d1–4 and section 12(d)(1)(G), and will assist the Commission with its accounting, auditing, and oversight functions.

All of these requirements are discussed in detail above. The costs and burdens of these requirements on small entities are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discusses the costs and burdens on all funds.

B. Significant Issues Raised by Public Comments

In the 2018 FOF Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be affected by the proposed rule and amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis and how to quantify the impact of the proposed rule and amendments. We also requested comment on the broader impact of the proposed rule and amendments on all relevant entities, regardless of size.

We proposed adopting a redemption limit that would prohibit an acquiring fund that acquires more than 3% of an acquired fund's outstanding shares from redeeming, submitting for redemption, or tendering for repurchase more than 3% of an acquired fund's total outstanding shares in any 30-day period.[757] Among the comments received on this topic, one commenter stated that the redemption limit could discourage acquiring funds from gaining exposure to non-traditional asset classes with more volatile in- and out-flows and smaller asset bases, resulting in a less desirable mix of assets being made available to investors.[758] Commenters also stated that this would negatively impact newly launched or small acquired mutual funds.[759] For example, these commenters noted that novel and emerging fund strategies, which would

[755] 5 U.S.C. 603(a).

[756] *See* 2018 FOF Proposing Release, at section VIII.

[757] *See supra* Section II.C.2.

[758] Voya Comment Letter.

[759] *See, e.g.,* ICI Comment Letter; Invesco Comment Letter; IDC Comment Letter; Voya Comment Letter; Chamber of Commerce Comment Letter; Guggenheim Comment Letter; Dimensional Comment Letter; Wells Fargo Comment Letter; Capital Group Comment Letter; Schwab Comment Letter; John Hancock Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; MFS Comment Letter; Ropes Comment Letter; IAA Comment Letter; BlackRock Comment Letter; Nationwide Comment Letter.

likely exist primarily in smaller funds, would not be as attractive to an acquiring fund as they otherwise would be because of liquidity concerns accompanying the redemption condition.[760] Commenters noted the potential that this provision would affect smaller funds disproportionately since funds of funds would likely migrate out of smaller funds into larger funds in order to dilute their position.[761] Further, commenters noted the possible impact of this provision on smaller funds achieving scalable asset sizes.[762] Finally, some commenters raised administrative and compliance challenges associated with tracking the outstanding voting securities of numerous acquired funds.[763] As discussed in more detail above, we are not adopting the proposed redemption limit.

Commenters also noted that codifying certain categories of existing exemptive relief would benefit smaller and midsize fund complexes by relieving them of the cost burden of obtaining an exemptive order.[764]

In addition to not adopting the proposed redemption limit, after consideration of the comments we received on the proposed rule and amendments, we are adopting the rule and amendments with several modifications that are designed to reduce certain operational challenges that commenters identified, while maintaining protections for investors and providing useful disclosures regarding fund of funds arrangements. Revisions to the estimates below also are based on updated figures regarding the number of small entities impacted by the rule and amendments and updated estimated wage rates.

C. Small Entities Subject to the Rule

An investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[765] Commission staff estimates that, as of December 2019, there were 46 open-end funds (including 8 ETFs), 30 closed-end funds, 2 UITs, and 14 BDCs that would be considered small entities that may be subject to rule 12d1–4.[766] For the purposes of this analysis, we estimate that, of those 92 total entities, 8 entities (1 open-end fund, 5 closed-end funds, and 2 UITs) invest in other funds and thus may be subject to the rule.[767]

D. Projected Board Reporting, Recordkeeping, and Other Compliance Requirements

We are adopting new rule 12d1–4 to streamline and enhance the regulatory framework applicable to fund of funds arrangements, the rescission of rule 12d1–2 and certain exemptive relief, and an amendment to rule 12d1–1 to create a more consistent and efficient rules-based regime for the formation and oversight of fund of funds arrangements. We are also adopting amendments to Form N–CEN to allow the Commission to better monitor funds' reliance on rule 12d1–4 and section 12(d)(1)(G) and assist the Commission with its accounting, auditing, and oversight functions.

Rule 12d1–4 will permit registered funds and BDCs that satisfy certain conditions to acquire shares of another fund in excess of the limits of section 12(d)(1) of the Act without obtaining an exemptive order from the Commission. These conditions include (1) adherence to certain voting provisions, (2) for some funds, entering into a fund of funds investment agreement, (3) for management companies, the adviser making certain evaluations and findings that are reported to the fund's board, (4) for UITs, a finding by the principal underwriter or depositor, and (5) for separate accounts funding variable insurance contracts, the acquiring fund obtaining a certification by the insurance company offering the separate account.[768]

To harmonize the overall regulatory structure in view of rule 12d1–4, we are rescinding rule 12d1–2, which would eliminate the flexibility of funds relying on section 12(d)(1)(G) to: (i) Acquire the securities of other funds that are not part of the same group of investment companies, subject to the limits in section 12(d)(1)(A) or 12(d)(1)(F); and (ii) invest directly in stocks, bonds and other securities. Similarly we are rescinding certain exemptive relief that has been granted from sections 12(d)(1)(A), (B), (C), and (G) of the Act for the same reasons. In addition, we are amending rule 12d1–1 to allow funds relying on section 12(d)(1)(G) to invest in money market funds that are not part of the same group of investment companies in reliance on that rule. Finally, we are amending Form N–CEN to require management companies and UITs to report whether they relied on section 12(d)(1)(G) or rule 12d1–4 during the reporting period.

New rule 12d1–4, the rescission of rule 12d1–2 and certain exemptive relief that has been granted from sections 12(d)(1)(A), (B), (C), and (G) of the Act, and the amendments to rule 12d1–1 and Form N–CEN would change current reporting requirements for small entities that choose to rely on the rule. Entities eligible to rely on rule 12d1–4 are required to comply with the requirements of the rule only if they wish to rely on the rule's exemptions. Additionally, entities that are management companies or UITs and are relying on rule 12d1–4 are required to report this reliance on Form N–CEN. For purposes of this analysis, Commission staff estimates, based on outreach conducted with a variety of funds, that small fund groups will incur approximately the same initial and ongoing costs as large fund groups. As discussed above, we estimate that each entity that relies on rule 12d1–4 (and is subject to rule 12d1–4's voting provision) would incur the following annual time and cost burdens (with initial burdens amortized over the initial three years): (a) 6 internal burden hours and $400 in external costs to satisfy the new voting provisions related to mirror voting and 33 internal burden hours and $4,000 in external costs to satisfy the new voting provisions related to pass-through voting;[769] (b) 38 internal burden hours and $2,778 in external costs to satisfy the requirement that acquiring fund enter into an agreement containing certain provisions with the acquired fund effective for the duration of the funds' reliance on the rule, if the acquiring fund and the acquired fund do not share the same

[760] *See, e.g.,* Invesco Comment Letter; Chamber of Commerce Comment Letter.

[761] *Id.*

[762] *See, e.g.,* Nationwide Comment Letter.

[763] *See, e.g.,* Fidelity Comment Letter; Ropes Comment Letter.

[764] *See, e.g.,* MFDF Comment Letter.

[765] *See* rule 0–10(a) under the Investment Company Act.

[766] This estimate is derived an analysis of data obtained from Morningstar Direct as well as data reported to the Commission for the period ending December 31, 2019. There are currently no ETMFs or face-amount certificate companies that would be considered small entities. We believe that no BDCs that are small entities invest in other funds outside the limits of 12(d)(1). *See supra* section V.B.1.

[767] *Id.*

[768] We estimate that no separate accounts funding variable insurance contracts would be treated as small entities for purposes of this analysis. *See also* Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Investment Company Act Release No. 33814 (May 1, 2020) [FR 24964 (May 1, 2020)] (noting that the Commission expects that few, if any, separate accounts would be treated as small entities).

[769] *See supra* Section VI.B.1. For purposes of this analysis, we assume that all small entities will utilize mirror voting. *See also supra* footnote 735 and footnotes 569 through 570 and accompanying text (outlining updated voting analysis).

investment adviser;[770] (c) for management companies, 35 internal burden hours and $35,220 in external costs initially,[771] and in cases where the acquired fund is a management company, 13 internal burden hours and $0 in external costs per year on an on-going basis to satisfy the considerations associated with their Fund Findings;[772] and (d) for UITs, 35 internal burden hours and $2,400 in external costs to satisfy the proposed complex structure and aggregate fees analysis.[773] Furthermore, as discussed above, we estimate that each entity that relies on the new rule would incur an additional annual time burden of 0.1 hours to comply with the amendments to Form N–CEN.[774]

Therefore, in the aggregate, we estimate that small entities would incur an annual internal burden of 570 additional hours and an annual external cost burden of $100,664 to comply with the requirements of rule 12d1–4. This estimate is based on the following calculations:

	Internal hour burden	External cost
Voting Provisions		
Mirror Voting	6 hours	$400
Small Entities	x 8	x 8
Total Voting Provisions	48 hours	$3,200
Fund of Funds Investment Agreements	38 hours	$2,778
Small Entities	x 8	x 8
Total Agreements	304 hours	$22,224
Management Company Findings		
Initially (Annualized over a 3 year-period)	11.67 hours	$11,740
Annually	13 hours	$0
Small Entities	x 6	x 6
Total Management Cos.	148	$70,440
UIT Evaluations	35 hours	$2,400
Small Entities	x 2	x 2
Total UITs	70 hours	$4,800
Total annual burden	**570 hours**	**$ 100,664**

Furthermore, in the aggregate, we estimate that small entities would incur an annual burden of an additional 0.8 hours to comply with the amendments to Form N–CEN.[775]

We do not otherwise expect the proposal to generate significant economic impacts on smaller entities that are disproportionate to the general economic impacts, including compliance costs and burdens, discussed in sections VI and VII above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant economic impact on small entities. We considered the following alternatives for small entities in relation to the disclosure, findings, board reporting, and recordkeeping requirements: (i) Exempting small entities from some or all of the requirements to rely on rule 12d1–4, or establishing different disclosure or reporting requirements, or different disclosure frequency, for small entities to account for different levels of resources available to small entities; (ii) clarifying, consolidating, or simplifying the compliance requirements under rule 12d1–4 for small entities; and (iii) using performance rather than design standards.

In addition, as discussed above, we proposed a redemption limitation applicable to fund of funds investments in an acquired fund to address concerns that an acquiring fund could threaten large-scale redemptions to unduly influence an acquired fund. In response to concerns raised by comments received on this redemption limit, including comments regarding the significant impact the proposed requirement would have on small entities, we are not adopting the redemption limit as part of rule 12d1–4.

Further, as discussed above, any cost savings to prospective acquiring and acquired funds derived from eliminating the need to apply for an exemptive order likely will be more pronounced for smaller funds because (i) the administrative cost of the exemptive order application process likely does not vary with fund size, and thus may constitute a higher percentage of a smaller fund's assets; and (ii) the same exemptive order can be used by multiple funds within a fund complex, and there may be fewer funds to benefit

[770] *See supra* Section VI.B.2.

[771] *See supra* Section VI.B.3.

[772] *Id.*

[773] *See supra* Section VI.B.4.

[774] *See supra* Section VI.D.

[775] This estimate is based on the following calculations: 0.1 hours × 8 small entities = 0.8 hours.

from an exemptive order within smaller fund complexes.[776]

We do not believe that exempting or establishing different requirements for any subset of funds, including funds that are small entities, from rule 12d1–4, the amendments to rule 12d1–1 and Form N–CEN, or the rescission of rule 12d1–2 would permit us to achieve our stated objectives. Nor do we believe that clarifying, consolidating or simplifying the various aspects of the final rule for small entities would satisfy those objectives. In particular, we do not believe that the interest of investors would be served by these alternatives. We believe that all investors, including investors in entities that are small entities, will benefit from the rule and form amendments. We believe that this rulemaking strikes the right balance between allowing funds to engage in fund of funds arrangements while protecting such entities from the abuses that Congress sought to curtail in adopting section 12(d)(1). We believe that the new requirements are vital to that balance and important to all investors, irrespective of the size of the entity. Existing fund of funds exemptive orders do not distinguish between small entities and other funds. Finally, we determined to use performance rather than design standards for all funds, regardless of size, because we believe that providing funds with the flexibility to determine how to implement the requirements of the rule allows them the opportunity to tailor these obligations to the facts and circumstances of the entities themselves.

VIII. Statutory Authority

The Commission is adopting new rule 12d1–4 pursuant to the authority set forth in sections 6(c), 12(d)(1)(G) and (J), 17(b) and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–12(d)(1)(G) and (J), 80a–17(b), and 80a–37(a)]. The Commission is adopting amendments to rule 12d1–1 pursuant to the authority set forth in sections 6(c), 12(d)(1)(J), and 38(a) of the Act [15 U.S.C. 80a–6(c), 80a–12(d)(1)(J), 80a–37(a)]. The Commission is adopting an amendment to Form N–CEN under the authority set forth sections 8(b), 30(a), and 38(a) of the Investment Company Act [15 U.S.C. 80a–8(b), 80a–29(a), and 80a–37(a)].

List of Subjects in 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

[776] *See supra* section V.C.1.ii (citing MFDF Comment Letter for a similar argument).

Text of Rules and Form Amendments

For the reasons set out in the preamble, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 1. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010) unless otherwise noted.

* * * * *

■ 2. Amend section 270.12d1–1 by revising paragraph (a) to read as follows:

§ 270.12d1–1 Exemptions for investments in money market funds.

(a) *Exemptions for acquisition of money market fund shares.* If the conditions of paragraph (b) of this section are satisfied, notwithstanding sections 12(d)(1)(A), 12(d)(1)(B), 12(d)(1)(G), 17(a), and 57 of the Act (15 U.S.C. 80a–12(d)(1)(A), 80a–12(d)(1)(B), 80a–12(d)(1)(G), 80a–17(a), and 80a–56)) and § 270.17d–1:

(1) An investment company (*acquiring fund*) may purchase and redeem shares issued by a money market fund; and

(2) A money market fund, any principal underwriter thereof, and a broker or a dealer may sell or otherwise dispose of shares issued by the money market fund to any acquiring fund.

* * * * *

§ 270.12d1–2 [Removed and Reserved]

■ 3. Remove and reserve section 270.12d1–2.

■ 4. Section 270.12d1–4 is added to read as follows:

§ 270.12d1–4 Exemptions for investments in certain investment companies.

(a) *Exemptions for acquisition and sale of acquired fund shares.* If the conditions of paragraph (b) of this section are satisfied, notwithstanding sections 12(d)(1)(A), 12(d)(1)(B), 12(d)(1)(C), 17(a), 57(a)(1)–(2), and 57(d)(1)–(2) of the Act (15 U.S.C. 80a 12(d)(1)(A), 80a–12(d)(1)(C), 80a 17(a), 80a–56(a)(1)–(2), and 80a–56(d)(1)–(2)):

(1) A registered investment company (other than a face-amount certificate company) or business development company (an *acquiring fund*) may purchase or otherwise acquire the securities issued by another registered investment company (other than a face-amount certificate company) or business development company (an *acquired fund*);

(2) An acquired fund, any principal underwriter thereof, and any broker or dealer registered under the Securities Exchange Act of 1934 may sell or otherwise dispose of the securities issued by the acquired fund to any acquiring fund and any acquired fund may redeem or repurchase any securities issued by the acquired fund from any acquiring fund; and

(3) An acquiring fund that is an affiliated person of an exchange-traded fund (or who is an affiliated person of such a fund) solely by reason of the circumstances described in § 270.6c–11(b)(3)(i) and (ii), may deposit and receive the exchange-traded fund's baskets, provided that the acquired exchange-traded fund is not otherwise an affiliated person (or affiliated person of an affiliated person) of the acquiring fund.

(b) *Conditions*—(1) *Control.* (i) The acquiring fund and its advisory group will not control (individually or in the aggregate) an acquired fund;

(ii) If the acquiring fund and its advisory group, in the aggregate,

(A) Hold more than 25% of the outstanding voting securities of an acquired fund that is a registered open-end management investment company or registered unit investment trust as a result of a decrease in the outstanding voting securities of the acquired fund, or

(B) Hold more than 10% of the outstanding voting securities of an acquired fund that is a registered closed-end management investment company or business development company, each of those holders will vote its securities in the same proportion as the vote of all other holders of such securities; provided, however, that in circumstances where all holders of the outstanding voting securities of the acquired fund are required by this section or otherwise under section 12(d)(1) to vote securities of the acquired fund in the same proportion as the vote of all other holders of such securities, the acquiring fund will seek instructions from its security holders with regard to the voting of all proxies with respect to such acquired fund securities and vote such proxies only in accordance with such instructions; and

(iii) The conditions in paragraphs (b)(1)(i) through (ii) of this section do not apply if:

(A) The acquiring fund is in the same group of investment companies as an acquired fund; or

(B) The acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as an acquired fund's investment adviser or depositor.

(2) *Findings and agreements.* (i) Management companies.

(A) If the acquiring fund is a management company, prior to the initial acquisition of an acquired fund in excess of the limits in section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a–12(d)(1)(A)(i)), the acquiring fund's investment adviser must evaluate the complexity of the structure and fees and expenses associated with the acquiring fund's investment in the acquired fund, and find that the acquiring fund's fees and expenses do not duplicate the fees and expenses of the acquired fund;

(B) If the acquired fund is a management company, prior to the initial acquisition of an acquired fund in excess of the limits in section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a–12(d)(1)(A)(i)), the acquired fund's investment adviser must find that any undue influence concerns associated with the acquiring fund's investment in the acquired fund are reasonably addressed and, as part of this finding, the investment adviser must consider at a minimum the following items:

(*1*) The scale of contemplated investments by the acquiring fund and any maximum investment limits;

(*2*) The anticipated timing of redemption requests by the acquiring fund;

(*3*) Whether and under what circumstances the acquiring fund will provide advance notification of investments and redemptions; and

(*4*) The circumstances under which the acquired fund may elect to satisfy redemption requests in kind rather than in cash and the terms of any such redemptions in kind; and

(C) The investment adviser to each acquiring or acquired management company must report its evaluation, finding, and the basis for its evaluations or findings required by paragraphs (b)(2)(i)(A) or (B) of this section, as applicable, to the fund's board of directors, no later than the next regularly scheduled board of directors meeting.

(ii) Unit investment trusts. If the acquiring fund is a unit investment trust (*UIT*) and the date of initial deposit of portfolio securities into the UIT occurs after the effective date of this section, the UIT's principal underwriter or depositor must evaluate the complexity of the structure associated with the UIT's investment in acquired funds and, on or before such date of initial deposit, find that the UIT's fees and expenses do not duplicate the fees and expenses of the acquired funds that the UIT holds or will hold at the date of deposit.

(iii) Separate accounts funding variable insurance contracts. With respect to a separate account funding variable insurance contracts that invests in an acquiring fund, the acquiring fund must obtain a certification from the insurance company offering the separate account that the insurance company has determined that the fees and expenses borne by the separate account, acquiring fund, and acquired fund, in the aggregate, are consistent with the standard set forth in section 26(f)(2)(A) of the Act (15 U.S.C. 80a–26(f)(2)(A)).

(iv) Fund of funds investment agreement. Unless the acquiring fund's investment adviser acts as the acquired fund's investment adviser and such adviser is not acting as the sub-adviser to either fund, the acquiring fund must enter into an agreement with the acquired fund effective for the duration of the funds' reliance on this section, which must include the following:

(A) Any material terms regarding the acquiring fund's investment in the acquired fund necessary to make the finding required under paragraph (b)(2)(i) through (ii) of this section;

(B) A termination provision whereby either the acquiring fund or acquired fund may terminate the agreement subject to advance written notice no longer than 60 days; and

(C) A requirement that the acquired fund provide the acquiring fund with information on the fees and expenses of the acquired fund reasonably requested by the acquiring fund.

(3) *Complex fund structures.* (i) No investment company may rely on section 12(d)(1)(G) of the Act (15 U.S.C. 80a–12(d)(1)(G)) or this section to purchase or otherwise acquire, in excess of the limits in section 12(d)(1)(A) of the Act (15 U.S.C. 80a–12(d)(1)(A)), the outstanding voting securities of an investment company (a *second-tier fund*) that relies on this section to acquire the securities of an acquired fund, unless the second-tier fund makes investments permitted by paragraph (b)(3)(ii) of this section; and

(ii) No acquired fund may purchase or otherwise acquire the securities of an investment company or private fund if immediately after such purchase or acquisition, the securities of investment companies and private funds owned by the acquired fund have an aggregate value in excess of 10 percent of the value of the total assets of the acquired fund; provided, however, that the 10 percent limitation of this paragraph shall not apply to investments by the acquired fund in:

(A) Reliance on section 12(d)(1)(E) of the Act (15 U.S.C. 80a–12(d)(1)(E));

(B) Reliance on § 270.12d1–1;

(C) A subsidiary that is wholly-owned and controlled by the acquired fund;

(D) Securities received as a dividend or as a result of a plan of reorganization of a company; or

(E) Securities of another investment company received pursuant to exemptive relief from the Commission to engage in interfund borrowing and lending transactions.

(c) *Recordkeeping.* The acquiring and acquired funds relying upon this section must maintain and preserve for a period of not less than five years, the first two years in an easily accessible place, as applicable:

(1) A copy of each fund of funds investment agreement that is in effect, or at any time within the past five years was in effect, and any amendments thereto;

(2) A written record of the evaluations and findings required by paragraph (b)(2)(i) of this section, and the basis therefor within the past five years;

(3) A written record of the finding required by paragraph (b)(2)(ii) of this section and the basis for such finding; and

(4) The certification from each insurance company required by paragraph (b)(2)(iii) of this section.

(d) *Definitions.* For purposes of this section:

Advisory group means either:

(1) An acquiring fund's investment adviser or depositor, and any person controlling, controlled by, or under common control with such investment adviser or depositor; or

(2) An acquiring fund's investment sub-adviser and any person controlling, controlled by, or under common control with such investment sub-adviser.

Baskets has the same meaning as in 17 CFR 270.6c–11(a)(1).

Exchange-traded fund means a fund or class, the shares of which are listed and traded on a national securities exchange, and that has formed and operates in reliance on § 6c–11 or under an exemptive order granted by the Commission.

Group of investment companies means any two or more registered investment companies or business development companies that hold themselves out to investors as related companies for purposes of investment and investor services.

Private fund means an issuer that would be an investment company under section 3(a) of the Act but for the exclusions from that definition provided for in section 3(c)(1) or section 3(c)(7) of the Act (15 U.S.C. 80a–3(c)(1) or 80a–3(c)(7)).

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 5. The general authority citation for part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, 80a–29, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 6. Amend Form N–CEN (referenced in § 274.101), by:

■ a. In Part C, revising Item C.7. and adding paragraphs l. and m.; and

■ b. In Part F, adding Item F.18. and Item F.19.

The revisions and additions read as follows:

Note: The text of Form N–CEN does not and the amendments will not appear in the Code of Federal Regulations.

FORM N–CEN

ANNUAL REPORT FOR REGISTERED INVESTMENT COMPANIES

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Part C. Additional Questions for Management Investment Companies

* * * * *

Item C.7. Reliance on certain statutory exemption and rules. Did the Fund rely on the following statutory exemption or any of the rules under the Act during the reporting period? (check all that apply)

* * * * *

l. Rule 12d1–4 (17 CFR 270.12d1–4): ____

m. Section 12(d)(1)(G) of the Act (15 U.S.C. 80a–12(d)(1)(G)): ____

* * * * *

Part F. Additional Questions for Unit Investment Trusts

* * * * *

Item F.18. Reliance on rule 12d1–4. Did the Registrant rely on rule 12d1–4 under the Act (17 CFR 270.12d1–2) during the reporting period? [Y/N]

Item F.19. Reliance on section 12(d)(1)(G). Did the Registrant rely on the statutory exception in section 12(d)(1)(G) of the Act (15 U.S.C. 80a–12(d)(1)(G)) during the reporting period? [Y/N]

* * * * *

By the Commission.

Dated: October 7, 2020.

Vanessa A. Countryman

Secretary.

[FR Doc. 2020–23355 Filed 11–18–20; 8:45 am]

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Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1, 25, et al.

Guidance Under Section 529A: Qualified ABLE Programs; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 25, 26, 301, and 602

[TD 9923]

RIN 1545–BM68; 1545–BP10

Guidance Under Section 529A: Qualified ABLE Programs

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance regarding programs under the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act). The ABLE Act provides rules under which States or State agencies or instrumentalities may establish and maintain a Federal tax-favored savings program for eligible individuals with a disability who are the owners and designated beneficiaries of accounts to which contributions may be made to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. In addition, these final regulations provide corresponding amendments to the unrelated business income tax regulations, the gift and generation-skipping transfer tax regulations, and the electronic filing requirements regulations. These regulations affect eligible individuals that are designated beneficiaries of accounts established and maintained under the ABLE Act.

DATES: *Effective date:* These final regulations are effective November 19, 2020.

Applicability dates: For dates of applicability, see §§ 1.511–2(e)(2), 1.513–(g), 1.529A–1(c), 1.529A–2(q), 1.529A–3(h), 1.529A–4(e), 1.529A–5(g), 1.529A–6(f), 1.529A–7(b), 1.529A–8(a), and 301.6011–2(g).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations under section 529A, Taina Edlund, (202) 317–4541, or Julia Parnell, (202) 317–4086; concerning the estate and gift tax regulations, Lorraine Gardner, (202) 317–4645, or Daniel Gespass, (202) 317–4632; concerning the reporting provisions under section 529A, Isaac Brooks, (202) 317–6844 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations amending 26 CFR parts 1, 25, 26 and 301, to provide guidance under section 529A of the Internal Revenue Code (Code). Section 529A provides rules under which States or State agencies or instrumentalities may establish and maintain a Federal tax-favored savings program through which contributions may be made to the account of an eligible individual with a disability to meet qualified disability expenses.

1. The ABLE Act

Section 529A was added to the Code on December 19, 2014, by the ABLE Act, which was enacted as part of the Tax Increase Prevention Act of 2014, Public Law 113–295 (128 Stat. 4010). The statutory requirements of section 529A apply to taxable years beginning after December 31, 2014.

Congress recognized the special financial burdens borne by families raising children with disabilities and the fact that increased financial needs generally continue throughout the lifetime of an individual with a disability. Section 101 of the ABLE Act confirms that one of the ABLE Act's purposes is to ''provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits'' otherwise available to those individuals, whether through private sources, employment, public programs, or otherwise. Before the enactment of the ABLE Act, various types of Federal tax-advantaged savings arrangements existed, but none adequately served the goal of promoting saving for those supplemental financial needs.

Section 529A allows the creation of a qualified ABLE program by a State (or agency or instrumentality thereof) under which a separate ABLE account may be established for an eligible individual with a disability who is the designated beneficiary and owner of that account. Generally, contributions to an ABLE account are subject to both an annual limit and a cumulative limit, and, when made by a person other than the designated beneficiary, are treated as gifts to the designated beneficiary. These gifts may be sheltered from Federal gift tax by the annual per-donee gift tax exclusion. Distributions from an ABLE account for the qualified disability expenses of the designated beneficiary are not included in the designated beneficiary's gross income. However, the earnings portion of distributions from an ABLE account in excess of the qualified disability expenses generally is includible in the gross income of the designated beneficiary. An ABLE account may be used for the long-term benefit or short-term needs of the designated beneficiary.

Section 103 of the ABLE Act, while not a tax provision, is critical to achieving the goal of the ABLE Act of providing financial resources for the benefit of individuals with disabilities. Because so many of the programs that provide essential financial, occupational, and other resources and services to individuals with disabilities are available only to persons whose resources and income do not exceed relatively low dollar limits, section 103 generally disregards a designated beneficiary's ABLE account (specifically, the account balance, contributions to the account, and distributions from the account) for purposes of determining the designated beneficiary's eligibility for, and the amount of any assistance or benefits provided under, certain means-tested Federal programs. However, in the case of the Supplemental Security Income (SSI) program under title XVI of the Social Security Act, distributions for certain housing expenses are not disregarded, and the balance (including earnings) in an ABLE account is considered a resource of the designated beneficiary to the extent it exceeds $100,000. Section 103 also addresses the impact of an excess balance in an ABLE account on the designated beneficiary's eligibility for benefits under the SSI program and Medicaid.

Finally, section 104 of the ABLE Act addresses the treatment of ABLE accounts in bankruptcy proceedings.

2. Guidance

A. Notice 2015–18

Shortly after the ABLE Act was enacted, the Department of the Treasury (Treasury Department) and the IRS were advised that several state legislatures were in the process of enacting enabling legislation, and ABLE programs might be in operation in some states before guidance under section 529A could be issued by the Treasury Department and the IRS. In order to prevent the lack of regulatory guidance from discouraging states to enact enabling legislation and create ABLE programs, the Treasury Department and the IRS issued Notice 2015–18, 2015–12 I.R.B. 765 (March 23, 2015). The Notice provided that future section 529A guidance would confirm that the owner of an ABLE account is the designated beneficiary of the account, and that a person with signature authority over the account (if other than the account's designated beneficiary) may neither have nor acquire any beneficial interest in the ABLE account and must administer the

account for the designated beneficiary of the account. The Notice further provided that, in the event that State legislation creating an ABLE program enacted in accordance with section 529A prior to the issuance of guidance does not fully comport with the guidance when issued, the Treasury Department and the IRS intended to provide transition relief to give the States sufficient time to implement the changes necessary to avoid the disqualification of the program and of the ABLE accounts already established under the program.

B. 2015 Proposed Regulations

On June 22, 2015, the Treasury Department and the IRS published a notice of proposed rulemaking (NPRM) in the **Federal Register** (REG–102837–15; 80 FR 35602) proposing regulations under section 529A regarding programs under the ABLE Act (2015 proposed regulations). The 2015 proposed regulations set forth the requirements a program established and maintained by a State, or agency or instrumentality thereof, must satisfy to be considered a qualified ABLE program under section 529A. They covered the requirements for establishing an ABLE account (including those that an individual must satisfy to be an eligible individual qualified to be the designated beneficiary of an ABLE account) and the requirements concerning contributions to an ABLE account (including the limitations on the amount and investment of such contributions). In addition, the 2015 proposed regulations addressed the gift and generation-skipping transfer (GST) tax consequences of contributions to an ABLE account, as well as the Federal income, gift, and estate tax consequences of distributions from, and changes in the designated beneficiary of, an ABLE account. The 2015 proposed regulations also provided guidance on requirements with respect to rollovers and program-to-program transfers from one ABLE account to another and on the recordkeeping and reporting requirements of a qualified ABLE program. Finally, the 2015 proposed regulations provided corresponding amendments to regulations under sections 511 and 513 (with respect to unrelated business taxable income), sections 2501, 2503, 2511, 2642, and 2652 (with respect to gift and GST taxes), and section 6011 (with respect to electronic filing requirements).

C. Notice 2015–81

More than 200 written comments were received in response to the 2015 proposed regulations and a public hearing was held on October 14, 2015. Numerous commenters asked the Treasury Department and the IRS to issue interim guidance to address three requirements under the proposed regulations that they said would create significant barriers to the development of qualified ABLE programs by the States: (i) The requirement to establish safeguards to categorize distributions from an ABLE account; (ii) the requirement to request the taxpayer identification number (TIN) of every contributor to an ABLE account; and (iii) the requirement to process disability certifications with signed physicians' diagnoses.

In response to the request for interim guidance, the Treasury Department and the IRS published Notice 2015–81, 2015–49 I.R.B. 784 (Dec. 7, 2015), advising that the final regulations would address these requirements in the following manner: First, the final regulations would eliminate the requirement that a qualified ABLE program distinguish between types of expenses. Second, the final regulations would eliminate the requirement that a qualified ABLE program must request the TIN of each contributor at the time a contribution is made if the program has a system in place to identify and reject excess contributions and excess aggregate contributions before they are deposited into an ABLE account. Third, the final regulations would permit a certification of eligibility to satisfy the requirement for filing a disability certification. A certification of eligibility is a certification, under penalties of perjury, that the individual (or the individual's agent under a power of attorney or a parent or legal guardian of the individual) has a signed physician's diagnosis, and that the signed diagnosis will be retained and provided to the ABLE program or the IRS on request.

3. The PATH Act Amendment

On December 18, 2015, Section 303 of the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act), was enacted as part of the Consolidated Appropriations Act, 2016, Public Law 114–113 (129 Stat. 2242). The PATH Act amended section 529A(b)(1), effective for taxable years beginning after December 31, 2014, by removing the requirement that a State's qualified ABLE program allow the establishment of an ABLE account only for a designated beneficiary who is a resident of that State or of a contracting State.

4. The TCJA

The contribution limits and other provisions of section 529A were modified by the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054, (2017) (TCJA), signed into law on December 22, 2017. The TCJA amended section 529A(b)(2)(B) to allow an employed designated beneficiary described in new section 529A(b)(7) to contribute, prior to January 1, 2026, an additional amount in excess of the limit in section 529A(b)(2)(B)(i) (the annual gift tax exclusion amount in section 2503(b), formerly set forth in section 529A(b)(2)(B)). This additional permissible contribution is subject to its own limit as described in section 529A(b)(2)(B)(ii). Specifically, this additional contributed amount may not exceed the lesser of (i) the designated beneficiary's compensation as defined by section 219(f)(1) for the taxable year, or (ii) an amount equal to the poverty line for a one-person household for the calendar year preceding the calendar year in which the taxable year begins. The TCJA also amended the section 529A(b)(2) flush language to require the designated beneficiary, or a person acting on behalf of the designated beneficiary, to maintain adequate records to ensure, and to be responsible for ensuring, that the requirements of section 529A(b)(2)(B)(ii) are met.

New section 529A(b)(7)(A) identifies a designated beneficiary eligible to make this additional contribution as one who is an employee (including a self-employed individual) with respect to whom there has been no contribution made for the taxable year to: A defined contribution plan meeting the requirements of sections 401(a) or 403(a); an annuity contract described in section 403(b); or an eligible deferred contribution plan under section 457(b). Section 529A(b)(7)(B) defines the term ''poverty line'' as having the meaning provided in section 673 of the Community Services Block Grant Act (42 U.S.C. 9902).

The TCJA also amended section 529 (regarding qualified tuition programs) to allow, before January 1, 2026, a limited amount to be rolled over to an ABLE account from the designated beneficiary's own section 529 qualified tuition program (QTP) account or from the QTP account of certain family members. The TCJA added section 529(c)(3)(C)(i)(III), which provides that a distribution from a QTP made after December 22, 2017, and before January 1, 2026, is not subject to income tax if, within 60 days of the distribution, it is transferred to an ABLE account of the designated beneficiary or a member of the family of the designated beneficiary. Under section 529(c)(3)(C)(i), the amount of any rollover to an ABLE account is limited to the amount that, when added to all other contributions

made to the ABLE account for the taxable year, does not exceed the contribution limit for the ABLE account under section 529A(b)(2)(B)(i), that is, the annual gift tax exclusion amount under section 2503(b). This limited rollover is described in more detail in Notice 2018–58, 2018–33 I.R.B. 305 (Aug. 13, 2018).

A. Notice 2018–62

To address the TCJA modifications to section 529A, the Treasury Department and the IRS published Notice 2018–62, 2018–34 I.R.B. 316 (Aug. 20, 2018), which announced the intent of the Treasury Department and the IRS to issue proposed regulations to implement these changes and describes the anticipated rules to implement the statutory changes. No comments were received in response to the Notice.

B. 2019 Proposed Regulations

On October 10, 2019, the Treasury Department and the IRS published an NPRM in the **Federal Register** (REG–128246–18; 84 FR 54529) to address the TCJA modifications to section 529A (2019 proposed regulations).

The 2019 proposed regulations confirmed that the employed designated beneficiary, or the person acting on his or her behalf, is solely responsible for ensuring that the requirements in section 529A(b)(2)(B)(ii) are met and for maintaining adequate records for that purpose. In addition, to minimize burdens for the designated beneficiary and the qualified ABLE program, the 2019 proposed regulations provided that ABLE programs may allow a designated beneficiary or the person acting on his or her behalf to certify, under penalties of perjury, that he or she is a designated beneficiary described in section 529A(b)(7) and that his or her contributions of compensation do not exceed the limit set forth in section 529A(b)(2)(B)(ii).

The 2019 proposed regulations also clarified that the poverty line in section 529A(b)(7)(B) is to be determined by using 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). Those guidelines vary based on locality. Specifically, there are separate guidelines for (1) the contiguous 48 states and the District of Columbia, (2) Alaska, and (3) Hawaii. Because the Treasury Department and the IRS concluded that the poverty guideline that most closely reflects the employed designated beneficiary's cost of living is the most relevant for determining the contribution limit, the 2019 proposed regulations provided that a designated beneficiary's contribution limit is to be determined using the poverty guideline applicable in the state of the designated beneficiary's residence.

Because section 529A(b)(2) provides that rules similar to those set forth in section 408(d)(4) regarding the return of excess contributions to an individual retirement account or annuity apply to ABLE accounts, the 2019 proposed regulations provided that a qualified ABLE program must return any contributions of the designated beneficiary's compensation in excess of the limit in section 529A(b)(2)(B)(ii) to the designated beneficiary.

The 2019 proposed regulations also provided that it will be the sole responsibility of the designated beneficiary (or the person acting on the designated beneficiary's behalf) to identify and request the return of any excess contribution of such compensation income. Such returns of excess compensation contributions must be received by the employed designated beneficiary on or before the due date (including extensions) of the designated beneficiary's income tax return for the year in which the excess compensation contributions were made. A failure to return excess contributions within this time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess compensation contributions.

Finally, in order to minimize administrative burdens for the designated beneficiary and the qualified ABLE program, for purposes of ensuring that the limit on contributions made under section 529A(b)(2)(B)(ii) is not exceeded, the 2019 proposed regulations provided that a qualified ABLE program may rely on self-certifications, made under penalties of perjury, of the designated beneficiary or the person acting on the designated beneficiary's behalf.

Six comments were received in response to the 2019 proposed regulations. No public hearing was requested or held.

Summary of Comments and Explanation of Provisions

Approximately 200 comments were received in response to the 2015 proposed regulations. These comments, along with the six comments received in response to the 2019 proposed regulations, are discussed in this section. The Treasury Department and the IRS, after consideration of all of these comments and the changes made to section 529A of the Code by the PATH Act and the TCJA, adopt the 2015 and 2019 proposed regulations as amended by this Treasury decision. The comments are available for public inspection at *www.regulations.gov* or on request.

These final regulations provide guidance on the requirements a program established and maintained by a State, or agency or instrumentality thereof, must satisfy to be considered a qualified ABLE program under section 529A. They also address the requirements for establishing an ABLE account, for qualifying as an eligible individual and thus a qualified designated beneficiary of an ABLE account and for contributions to an ABLE account, including the limitations on the amount and investment of such contributions. These final regulations also provide rules regarding changes in the designated beneficiary of an ABLE account, and rollovers and program-to-program transfers from one ABLE account to another. In addition, these final regulations provide guidance on the gift and GST tax consequences of contributions to an ABLE account, as well as on the Federal income, gift, and estate tax consequences of distributions from, and changes in the designated beneficiary of, an ABLE account. Finally, these final regulations provide guidance on the recordkeeping and reporting requirements of a qualified ABLE program.

1. Qualified ABLE Programs

A. Established and Maintained by a State

Consistent with section 529A(b)(1), which defines an ABLE program as a program established and maintained by a State, or agency or instrumentality thereof, the final regulations, like the 2015 proposed regulations, provide that a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an act of a State official or agency with the authority to act on behalf of the State. A program is maintained by a State, or its agency or instrumentality, if all the terms and conditions of the program are set by the State, or its agency or instrumentality, and the State, or its agency or instrumentality, is actively involved on an ongoing basis in the administration of the program, including supervising decisions relating to the investment of assets contributed to the program. The final regulations set forth factors that are relevant in determining whether a State, or its agency or instrumentality, is actively involved in the administration of the program. Among those factors is the nature and extent of the State's role

in selecting and overseeing private contractors contracted to provide administrative or other services.

B. Community Development Financial Institutions

The Treasury Department and the IRS understand that many of the States will have the entity that currently administers its section 529 qualified tuition program (on which section 529A was loosely modeled) also administer that State's qualified ABLE program. However, because of greater administrative obligations, each qualified ABLE program is likely to have higher costs and lower revenue to offset those costs than the same State's qualified tuition program. The 2015 proposed regulations suggested that, by contracting with one or more Community Development Financial Institutions (CDFIs) [1] to perform some or all of the duties involved in administering the qualified ABLE program, a State might be able to reduce its costs, and the cost to each owner of an ABLE account, because the CDFI might be able to obtain corporate or other grants to cover those costs. For example, a CDFI could provide services to facilitate distributions, collect and report social data, solicit grants to defray the cost of administering the program, and apply for a financial assistance award from the CDFI Fund, an entity established within the Treasury Department to promote community development in economically distressed communities.

Several commenters expressed concerns that the reference to CDFIs in the 2015 proposed regulations may lead qualified ABLE program administrators to believe that CDFIs are the preferred, or perhaps even the sole, entities with which they may contract for administrative and other services. These commenters asked that the final regulations clarify that organizations other than CDFIs, such as community banks, also may perform such services. One commenter expressed concern that CFDIs will not be located where people with disabilities and their families would have easy access to make deposits or withdrawals. The same commenter also expressed concern that CFDIs would be overwhelmed by screening and verifying people associated with ABLE accounts.

[1] CDFIs (as defined in 12 U.S.C. 4702(5) and 12 CFR 1805.104) are certified by the CDFI Fund established under 12 U.S.C. 4703. The CDFI Program (authorized by 12 U.S.C. 4704–4707) is administered by the Treasury Department. See the CDFI Fund's website (*www.cdfifund.gov*) for more detailed information and a listing of CDFIs nationwide.

The Treasury Department and the IRS note that the final regulations, like the 2015 proposed regulations, do not prohibit States from contracting with private contractors for various services. However, to increase clarity, the final regulations specifically provide that, while a qualified ABLE program may contract with a CDFI for services, a qualified ABLE program also may contract with other private contractors.

Some commenters requested that the rules applicable to qualified ABLE programs be as consistent as possible with the rules applicable to qualified tuition programs under section 529 in order to reduce administrative burdens and costs. Numerous others requested that the process and reporting should be made as simple and streamlined as possible for the individuals with a disability and their families. Others requested as much uniformity as possible among the qualified ABLE programs, to facilitate the movement of ABLE accounts from one program to another.

The Treasury Department and the IRS are aware of the desirability of reducing administrative burdens and costs. The final regulations therefore are consistent with the rules applicable to qualified tuition programs, where appropriate. However, the final regulations allow certain flexibility in the way each ABLE program may implement the applicable requirements.

C. Consortia

Several commenters asked whether qualified ABLE programs could join together to form a consortium for the purpose of offering broader investment choices, streamlined program administration, and lower fees for account holders. The Treasury Department and the IRS view the States' ability to streamline administration and lower costs as helpful in facilitating the establishment and maintenance of qualified ABLE programs. Therefore, the final regulations provide that a qualified ABLE program may be maintained by two or more States or agencies or instrumentalities of a State. If a State or agency or instrumentality of a State participates in a consortium, the consortium's program is considered to be the program of each member (State or agency or instrumentality of a State) of the consortium.

D. Residency Requirement

As originally enacted, section 529A(b)(1)(C) required a qualified ABLE program to allow for the establishment of an ABLE account only for a designated beneficiary who is a resident of that State or of a contracting State. Consistent with the statute, the 2015 proposed regulations required that an ABLE account for a designated beneficiary may be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident or with which the State of the designated beneficiary's residence has contracted for the provision of ABLE accounts.

The 2015 proposed regulations provided that, if a State does not establish and maintain a qualified ABLE program, it could contract with another State to provide an ABLE program for its residents. The 2015 proposed regulations defined ''contracting State'' as a State without a qualified ABLE program of its own, which, in order to make ABLE accounts available to its residents who are eligible individuals, contracts with another State that has a program.

Many commenters asked that the final regulations clarify whether a State without an ABLE program could contract with more than one State having an ABLE program. Another commenter asked whether the Federal government would allow a State without its own qualified ABLE program to decline to contract with another State, and thus deprive its residents of access to ABLE accounts.

A few commenters were in support of the residency requirement, but several commenters expressed hope that Congress would amend the ABLE Act to eliminate the residency requirement. Commenters pointed out that the residency requirement prevents an otherwise eligible US citizen living abroad from having an ABLE account, and that the accounts of non-resident US citizens in a disability savings account program created under foreign law would not receive the same tax-sheltered benefits under US law as are accorded to ABLE accounts. Others argued that allowing an eligible individual a choice of programs would ensure quality, competitive fees, uniformity, and other benefits for the eligible individual.

Several commenters suggested that the final regulations permit a qualified ABLE program to rely on a certification under penalties of perjury by the designated beneficiary regarding his or her state of residence to establish that the residency requirement has been satisfied.

After the Treasury Department and the IRS received these comments, the PATH Act repealed the residency requirement. Therefore, the final regulations eliminate all references to a residency requirement and to a ''contracting State.'' A qualified ABLE

program may allow an ABLE account to be established for an eligible individual regardless of his or her residence and, subject to the rules of the particular qualified ABLE program, an eligible individual may be the designated beneficiary of an ABLE account under the qualified ABLE program of any State. However, the Treasury Department and the IRS note that the final regulations do not prohibit a State from limiting its program to State residents nor do they require a State to establish or participate in an ABLE program.

2. ABLE Accounts

A. Establishment and Signatory of an ABLE Account

Section 529A(e)(3) defines the term ''designated beneficiary'' as the eligible individual who established an ABLE account and is the owner of such account. Consistent with section 529A(e)(3), the 2015 proposed regulations provided that the designated beneficiary of an ABLE account is the individual who is the owner of the ABLE account and who either established the account at a time when he or she was an eligible individual or who has succeeded the original designated beneficiary. Because not every eligible individual may have the capacity or otherwise be able to establish an ABLE account on his or her own behalf, the 2015 proposed regulations provided that the ABLE account may be established on behalf of the eligible individual by his or her agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual. Similarly, the 2015 proposed regulations also provided that if the designated beneficiary is unable to, or chooses not to, exercise signature authority over his or her account, then signature authority may be exercised by an agent under power of attorney or, if none, a parent or legal guardian of the designated beneficiary. The final regulations retain these provisions with modifications.

One commenter suggested that the final regulations clarify that ''parent'' refers to the parent of an adult designated beneficiary, as well as the parent of a minor. The final regulations do not adopt this suggestion because it is not necessary. A person's status as a parent is not changed by the child's attainment of the age of majority. Rather, a person's status as a parent is determined by reference to a familial relationship that is not age dependent.

Numerous commenters asked that the list of persons who may exercise signature authority over the ABLE account on behalf of the designated beneficiary (signatories) be expanded to provide greater flexibility and to avoid the need for the court appointment of a conservator or other legal representative, particularly in cases in which the designated beneficiary has no parent available to serve as signatory. One commenter suggested that there is no reason to restrict the list to those acting under a power of attorney or to legal guardians to the exclusion of custodians and other types of fiduciaries permitted under applicable state law. One commenter pointed out that an individual eligible for an ABLE account may not have a parent, guardian, or agent under a power of attorney who can and who is willing to manage an account. Other commenters suggested that the list of authorized signatories be expanded to include grandparents, siblings, non-family members, the trustees of a trust for which the designated beneficiary is the trust beneficiary, the designated beneficiary's representative payee as recognized by the Social Security Administration (SSA), and custodians or others designated by the designated beneficiary. One commenter explained that concerns about fraud or abuse by SSA representative payees would be alleviated by the Strengthening Protections for Social Security Beneficiaries Act of 2018, Public Law 115–165 (132 Stat. 1257), which increases the funding for the Representative Payee program and strengthens procedures for addressing misuse or misappropriation of funds by SSA representative payees. Another commenter suggested that someone other than the eligible individual be permitted to establish the account if the eligible individual has the legal capacity to do so but chooses to have another person establish the account. One commenter suggested that the law of each individual State should be permitted to govern who can be a signatory.

Some commenters suggested that the designated beneficiary and/or the other person with signature authority be permitted to name a successor, that the designated beneficiary be allowed to delegate to others not only signature authority over his or her account but also the ability to establish the ABLE account, that the designated beneficiary be able to choose more than one person to exercise signature authority over his or her ABLE account, and that the designated beneficiary be allowed to designate a co-signer to serve concurrently with the designated beneficiary. Commenters also requested that the final regulations confirm that a parent with signature authority over a minor child's ABLE account remains eligible to serve after the designated beneficiary reaches the age of majority.

Some commenters requested that the ordering rule for determining the order in which a person has the authority to be a signatory be removed. These commenters were concerned that the ordering rule would impose obligations on the qualified ABLE programs to verify the absence of any other person with higher priority who was both willing and able to so serve. These commenters suggested that a program be permitted to rely on the certification, under penalties of perjury, of an individual seeking to exercise signature authority over an ABLE account regarding that individual's authority to act on behalf of the designated beneficiary.

On the other hand, one commenter supported the provision in the 2015 proposed regulations regarding permissible signatories. Another commenter questioned whether allowing the designated beneficiary to designate another individual (who may otherwise lack independent authority to act on behalf of the designated beneficiary) to exercise signature authority would be consistent with the designated beneficiary's ownership of the ABLE account. The commenter also noted that allowing greater flexibility in the choice of authorized signatory could increase program costs.

The Treasury Department and the IRS recognize that there may be situations in which an eligible individual with legal capacity may want another person to establish, or to serve as the person with signature authority over, the ABLE account for that eligible individual. Therefore, the final regulations clarify that an eligible individual with legal capacity may delegate these responsibilities to any other person. Furthermore, the Treasury Department and the IRS recognize that expanding the categories of individuals who may serve as signatories of an ABLE account of a designated beneficiary who lacks legal capacity affords less cumbersome alternatives to a court-appointed guardian in the event the designated beneficiary has no agent under a power of attorney or parent to exercise signature authority. However, the Treasury Department and the IRS also recognize that expanding too widely the universe of individuals who are allowed to establish an ABLE account and serve as the signatory of that ABLE account could increase the risk of the impermissible establishment of multiple accounts for a single individual or of

having the designated beneficiary's only ABLE account being established and managed by a person who might not be the most appropriate person to serve in that capacity.

In an effort to find an appropriate balance between these possibly competing concerns, the final regulations provide an expanded hierarchy of persons who may establish an ABLE account for an individual or exercise signature authority over that individual's ABLE account. That hierarchy consists of the individual selected by the eligible individual or the eligible individual's agent under a power of attorney, conservator or legal guardian or conservator, the spouse, a parent, a sibling, a grandparent, or a representative payee (whether an individual or organization) appointed by the SSA, in that order. It is noted that the representative payee is subject to all applicable SSA rules.

Because each eligible individual is allowed to have only one ABLE account, the Treasury Department and the IRS concluded that the ordering rule is necessary to provide a clearer process for determining who may establish the designated beneficiary's only permissible ABLE account. For this reason, the limitation and ordering rule prescribing the persons who may establish the account and/or serve as a signatory is retained in the final regulations. To further facilitate the establishment of ABLE accounts without imposing undue burden on the program or the eligible individuals, the final regulations permit a qualified ABLE program to accept a certification by an individual, under penalties of perjury, that he or she is authorized to establish the ABLE account for the benefit of the eligible individual and that there is no other willing and able person with a higher priority to do so.

The final regulations also allow a designated beneficiary with legal capacity to remove and replace from time to time the individual with signature authority over that designated beneficiary's ABLE account, and to name a successor signatory. The final regulations also allow a person with signature authority to name a successor signatory, consistent with the same ordering rule, if the designated beneficiary lacks the legal capacity to do so.

A few commenters suggested that more than one person be allowed to serve as authorized co-signatories. The Treasury Department and the IRS understand that this could provide administrative flexibility, so the final regulations allow a qualified ABLE program to permit co-signatories as long as each co-signatory would satisfy the ordering rule if the other had refused to so serve.

As in the 2015 proposed regulations, the final regulations provide that, because individuals with signature authority over an ABLE account would be acting on behalf of the designated beneficiary, references to actions of the designated beneficiary, such as establishing or managing the ABLE account, are deemed to include the actions of any individual with signature authority over the ABLE account. Further, the final regulations continue to provide that, except for the designated beneficiary of the ABLE account, any person with signature authority over the account may neither have, nor acquire, a beneficial interest in the account during the lifetime of the designated beneficiary, and must administer the account for the benefit of the designated beneficiary.

One commenter asked that the person with signature authority over an ABLE account be allowed to elect to establish an ABLE account as a custodial account under a Uniform Transfers to Minors Act (UTMA) or the Uniform Gifts to Minors Act (UGMA). The Treasury Department and the IRS decline to adopt this suggestion. The ABLE Act mandates very different rules governing ABLE accounts than those governing UTMA and UGMA accounts under State laws. As a result, the Treasury Department and the IRS concluded it would not be possible to administer an ABLE account as mandated by the ABLE Act if the account instead was structured and administered as a UTMA or UGMA account.

One commenter suggested that the final regulations confirm that the provisions regarding authorized signatories do not limit the ability of either the designated beneficiary or the person with signature authority to name other agents to, for instance, obtain information, make electronic contributions and investment option changes, authorize withdrawals, or have full joint control. With regard to shared full joint control, the final regulations do not adopt the suggestion. The Treasury Department and the IRS have concluded that this responsibility is properly the obligation of the person(s) with signature authority over the account and should not be delegable. However, the final regulations do not prohibit the person(s) with signature authority from having co-signatories or from allowing sub-accounts, each with a different signatory, for specific purposes.

B. Limit on Number of ABLE Accounts of a Designated Beneficiary

Section 529A(b)(1)(B) provides that each eligible person may have only one ABLE account. In addition, section 529A(c)(4) generally provides that, except with respect to rollovers, once an ABLE account has been established for a designated beneficiary, no account subsequently established for the same designated beneficiary may qualify as an ABLE account. Accordingly, the 2015 proposed regulations provided that, except in the case of rollovers or program-to-program transfers, a designated beneficiary would be limited to one ABLE account at a time, regardless of where located. The final regulations confirm that an eligible individual is not prohibited from establishing an ABLE account merely because he or she previously was the designated beneficiary of an ABLE account that has been closed.

Consistent with the statutory provisions, the 2015 proposed regulations provided that, except with respect to rollovers and program-to-program transfers, if an ABLE account is established for a designated beneficiary who already has an ABLE account in existence, the additional account would not be treated as an ABLE account. The 2015 proposed regulations also provided that, if an additional account is established and all contributions made to the additional account are returned in accordance with the rules applicable to excess contributions, the additional account would be treated as never having been established. The final regulations retain these provisions with one substantive modification.

Section 103 of the ABLE Act generally exempts ABLE accounts from being counted as a resource in determining the designated beneficiary's eligibility for, or the amount of, certain public benefits. Thus, an ABLE account has both tax and nontax benefits. Several commenters raised concerns regarding the treatment of additional accounts for purposes of the designated beneficiary's eligibility for public benefits. Although a tax regulation cannot govern provisions administered by other government agencies, the final regulations appropriately provide guidance on circumstances under which accounts are treated as ABLE accounts.

As a result of the PATH Act's amendment to section 529A eliminating the requirement that the account be opened in the State of the designated beneficiary's residence, the Treasury Department and the IRS concluded that there is now an increased risk that an additional account could be opened

under a different qualified ABLE program by a person with authority to establish an account without the knowledge of either the eligible individual or another person with authority to establish an account, thus increasing the risk that the eligible individual thereby could lose his or her eligibility for his or her public benefits. The Treasury Department and the IRS also concluded that it is within the scope of their regulatory authority to attempt to prevent this potential harm to the class of individuals that section 529A was enacted to benefit. Accordingly, the final regulations provide that, if an additional account is established for the eligible individual, the additional account also is an ABLE account if either all contributions made to the additional account are returned to the contributor(s) under the same rules applicable to the return of excess contributions, or the additional account is transferred into the designated beneficiary's preexisting ABLE account with any excess contributions and excess aggregate contributions being returned to the contributor(s). If neither of these conditions is satisfied on or before the due date (including extensions) of the eligible individual's Federal income tax return for the year in which the additional account was established, the additional account will cease to be an ABLE account immediately after that return due date.

Like the 2015 proposed regulations, the final regulations provide that, at the time when an individual seeks to establish an ABLE account, the qualified ABLE program must obtain verification from the individual, signed under penalties of perjury, that the individual neither knows nor has reason to know that the eligible individual for whom the ABLE account is being established has an existing ABLE account, other than an account the assets of which will be rolled over or transferred to the new account in a program-to-program transfer. As noted previously, an eligible individual is not prohibited from establishing an ABLE account merely because he or she was the designated beneficiary of an ABLE account that has been closed.

Some commenters asked whether any penalty would be imposed on a qualified ABLE program that allows an individual to establish an ABLE account on the basis of such certification if the same eligible individual in fact does have a preexisting ABLE account. The Treasury Department and the IRS note that, in such an instance, no penalty would be imposed on the qualified ABLE program as long as the program has complied with all of the requirements of the regulations, including in obtaining the necessary certifications. As noted earlier in this section, if all of the contributions to the additional account are returned timely, the additional account will be treated as an ABLE account.

C. Definition of One Account

Several commenters asked that the final regulations allow for the establishment of one or more sub-accounts under a master account of a single designated beneficiary, and that the master account (including all of its sub-accounts) would constitute a single ABLE account. Each sub-account would have a different individual with signature authority and discretion to direct the investments in that sub-account, provided that all of the sub-accounts are treated as one account for Federal tax and Federal means-tested benefit purposes. These commenters expressed concern that, if qualified ABLE programs are not given the discretion to allow sub-accounts, fewer individuals would be willing to contribute to a designated beneficiary's account because they would not have control over the manner in which the contributions were invested or used for the designated beneficiary. Another commenter expressed concern that allowing sub-accounts could increase program costs.

The Treasury Department and the IRS view the ability of a program to allow different individuals to establish and have signature authority over separate sub-accounts under one master account as being contrary to the only-one-account rule under section 529A. Therefore, the final regulations do not permit the kind of arrangement described in the preceding paragraph.

However, the final regulations do permit, but do not require, an ABLE program to allow the establishment of sub-accounts within the sole ABLE account of the designated beneficiary. Such a sub-account could be authorized by either the designated beneficiary or the person with signature authority over the ABLE account. The signatory over the ABLE account has sole authority over the investment of the ABLE account, but the final regulations permit a program to allow the creation and maintenance of separate funds within that account, each to be used for one or more types of expenditures and from which distributions may be authorized by a person other than the signatory. For example, a designated beneficiary may authorize a parent to open and administer the ABLE account, but also may authorize the maintenance of a particular sub-account to be used for the purchase of the designated beneficiary's groceries and entertainment expenses on an ongoing basis, and from which the designated beneficiary (or a named sibling, for example) may make distributions for that purpose. Thus, different persons may be authorized to make distributions from different sub-accounts. All sub-accounts are aggregated as part of the one ABLE account for all other purposes, including, without limitation, the contributions limits, limit on the number of permissible investment direction changes, tax provisions, and reporting requirements.

D. Eligible Individual

At the time an ABLE account is established, the designated beneficiary of the account must provide evidence that he or she is an ''eligible individual.'' Consistent with section 529A(e)(1), the 2015 proposed regulations provided that an individual is an eligible individual for a taxable year if he or she is either (i) entitled during that year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such blindness or disability occurred before the date on which the individual attained age 26, or (ii) the subject of a disability certification filed with the Secretary of the Treasury or his delegate (Secretary) for that year.

The final regulations, like the 2015 proposed regulations, provide that the determination that an individual is an eligible individual is made each taxable year and applies for the entire year. The final regulations, like the 2015 proposed regulations, provide that a qualified ABLE program must specify the documentation that an individual must furnish, both at the time an account is established and thereafter, to ensure that the designated beneficiary of the ABLE account is, and continues to be, an eligible individual.

A few commenters requested clarification as to whether an ABLE account may be established for an individual with a mental illness. The Treasury Department and the IRS note that the statute does not differentiate between a mental or physical condition, and the final regulations retain the language from § 1.529A–2(e)(1)(i)(A) of the 2015 proposed regulations that provides that a mental impairment can meet the requirements for a disability certification.

One commenter asked whether a qualified ABLE program could narrow the types of physical or mental impairments that would satisfy the requirements to be an eligible individual to specific disabilities, such

as developmental disabilities. The Treasury Department and the IRS concluded that the statute does not permit a qualified ABLE program to discriminate on the basis of the nature of the disability, and that Congress intended that all individuals meeting the definition of an eligible individual under section 529A have access to an ABLE account, regardless of the nature of the individual's disability. Therefore, a qualified ABLE program may not narrow the definition of an eligible individual by limiting the types of disabilities that can be considered.

The Treasury Department and the IRS considered whether to retain the term ''entitled'' for purposes of the definition of an eligible individual under section 529A(e)(1)(A). To clarify the definition of ''eligible individual'' under section 529A(e)(1)(A) and its use of the word ''entitled'', the final regulations retain the term ''entitled'' as provided in the statute, interpret it to include eligibility for SSI benefits, and define the term ''eligible individual'' to include an individual who either is receiving SSI benefits based on blindness or a disability that occurred before age 26 or is a person whose entitlement to such benefits has been suspended due solely to excess income or resources.

A few commenters suggested that establishing an individual's eligibility should be the obligation of the Treasury Department or the SSA and should not be a burden shifted to the qualified ABLE programs. In addition, one commenter requested that a defined term, ''qualified proxy,'' be added to the regulations to clarify the procedures for establishing eligibility based on the individual's entitlement to SSI or SSDI benefits. Such a certification would be signed under penalties of perjury by the designated beneficiary or a ''qualified proxy'' who would certify as to the beneficiary's entitlement to these benefits during the applicable tax year and as to the onset of blindness or disability prior to age 26. The commenter also suggested that the certification either be accompanied by a copy of a letter from the SSA confirming eligibility for such benefits or reference the existence of such a letter and specifying the date of that letter. The commenter suggested allowing a qualified ABLE program to rely on an SSA certification for purposes of determining whether an individual is an eligible individual based on blindness or disability under title II or XVI of the Social Security Act. Other commenters recommended that the applicant be asked to certify the date of the most recent SSA benefit entitlement letter or to show some easily available proof, which the commenters suggested could be verified through electronic data matches between the IRS and the SSA.

The Treasury Department and the IRS agree that a certification-based process regarding eligibility by reason of entitlement to benefits based on blindness or disability under title II or XVI of the Social Security Act is the simplest way to facilitate the establishment of ABLE accounts without unduly burdening individuals, the program, the IRS, or the SSA. Additionally, the Treasury Department and the IRS concluded that it would be in everyone's best interests to permit an eligible individual to establish an ABLE account without experiencing the delay that would result from having to wait for the acceptance or approval of a certification by a government agency. Therefore, consistent with Notice 2015–81, the final regulations provide that a qualified ABLE program may establish entitlement with a certification, under penalties of perjury, by the individual establishing the ABLE account that the designated beneficiary of that account is eligible for benefits under title II or XVI of the Social Security Act and that the blindness or disability that qualifies the designated beneficiary for those benefits occurred before the date on which he or she attained age 26.

The other method of satisfying the definition of an eligible individual is by obtaining a disability certification and filing it with the Secretary. Consistent with section 529A(e)(2)(A), the 2015 proposed regulations provided that a disability certification is a certification deemed sufficient by the Secretary, signed under penalties of perjury, that an individual has a severe physical or mental impairment that can be expected to result in death or that has lasted (or can be expected to last) for a continuous period of not less than 12 months, or that the individual is blind, and that the blindness or impairment occurred before age 26, which certification is accompanied by a copy of a physician's diagnosis relating to the blindness or impairment. One commenter asked that the final regulations clarify that a disability certification that meets the requirements of the final regulations will be ''deemed sufficient by the Secretary.'' The Treasury Department and the IRS agree, and the final regulations affirm that a certification that meets the requirements of a disability certification as set forth in the final regulations is sufficient to establish the requisite level of physical or mental impairment described in § 1.529A–2(e)(2).

The final regulations, like the 2015 proposed regulations, also provide that a disability certification is deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification or a disability certification is deemed to have been received under the rules of the qualified ABLE program, about which receipt the qualified ABLE program must file information with the IRS.

As was stated in Notice 2015–81, numerous commenters, including States and potential qualified ABLE program administrators, expressed concerns about their responsibilities and potential liabilities for receiving and safeguarding medical information contained in a signed diagnosis, particularly because they do not anticipate having the expertise or ability to evaluate that medical information. The commenters emphasized that qualified ABLE programs would incur unmanageable costs and burdens in trying to comply with applicable laws imposing system and other requirements on those in possession of medical records, as well as in implementing systems to receive and store paper documentation. The commenters also expressed the concern that, if these costs and burdens are not minimized, some States might not proceed with the implementation of qualified ABLE programs for their residents. The commenters recommended that a qualified ABLE program be permitted to establish an ABLE account on the basis of a certification by the person establishing the ABLE account, signed under penalties of perjury, that the individual who is to be the designated beneficiary of the account has a qualifying condition and otherwise satisfies the definition of an eligible individual, and that a diagnosis signed by a physician regarding the relevant impairment or impairments has been obtained. To facilitate the establishment of qualified ABLE programs by the States, commenters requested interim guidance addressing the issue.

After consideration of these comments, the Treasury Department and the IRS issued Notice 2015–81, stating that a certification under penalties of perjury that the individual (or the individual's agent under a power of attorney or legal guardian of the individual) has a signed physician's diagnosis, and that the signed diagnosis will be retained and provided to the qualified ABLE program or the IRS upon request, would be adequate under the final regulations to satisfy the requirements pertaining to the filing of a disability certification to establish eligibility for an ABLE account.

One commenter stated that the degree of flexibility given to each state with respect to the specific documentation that will need to be filed to establish proof of eligibility will place an undue burden on the process and will create confusion within the disability community. This commenter and others asked that the IRS provide standard forms to document eligibility. Another commenter recommended that the final regulations establish a maximum amount of required information and documentation to make it easier for those attempting to establish an ABLE account to ensure they have everything required. Other commenters asked that qualified ABLE program administrators be required to collect only information concerning the basis of eligibility and a statement that the blindness or disability occurred before age 26. These commenters recommended the use of an application with ''check-off'' boxes allowing the applicant to indicate whether his or her eligibility for an ABLE account is based on SSI eligibility, SSDI eligibility, or the filing of a disability certification. The commenters would require the eligible individual to maintain records and documentation supporting the category of eligibility indicated on the application form, and to sign the application form under penalties of perjury.

The Treasury Department and the IRS understand and appreciate the benefits of a consistent and predictable disability documentation process, while recognizing that a qualified ABLE program should be accorded the flexibility to meet its own particular needs. Therefore, consistent with Notice 2015–81, the Treasury Department and the IRS added a safe harbor to the final regulations. The safe harbor provides that a qualified ABLE program may establish that an individual is an eligible individual if the individual (or the person with authority to establish that individual's account) certifies under penalties of perjury: (i) The basis for the individual's status as an eligible individual under § 1.529A–1(b)(8) (entitlement for benefits based on blindness or disability under title II or XVI of the Social Security Act, or a disability certification); (ii) that the individual is blind or has a medically determinable physical or mental impairment as described in the final regulations; (iii) that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); (iv) if the basis of the individual's eligibility is a disability certification, that the individual has obtained and will retain a copy of the written diagnosis relating to the disability, accompanied by the name and address of the diagnosing physician and the date of the written diagnosis; (v) that the individual has provided the applicable diagnostic code from those listed on Form 5498–QA that applies with respect to the designated beneficiary's disability; (vi) that the person establishing the account is the individual who will be the designated beneficiary of the account or is the person authorized under § 1.529A–2(c)(1)(i) to establish the account; and (vi) if required by the qualified ABLE program, that the individual has provided the information from a physician as to the categorization of the disability that may be used to determine, under the particular State's program, the appropriate frequency of required recertifications.

A few commenters, observing that persons with developmental disabilities are often diagnosed by licensed psychologists, clinical therapists, or certified vocational rehabilitation counselors, requested that the final regulations authorize such professionals to sign the individual's diagnosis. While the Treasury Department and the IRS understand the commenters' concerns, the final regulations do not incorporate these suggestions. Section 529A(e)(2)(A)(ii) requires the individual's diagnosis to be signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act, which means a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, and, for some purposes, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor.

In the case of a program-to-program transfer, several commenters requested that the final regulations allow the recipient qualified ABLE program to assume at the time of the transfer (in reliance on the obligations of the transferor program) that the designated beneficiary of the recipient ABLE account is an eligible individual. The final regulations do not incorporate this suggestion because the Treasury Department and the IRS concluded that the obligation of a qualified ABLE program to establish an account only for an eligible individual is not delegable. Thus, the same requirements for establishing an ABLE account apply, regardless of whether the account is funded initially with a program-to-program transfer or otherwise, including permitting a qualified ABLE program to allow the designated beneficiary to certify that he or she is an eligible individual.

E. Disability Standard

As directed in the ABLE Act, the Treasury Department and the IRS consulted with the Commissioner of Social Security in developing the medical standards relating to disability certifications and determinations of disability. The final regulations, like the 2015 proposed regulations, provide that a person signing (under penalties of perjury) a disability certification with respect to an individual is certifying that such individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind. The disability certification also is a certification that such blindness or disability occurred before the date on which the individual attained age 26.

Consistent with section 529A(e)(2)(A), the 2015 proposed regulations defined the phrase ''marked and severe functional limitations'' as the standard of disability in the Social Security Act for children claiming benefits under the SSI program based on disability, but without regard to the age of the individual. Citing 20 CFR 416.906, the 2015 proposed regulations clarified that this definition refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments in appendix 1 of subpart P of 20 CFR part 404. An impairment is medically equivalent to a listing if it is at least equal in severity and duration to the severity and duration of any listing. An impairment that does not meet or medically equal any listing may result in limitations that functionally equal the listings if it results in marked limitations in two domains of functioning or an extreme limitation in one domain of functioning, as explained in 20 CFR 416.926a. Several commenters commended the proposed regulation's use of this disability standard, saying that it achieves the intended statutory result.

One commenter questioned whether physicians would accurately interpret and apply the standard, and asked whether training for physicians would be provided. The Treasury Department and the IRS note that, while the physician is to provide the diagnosis, it is the designated beneficiary or other person establishing the ABLE account who is responsible for certifying satisfaction of the standard of medical

disability, so no special training of physicians by the SSA, the Treasury Department, or the IRS is contemplated.

A few commenters noted that the definition of ''marked and severe functional limitations'' under 20 CFR 416.906 includes the statement that ''if you file a new application for benefits and you are engaging in substantial gainful activity, we will not consider you disabled.'' These commenters questioned whether that statement suggests that a person is disqualified from having an ABLE account if he or she is gainfully employed. The Treasury Department and the IRS agree that the citation to the SSI regulation, without any further clarification, may lead to confusion. Therefore, the final regulations adopt the proposed regulation's definition of ''marked and severe functional limitations,'' but also provide that the standard of disability under section 529A is applied without regard to either the individual's age or whether the individual is engaged in substantial gainful activity.

Some commenters requested that the final regulations provide that a person who does not meet the definition of an eligible individual before attaining age 26, but who subsequently will develop blindness or a disability of sufficient severity to satisfy that definition as a result of either a genetic disorder present at birth or a condition that is diagnosed before attaining age 26 may qualify as an eligible individual. One commenter asserted that such an individual should be allowed to prepare for a known future disability by establishing an ABLE account. The Treasury Department and the IRS also have considered whether such an individual should be able to qualify as an eligible individual once the disorder or condition causes blindness or a disability of sufficient severity. While sympathetic to this request, the Treasury Department and the IRS concluded that the statutory requirement that the blindness or disability have ''occurred'' before age 26 is not consistent with the broader interpretations requested or considered. There is no indication in the statute or legislative history of the ABLE Act that Congress intended to permit what could be a significant expansion of the definition of an eligible individual by including a person who may never develop the disability or whose condition is cured or significantly alleviated by subsequent medical discoveries. Accordingly, the final regulations do not incorporate this suggested change.

The 2015 proposed regulations provided that a condition listed in the ''List of Compassionate Allowances Conditions'' maintained by the SSA (currently at *www.socialsecurity.gov/compassionateallowances/conditions.htm*) would be deemed to meet the requirements of a condition sufficient for a disability certification without a physician's diagnosis if the condition was present before the date on which the individual attained age 26. In the preamble to the 2015 proposed regulations, the Treasury Department and the IRS requested comments on other conditions that might also be deemed sufficient for a disability certification without the need of a physician's diagnosis.

Some commenters proposed that a few additional specific conditions should be treated similarly as qualifying disabilities. One commenter suggested that three additional types of spinal muscular atrophy, a permanent disability that can occur after age 26, should so qualify, in addition to the two types already on the List of Compassionate Allowances Conditions. Another commenter suggested that polymicrogyria qualifies under certain conditions, while yet another commenter pointed out that autism is typically a lifelong condition. One commenter suggested that the regulations incorporate what was described as the ''non-exhaustive list of impairments presumed to be disabilities under the updated EEOC Title I regulations of the Americans with Disabilities Act (76 FR 16978).'' While sympathetic to the suggestions of these commenters, the Treasury Department and the IRS are not qualified to make the kind of decisions that are made by the SSA when compiling the List of Compassionate Allowances Conditions. For that reason, the final regulations adopt the provision in the 2015 proposed regulations without change. The Treasury Department and the IRS note that the SSA periodically updates the List of Compassionate Allowances Conditions, so these commenters may want to consider approaching the SSA with their requests. The Office of Disability Policy maintains a website and email box for soliciting and evaluating compassionate allowance condition submissions from the public at *https://www.ssa.gov/compassionateallowances/submit_potential_cal.html.*

F. Recertification

The 2015 proposed regulations provided that a qualified ABLE program could choose different methods of ensuring a designated beneficiary's status as an eligible individual. That might include, for example, imposing different periodic recertification requirements for different types of impairments, taking into consideration whether an impairment is incurable and the likelihood that a cure may be found. The 2015 proposed regulations explained that, while a qualified ABLE program generally must require an annual recertification that the designated beneficiary continues to satisfy the definition of an eligible individual, it may deem an annual recertification to have been provided in appropriate circumstances. For example, a qualified ABLE program could deem a one-time certification by an individual that he or she has a permanent disability as meeting the annual recertification requirement in subsequent years. In other cases, a program could require the same evidence that is required of an initial disability certification, or could incorporate some other method of ensuring that the designated beneficiary continuously qualifies as an eligible individual.

While most commenters supported the flexibility accorded qualified ABLE programs to impose different periodic recertification requirements for different types of impairments, several commenters recommended that there be as much uniformity among qualified ABLE programs as possible. Some of these commenters asked that the final regulations identify those illnesses or disabilities for which there is no known cure and then excuse them from any recertification requirement. Many of these commenters requested that the form used to establish the ABLE account contain a box for the diagnosing physician to check if the disability is unlikely to change within five years, and require recertification only every five years thereafter. Other commenters suggested that there be a uniform certification form with which a physician could certify that an individual's impairment is unlikely to improve, in which case the certification would be effective for a certain number of years (for example, 5 years or longer), after which time a new certification form could be filed for an additional number of years. Some commenters suggested that the certification of a ''permanent,'' ''incurable,'' or ''severe and sustained'' disability should be effective for a longer period of time than the certification of a ''moderate'' or ''curable'' disability, or that the disability be classified as ''severe'', ''moderate'', or ''mild'' with a different recertification frequency for each, and that those classifications would be certified when the account is

established. Some commenters suggested that there be a presumption of continued eligibility until the designated beneficiary notifies the qualified ABLE program of his or her ineligibility. Other commenters suggested that recertification be waived as long as the designated beneficiary's SSDI or SSI benefits qualify him or her for an ABLE account, while still other commenters requested that the annual recertification requirement be waived for anyone with an incurable illness or disability. One commenter suggested that the IRS partner with the SSA to maintain lists of recertification criteria. Other commenters pointed out that recertification may be too burdensome.

The final regulations retain the rule set forth in the 2015 proposed regulations that a determination of eligibility must be made annually unless the qualified ABLE program adopts a different method of ensuring a designated beneficiary's continuing status as an eligible individual. This gives each qualified ABLE program broad discretion to devise its own recertification methods. This provision is broad enough to permit many of the approaches suggested by commenters, other than the suggestions regarding the elimination of the recertification requirement entirely. The final regulations specify that a permissible method may include a certification by the designated beneficiary under penalties of perjury.

The final regulations, like the 2015 proposed regulations, also provide that even if a qualified ABLE program imposes an enforceable obligation on the designated beneficiary or other person with signature authority over the ABLE account to report promptly any changes in the designated beneficiary's condition that would disqualify the designated beneficiary as an eligible individual, the qualified ABLE program may provide that a certification is valid until the end of the taxable year in which the change in the designated beneficiary's condition occurred. One commenter asked for clarification that a qualified ABLE program that adopts this approach will not be deemed to be noncompliant with the annual recertification requirement for any year in which the designated beneficiary is no longer an eligible individual but fails to report a change in status to the program. The final regulations confirm that a qualified ABLE program that is compliant with the rules regarding recertification will not cease to be a qualified ABLE program if the designated beneficiary fails to report a change in status.

G. Change in Eligible Individual Status

The Treasury Department and the IRS recognize that there will be instances when an individual's impairment abates to the point that the individual no longer qualifies as an eligible individual, either temporarily or permanently. The 2015 proposed regulations provided that an existing ABLE account will remain the ABLE account of the designated beneficiary even during years in which the designated beneficiary does not qualify as an eligible individual. However, the 2015 proposed regulations also provided that, beginning with the year immediately following the year in which that qualification ceases, no additional contributions may be made into that ABLE account. The final regulations preserve these rules. However, the 2015 proposed regulations provided that, beginning with that same year, no amounts incurred would constitute a qualified disability expense, regardless of the nature of that expense. As explained in the following paragraphs, the final regulations continue to provide that, in this event, no expense will constitute a qualified disability expense, but further provide that this rule applies at all times when the designated beneficiary does not qualify as an eligible individual, including during the portion of the year remaining after that eligibility has been lost.

One commenter asked whether the ABLE account could be used to pay for medical treatments that may be necessary to sustain the designated beneficiary's improved condition. Another commenter asked whether distributions from the ABLE account to pay for medically necessary procedures of a designated beneficiary who is not an eligible individual are subject to tax. One commenter suggested that an ABLE account should be closed if the designated beneficiary of the account no longer has the qualifying blindness or disability, and that the designated beneficiary then should be subjected to long term capital gains tax on the income portion of any remaining funds in that ABLE account, possibly payable over more than a single year.

A condition in remission subsequently can become active, so it is possible that the designated beneficiary could again satisfy the definition of an eligible individual in the future. In addition, even though a designated beneficiary may fail to qualify as an eligible individual for purposes of section 529A, that person still may be relying on public benefits that could be lost if the ABLE account were to lose its special exclusion under section 103 of the ABLE Act. For these reasons, the Treasury Department and the IRS concluded that it is appropriate to preserve the ABLE account for the benefit of the designated beneficiary, even after the designated beneficiary fails to qualify as an eligible individual, in case he or she once again becomes an eligible individual. Therefore, like the 2015 proposed regulations, the final regulations provide that, for any year during which a designated beneficiary no longer satisfies the definition of an eligible individual, his or her ABLE account remains an ABLE account, to which all of the non-tax provisions of the ABLE Act continue to apply, and to which all of the tax provisions continue to apply except as otherwise provided with regard to contributions and the tax treatment of distributions. The ABLE account does not have to terminate, and there is no deemed distribution of the account balance for tax purposes. Beginning on the first day of the designated beneficiary's first taxable year following the year in which the designated beneficiary no longer satisfies the definition of an eligible individual, no contributions to the ABLE account may be accepted by the qualified ABLE program. In addition, expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither an individual with a disability nor blind within the meaning of § 1.529A–1(b)(8)(i) or § 1.529A–2(e)(1)(i), even if the individual remains an eligible individual through the end of the year in which the individual ceases to be disabled or blind. Therefore, although distributions still may be made from an ABLE account to pay the expenses of the designated beneficiary incurred during periods when the designated beneficiary is no longer blind or disabled, none of those expenses are qualified disability expenses and thus the earnings included in those distributions are includible in the gross income of the designated beneficiary. If the designated beneficiary subsequently requalifies as an eligible individual, contributions to the designated beneficiary's ABLE account again will be allowed, subject to the annual contribution limit under section 529A(b)(2)(B) and the aggregate contribution limit under section 529A(b)(6), and expenses again may constitute qualified disability expenses.

3. Contributions to an ABLE Account

A. Source and Nature

Like the 2015 proposed regulations, the final regulations provide that any

person may make contributions to an ABLE account, subject to annual and aggregate contribution limits. One commenter suggested that the final regulations explicitly define the word ''person'' with reference to the definition of ''person'' under section 7701. Another commenter requested clarification that contributors to an ABLE account may include charitable organizations described in section 501(c)(3) of the Code, as well as special needs trusts as described in 42 U.S.C. 1396p(d)(4) that can be excluded from a person's assets for purposes of eligibility for certain Medicaid benefits. The Treasury Department and the IRS note that the definition of ''person'' in section 7701 applies throughout the Code unless explicitly provided otherwise or where manifestly incompatible with the statutory intent and is thus applicable in this context. The Treasury Department and the IRS also note that a ''person'' under section 7701 includes both trusts and tax-exempt organizations. Accordingly, an express statement in the regulatory text is not necessary to achieve the commenter's purpose. Therefore, the final regulations do not adopt these comments.

Like the 2015 proposed regulations, the final regulations provide that all contributions to an ABLE account must be made in cash, and that a qualified ABLE program may accept contributions in the form of cash, check, money order, credit card payment, electronic transfer, or other similar method of payment. Many commenters urged that the final regulations continue to allow a qualified ABLE program to accept contributions by credit card, and the final regulations do so. One commenter asked that the final regulations clarify that a qualified ABLE program may accept payroll deductions. The final regulations accordingly clarify that cash contributions may be made as after-tax payroll deductions.

One commenter asked that the final regulations clarify that a qualified ABLE program may accept contributions directly from a corporation, and that employers may contribute to the ABLE accounts of their employees through matching contribution programs. The Treasury Department and the IRS note that the final regulations provide that a qualified ABLE program may accept contributions in the form of after-tax payroll deductions and do not prohibit other forms of contributions from a corporation or employer. However, it is important to remember that contributions made by an employer to the ABLE account of its employee or of a family member of the employee are subject to the rules governing the taxation of compensation. The final regulations also clarify that the rules concerning the tax treatment of contributions to an ABLE account apply only for purposes of section 529A. No inference is intended with respect to the tax treatment of amounts contributed to ABLE accounts for other purposes of the Code, such as the tax treatment of compensation.

Several commenters requested that certain contributions be allowed without regard to other applicable tax provisions. For example, one commenter suggested that a parent be allowed to withdraw assets from his or her IRA and contribute the assets to his or her child's ABLE account free of income tax on the IRA withdrawal. Although there is no limit on the permissible sources of contributions to an ABLE account, the regulatory authority of the Treasury Department and the IRS does not extend to negating the tax consequences that otherwise are applicable to amounts used to make contributions.

B. Annual and Aggregate Contribution Limits

Consistent with section 529A(b)(2)(B), the 2015 proposed regulations provided that the total amount of contributions to an ABLE account during the designated beneficiary's taxable year (excluding rollovers and program-to-program transfers) could not exceed the section 2503(b) gift tax annual exclusion amount ($14,000 in 2015, 2016, and 2017 and $15,000 in 2018, 2019, and 2020) (annual contribution limit). Although section 529A was effective for taxable year 2015, no qualified ABLE programs were operational in 2015. Several commenters asked that the final regulations allow a ''make-up'' contribution for 2015 to be made in 2016, so that, for 2016 only, the total amount that may be contributed to an ABLE account is $28,000. Setting the 2016 contribution limit at $28,000, these commenters said, would effectuate Congressional intent to enable eligible individuals to benefit from ABLE accounts beginning in 2015.

The final regulations do not incorporate this suggestion as the statute is explicit with regard to the annual contribution limit and does not permit a carryover. Section 529A(b)(2) states that, except in the case of a rollover, a qualified ABLE program may not accept a contribution to an ABLE account that would result in aggregate contributions from all contributors to the account for the taxable year exceeding the Federal gift tax exclusion amount in effect under section 2503(b) for that year.

One commenter asked that the final regulations expressly state that a change in the designated beneficiary of an ABLE account to a member of the family of the designated beneficiary effectuated without a rollover or program-to-program transfer is not a contribution subject to the annual contribution limit. The final regulations adopt this suggestion. The Treasury Department and the IRS view such a change of the designated beneficiary as the equivalent of a rollover or program-to-program transfer. Therefore, the annual contribution limit does not apply as long as the successor designated beneficiary is both an eligible individual and a sibling, stepsibling, or half-sibling of the designated beneficiary (collectively referred to as siblings).

Section 529A(b)(2) provides that, for purposes of applying the annual contribution limit imposed by that section, rules similar to the rules of section 408(d)(4), determined without regard to subparagraph (B) thereof, apply. Section 408(d)(4) generally provides that a distribution from an IRA is not taxable if it is the return of a contribution made during the taxable year, provided that the return of the contribution is received by the IRA owner on or before the due date (including extensions) of his or her income tax return for that year, and if the amount returned includes the earnings on the amount of the contribution. However, the earnings portion of the distribution is includible in the recipient's gross income for the year in which the contribution was made.

One commenter suggested that the reference to section 408(d)(4) should be construed to calculate both the annual contribution limit and the aggregate contribution limit by not counting toward either limit the amount of each contribution withdrawn during that same year for qualified disability expenses. Under this view, total permissible contributions during any year would equal the sum of the annual contribution limit (currently $15,000) and the total withdrawals during that year for qualified disability expenses, thus giving the designated beneficiary the ability to save amounts in the ABLE account in excess of what is needed for current expenses.

The final regulations do not incorporate this suggestion. The Treasury Department and the IRS concluded that the mere reference in section 529A(b)(2) to section 408(d)(4) cannot be read to increase the permissible annual contributions by the amounts distributed out of the ABLE account in the same year. The reference

to section 408(d)(4) provides a mechanism for correcting the receipt of a contribution in excess of the annual contribution limit. Under section 4973(h)(2), an excess annual contribution timely returned in accordance with the reference to section 408(d)(4) in section 529A(b)(2) is treated as an amount not contributed, and therefore avoids the imposition of a six percent excise tax under section 4973 on excess annual contributions that are not timely returned.

One commenter suggested that the final regulations should allow an individual's benefits under the SSI program to be directly deposited or otherwise transferred to the ABLE account of which the individual is the designated beneficiary, without being counted against the annual contribution limit. Another commenter suggested that, in applying the annual contribution limit, the final regulations should disregard the amount of certain other items deposited into an ABLE account, such as the payment of retroactive SSDI benefits, the proceeds from a personal injury lawsuit, or a family inheritance. Noting that large sums of money received as a result of a lawsuit settlement or inheritance are often placed in special needs trusts, the commenter also recommended that the final regulations permit transfers from a special needs trust to an ABLE account. Another commenter asked that the final regulations not treat any earned income of the designated beneficiary that is deposited into his or her ABLE account as a contribution subject to the annual contribution limit because such a transfer is not treated as a completed gift for Federal tax purposes.

The final regulations do not incorporate these suggestions. The statute does not differentiate between contributions based on their nature or source. The Treasury Department and the IRS concluded that the statute is properly interpreted to include all amounts contributed to an ABLE account for the benefit of the designated beneficiary (other than a rollover, program-to-program transfer, or pursuant to a change of designated beneficiary) as a contribution subject to the annual limit, regardless of the source of the funds contributed. The Treasury Department and the IRS note that section 529A does not prevent a transfer from a special needs trust to an ABLE account subject to the annual and aggregate contribution limits of sections 529A(b)(2)(B) and 529A(b)(6).

The 2015 proposed regulations provided that a qualified ABLE program is required to provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by the State on contributions to its qualified tuition program under section 529(b)(6) (aggregate contribution limit). The 2015 proposed regulations included a safe harbor providing that a qualified ABLE program satisfies the aggregate contribution limit requirement if it refuses to accept any additional contribution to an ABLE account once the balance in the account reaches that limit. Once the account balance falls below the aggregate contribution limit, additional contributions again may be accepted up to the aggregate contribution limit. The Treasury Department and the IRS concluded that this safe harbor and the permissible recommencement of contributions is appropriate based on the nature and purposes of a qualified ABLE program.

Most commenters were supportive of the proposed safe harbor, which is the same safe harbor in the proposed regulations addressing the cumulative limit on qualified tuition accounts under section 529. Some commenters also noted that the safe harbor would be consistent with the way most States administer their 529 programs, which would lower administrative costs. One commenter observed that the safe harbor avoids the disparities inherent in focusing solely on contributions, which penalizes savers experiencing financial market downturns while favoring those experiencing financial gains. Some commenters requested clarification that the safe harbor could be applied each time the account balance reaches the applicable limit, and is not limited to just one application. The final regulations, like the 2015 proposed regulations, provide that, once the account balance falls below the aggregate contribution limit, additional contributions again may be accepted, again subject to the aggregate contribution limit.

One commenter, however, expressed concerns that the proposed safe harbor, by substituting the account balance for the aggregate contribution limit, renders an ABLE account less attractive as a savings vehicle for the designated beneficiary. The commenter noted that earnings on contributions to the account may cause the account balance to reach the aggregate contribution limit long before aggregate contributions to the account rise to that limit. Therefore, the commenter recommended replacing the safe harbor in the 2015 proposed regulations with a six-month grace period during which a qualified ABLE program could identify and disgorge excess aggregate contributions.

The Treasury Department and the IRS are also concerned, however, with the opposite situation in which total contributions have reached the aggregate contribution limit but distributions and/or decreases in market value have reduced the account balance to below the aggregate contribution limit. In that case, without the safe harbor, all further contributions would be prohibited. Accordingly, the Treasury Department and the IRS continue to view the proposed safe harbor as potentially more favorable to the designated beneficiary than an approach focused on cumulative contributions. In addition, some commenters predicted that the safe harbor would reduce the administrative costs of qualified ABLE programs. Therefore, the final regulations retain the safe harbor provision but clarify that the safe harbor may be applied an unlimited number of times and that, once contributions recommence, they are subject to both the annual and aggregate contribution limits. The final regulations also change a cross-reference that caused some confusion among commenters.

The aggregate contribution limit is likely to be different for each qualified ABLE program because that limit is determined by the limit established by each particular State for contributions to its qualified tuition program under section 529(b)(6). One commenter asked that the final regulations permit rollovers and program-to-program transfers of amounts in excess of the transferee ABLE program's aggregate contribution limit if such amount does not exceed the aggregate contribution limit of the transferor ABLE program, or, if it does, that it exceeds that limit solely because of investment growth. The commenter suggested that the transferee ABLE program would reject additional contributions until the account balance falls below the aggregate contribution limit set by the transferee ABLE program. The final regulations adopt this suggestion and exclude rollovers, program-to-program transfers, and changes to a new designated beneficiary who is an eligible individual and a sibling of the former designated beneficiary for purposes of the aggregate contribution limit, provided that subsequent contributions are prohibited either under the general rule or the safe harbor. The Treasury Department and the IRS view this exclusion as consistent with the account balance safe harbor.

C. Additional Contribution Limit and Applicable Poverty Line

Consistent with the TCJA amendment to section 529A(b)(2)(B), the 2019 proposed regulations provided that an employed or self-employed designated beneficiary described in section 529A(b)(7) may contribute to his or her ABLE account the lesser of the designated beneficiary's compensation for the taxable year or an amount equal to the poverty line for a one-person household for the calendar year preceding the calendar year in which the designated beneficiary's taxable year begins.

Section 529A(b)(7)(B) provides that the term poverty line referred to in section 529A(b)(2)(B)(ii) has the same meaning given to that term by section 673 of the Community Services Block Grant Act (42 U.S.C. 9902). Consistent with the 2019 proposed regulations, the final regulations provide that the poverty line in section 529A(b)(7)(B) is to be determined by using 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). Those guidelines vary based on locality. Specifically, there are three separate guidelines: (1) The contiguous 48 states and the District of Columbia, (2) Alaska, and (3) Hawaii. The 2019 proposed regulations provided that a designated beneficiary's contribution limit is to be determined using the poverty guideline applicable in the state of the designated beneficiary's residence.

One commenter suggested that the final regulations should provide that the poverty line on which the designated beneficiary's contribution limit is based should be uniform throughout the United States to avoid both confusion and an incentive for a move to a state with a higher poverty line. The Treasury Department and the IRS have concluded that the poverty guideline that most closely reflects the employed designated beneficiary's cost of living is the most relevant for determining the contribution limit, and that a move to a state with a higher poverty line generally also would subject the designated beneficiary to a higher cost of living, thus effectively negating any incentive to move. Therefore, consistent with the 2019 proposed regulations, the final regulations provide that a designated beneficiary's contribution limit is determined using the poverty guideline applicable in the state of the designated beneficiary's residence, and that an employed or self-employed designated beneficiary described in section 529A(b)(7) may contribute to his or her ABLE account the lesser of the designated beneficiary's compensation for the taxable year or an amount equal to the poverty line for a one-person household for the calendar year preceding the calendar year in which the designated beneficiary's taxable year begins.

One commenter suggested that designated beneficiaries generally will not easily be able to determine the annual applicable poverty line and requested that the IRS require ABLE programs to provide notice to designated beneficiaries each year of the poverty line for each of the geographic areas applicable for that year. Two commenters also expressed concern about the statutory provision that makes the designated beneficiary responsible for ensuring that these contributions of compensation income do not exceed the applicable limit, and pointed out that an uncorrected excess contribution would be likely to jeopardize the designated beneficiary's qualification for public benefits on which the designated beneficiary relies. They suggested that supplemental information is needed to assist the designated beneficiaries and their advisors, and recommended that ABLE programs be required not only to provide annual updates on the applicable poverty limits, but also general information about the compensation contribution limit, as well as notice to each designated beneficiary when compensation contributions are approaching and/or have exceeded the applicable level, and when other contributions have reached the annual and cumulative limits. Finally, a commenter suggested that ABLE programs should allow ABLE beneficiaries to opt out of the compensation contribution limit to assist those designated beneficiaries who do not want to incur any risk of exceeding the applicable limit.

The final regulations do not incorporate these suggestions. The Treasury Department and the IRS note that the statute does not require qualified ABLE programs to provide any of the notices suggested by the commenter and, in fact, requires the designated beneficiary to be solely responsible for monitoring the increased limit. Furthermore, the Treasury Department and the IRS are concerned that requiring qualified ABLE programs to provide these notices would be unduly burdensome and would increase costs to the programs. Although the final regulations do not impose such notification requirements on qualified ABLE programs, the Treasury Department and the IRS acknowledge that it may be helpful and a real service to designated beneficiaries if the ABLE programs would make this information available to designated beneficiaries, whether by information posted online or otherwise, and suggest that ABLE programs are free to provide such a service if they wish. Finally, the Treasury Department and the IRS note that, because making the additional contribution of the designated beneficiary's compensation income is voluntary, there is no need to opt out of the ability to make such a contribution.

Another commenter requested that the final regulations provide that an amount not in excess of the new compensation contribution limit may be contributed by a person other than the designated beneficiary. The commenter pointed out that many employed designated beneficiaries have to use their earned income to pay their living expenses, thus leaving little for saving in the ABLE account, and that, without such a provision, another person's gift to match the designated beneficiary's earned income would have to be made through the designated beneficiary's account, which could adversely impact qualification for public benefits. The Treasury Department and the IRS understand the potential problem but believe that such a provision would be contrary to the explicit language of the statute, requiring that such contributions be made by the designated beneficiary. Further, the legislative history of the TCJA, like the statute, explicitly states that additional amount must be contributed by the designated beneficiary. See H.R. Rep. No. 115–466, at 329 (2017) (Conf. Rep.). Therefore, the final regulations do not incorporate this suggestion.

The commenter also requested confirmation that a direct deposit of the designated beneficiary's compensation income to his or her ABLE account is a contribution ''by'' the designated beneficiary, as well as confirmation that contributions subject to the new compensation contribution limit do not have to be made from the designated beneficiary's compensation income. The Treasury Department and the IRS agree. Money is fungible. In addition, the statute does not require that the contributions come from the designated beneficiary's earned income; rather, the designated beneficiary's earned income is one measure used to determine the additional contribution limit applicable to an employed designated beneficiary's own contributions. The final regulations clarify these two points.

One commenter asked whether a designated beneficiary's compensation contributions count towards the compensation contribution limit even if

the annual contribution limit has not been reached. If the new limit on compensation contributions has been reached, the designated beneficiary may continue to make additional contributions until the annual or cumulative contribution limits have been reached. The Treasury Department and the IRS believe each qualified ABLE program has the flexibility to determine how to identify contributions from the designated beneficiary that are compensation contributions subject to the new contribution limit.

Finally, one commenter requested clarification that, although contributions to and distributions from an ABLE account generally are not taken into account in determining the designated beneficiary's qualification for certain public benefits, the earned income of a designated beneficiary that is deposited into his or her ABLE account nevertheless is earned income and, as such, may be counted in calculating ''substantial gainful activity'' of the designated beneficiary which, regardless of its deposit into an ABLE account, may have an impact for purposes of determining the designated beneficiary's qualification for those benefits. This is not a tax issue and thus is beyond the scope of these regulations.

D. Application of Gift Tax and GST to Contributions to an ABLE Account

Contributions to an ABLE account are completed gifts to the designated beneficiary of that ABLE account. Gift tax consequences may arise from a contribution to an ABLE account even though the aggregate amount of contributions to that ABLE account from all contributors must not exceed the annual exclusion amount under section 2503(b) applicable to any single contributor. For example, if a contributor makes gifts to an individual in addition to that contributor's contributions to the same individual's ABLE account, the contributor's total gifts to such individual in that year could give rise to a gift tax liability.

Contributions can be made by any person. The term *person* is defined in section 7701(a)(1) to include an individual, trust, estate, partnership, associations, company, or corporation. Therefore, for purposes of section 529A(b)(1)(A), a person includes an individual as well as each of the entities described in section 7701(a)(1). Although under section 2501(a)(1), the gift tax applies only to gifts by individuals, it applies to gifts made directly or indirectly. As a result, a gift made by a trust, estate, association, company, corporation, or partnership is treated for gift tax purposes as having been made by the owner(s) of that entity. For example, a gift from a corporation to a designated beneficiary is treated as a gift from the shareholders of the corporation to the designated beneficiary. See § 25.2511–1(h)(1). Accordingly, the final regulations adopt unchanged the provisions of the 2015 proposed regulations and provide that, for purposes of section 529A, a contribution by a corporation is treated as a gift by its shareholders and a contribution by a partnership is treated as a gift by its partners. This rule also applies to trusts, estates, associations, and companies. See section 2511 and § 25.2511–1(c) and (h).

The legislative history of section 529A suggests that a ''person'' described in section 529A(b)(1)(A) who can make contributions to an ABLE account includes the designated beneficiary of an ABLE account. See 160 Cong. Rec. H7051, H8317, H8318, H8321, H8322 (2014). A person may transfer his or her own funds into an ABLE account of which that person is the designated beneficiary. Because an individual cannot make a gift to himself or herself, the final regulations, like the 2015 proposed regulations, provide that no contribution by a designated beneficiary to his or her own ABLE account is treated as a completed gift. See § 25.2511–2(b) and (c).

However, because the statute contemplates that the funds being deposited into an ABLE account are taxable gifts, and the contributions from the designated beneficiary into his or her own ABLE account were never treated as completed gifts to the designated beneficiary, the 2015 proposed regulations provided that, notwithstanding section 529A(c)(2)(C), which makes gift and GST taxes inapplicable to the change of beneficiary of an ABLE account if the transferee is both an eligible individual and a sibling of the former designated beneficiary, if the designated beneficiary transfers the funds in the account to any other person, including a sibling, the designated beneficiary making the transfer is the donor for gift tax purposes and the transferor for GST tax purposes to the extent of the funding provided by that designated beneficiary and the accumulated earnings thereon. Although the provisions of section 529A(c)(2)(C) would appear to apply to exclude the balance of the account from gift and GST taxes if the transfer was to a sibling, one commenter asked why, in that case, the entire value of the account would not be a taxable gift. That commenter also objected to requiring ABLE programs to track contributions from the designated beneficiary for this purpose as being too burdensome.[2]

In light of these comments, the Treasury Department and the IRS have reconsidered the approach of the 2015 proposed regulations, taking into account the comments describing the burden of separately tracking contributions from the designated beneficiary. The final regulations balance the treatment of contributions as a completed gift and the exclusion of gifts to a sibling of the designated beneficiary by taking the least burdensome approach, as requested by these commenters. Specifically, even though the portion of the account attributable to contributions from the designated beneficiary is the only part of the ABLE account that was not previously treated as a gift, the designated beneficiary is the owner of the entire account and the gift and GST tax properly applies to the entire account when there is a change of designated beneficiary, but those taxes are inapplicable if the new designated beneficiary is a sibling of the former designated beneficiary. Making this change makes it unnecessary for a qualified ABLE program to separately track contributions made by the designated beneficiary. The final regulations reflect this change.

E. Return of Excess Contributions and Excess Aggregate Contributions

The 2015 proposed regulations define an ''excess contribution'' as the amount by which the amount contributed during the taxable year of the designated beneficiary to an ABLE account exceeds the limit in effect under section 2503(b) (the gift tax annual exclusion amount) for the calendar year in which the taxable year of the designated beneficiary begins (annual contribution limit). The 2015 proposed regulations defined an ''excess aggregate contribution'' as the amount contributed during the taxable year of the designated beneficiary that causes the total amount

[2] Another commenter stated that requiring a qualified ABLE program to assign ''earnings attributable to that contribution'' would require the qualified ABLE program to track specific tax lots for each contribution, which would be unduly burdensome. Therefore, the commenter recommended that the phrase ''any earnings attributable to that contribution'' be deleted. It is not correct that earnings would have to be tracked to meet such a requirement, as the rules for calculating earnings attributable to a contribution would not need to require tracking earnings on a particular investment but could be based on the proportionate increase in value of the account over the relevant period. See § 1.408–11. However, given that the Treasury Department and the IRS agree that the entire account would be a taxable gift, it is not necessary to calculate earnings attributable to a contribution.

contributed since the establishment of the ABLE account to exceed the limit in effect under section 529(b)(6) or, in the context of the safe harbor, a contribution that causes the account balance to exceed the limit in effect under section 529(b)(6) (aggregate contribution limit).

Consistent with section 529A(c)(3)(C), the 2015 proposed regulations provided that, if an excess contribution or an excess aggregate contribution is deposited into or allocated to the ABLE account of a designated beneficiary, a qualified ABLE program would be required to return that excess contribution or excess aggregate contribution, along with all net income attributable to the excess amount, to the person or persons who made the contribution. The 2015 proposed regulations provided rules for determining the net income attributable to a contribution made to an ABLE account, and also provided that excess contributions and excess aggregate contributions must be returned to their contributors on a last-in-first-out (LIFO) basis. The 2015 proposed regulations also required that a returned contribution be received by the contributor on or before the due date (including extensions) for the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. Failure to return an excess contribution within that time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of the excess contribution. See section 4973(a)(6) and (h)(2). However, the 2015 proposed regulations impose an affirmative obligation on the qualified ABLE program to ensure that these excess contributions are returned on a timely basis so that the excise tax never will be imposed on the designated beneficiary.

The 2015 proposed regulations also provided that, if an excess contribution or excess aggregate contribution and the net income attributable to such contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program is to notify the designated beneficiary of such return at the time of the return.

One commenter objected to the requirement that an excess contribution or excess aggregate contribution be returned to the person or persons who made the contribution, which, according to the commenter, places a burden on the qualified ABLE program to track the source, amount, and date of each contribution. The commenter suggested that it would be less burdensome if excess contributions and excess aggregate contributions were returned instead to the designated beneficiary who, in turn, would then be responsible for returning the contribution to the appropriate contributor. The Treasury Department and the IRS decline to adopt this suggestion. Requiring the designated beneficiary to return contributions would be unduly burdensome to the designated beneficiary, the person for whom many commenters requested as much simplification as possible. More importantly, contributions returned to the designated beneficiary are likely to be counted as a resource of the designated beneficiary for purposes of determining his or her eligibility for benefits under certain means-tested government programs, thus potentially causing the designated beneficiary to lose eligibility for those critical benefits.

Another commenter asked that the final regulations eliminate the requirement to return any earnings on an excess contribution or excess aggregate contribution to the contributor, citing the cost and other burdens of creating an automated process to track individual contributions and calculate the earnings thereon. The Treasury Department and the IRS decline to adopt this suggestion because section 529A(c)(3)(C)(ii) requires the return of the net income attributable to an excess contribution. The statute also requires that the net income attributable to an excess contribution be determined in the same manner as in the case of withdrawn excess contributions to IRAs. In addition, because this determination is based on the change in value of the account, it does not require the tracking of earnings attributable to each contribution. For more information on how to determine the net income attributable to an excess contribution, see Publication 590–A, ''Contribution to Individual Retirement Arrangements (IRAs)'', Worksheet 1–4, ''Determining the Amount of Net Income Due To an IRA Contribution and Total Amount To Be Withdrawn From the IRA.'' See also § 1.408–11.

A few commenters also recommended that the final regulations explicitly state that a qualified ABLE program need not notify the designated beneficiary when it rejects and returns an excess contribution or excess aggregate contribution from another contributor to the designated beneficiary's ABLE account as long as such contribution was not deposited into or allocated to the ABLE account. Because such a contribution could not have generated any earnings in the ABLE account, the Treasury Department and the IRS concluded that there is no need for such a contribution to generate any reporting requirement. The final regulations clarify that notification is not required if amounts are rejected by the qualified ABLE program before they are deposited into or allocated to the designated beneficiary's ABLE account.

Another commenter criticized the requirement that excess contributions be returned on a LIFO basis, stating that a LIFO approach could result in the return of contributions made by the designated beneficiary before contributions made by another person, thereby making an ABLE account less attractive as a financial planning tool for the designated beneficiary. The commenter recommended that the final regulations require that the qualified ABLE program return contributions made by persons other than the designated beneficiary before returning any contribution made by the designated beneficiary. The Treasury Department and the IRS decline to adopt this recommendation in the final regulations. The Treasury Department and the IRS note that a qualified ABLE program may allow the designated beneficiary or person with signature authority over an ABLE account to place restrictions on the contributors and/or the amounts contributed to the account if the designated beneficiary is concerned about the impact of the unwanted contributions on financial planning. In addition, adopting the suggestion would impose additional burdens on the qualified ABLE programs, that then would be required to separately track contributions from the designated beneficiary (which several commenters opposed). Moreover, many states have designed their programs and administrative systems to stop accepting contributions once the total contributions or value of the account reaches the applicable limit. Such a system is not consistent with a rule other than a LIFO rule.

F. Return of Excess Compensation Contribution

The 2019 proposed regulations defined an excess compensation contribution as the amount by which the amount contributed during the taxable year of an employed designated beneficiary to the designated beneficiary's ABLE account exceeds the limit in effect under section 529A(b)(2)(B)(ii) for the calendar year in which that taxable year of the employed designated beneficiary begins.

Consistent with section 529A(b)(2) and the 2019 proposed regulations, if an excess compensation contribution is

deposited into or allocated to the ABLE account of a designated beneficiary, the qualified ABLE program must return the excess contribution, along with all net income attributable to the excess contribution, as determined under the rules set forth in § 1.408–11 (treating references to an IRA as references to an ABLE account, and references to returned contributions under section 408(d)(4) as references to excess compensation contributions), to the employed designated beneficiary. Also consistent with section 529A(b)(2) and the 2019 proposed regulations, the final regulations provide that it will be the sole responsibility of the designated beneficiary (or the person acting on the designated beneficiary's behalf) to identify and request the return of any excess contribution of such compensation income. Such returns of excess compensation contributions must be received by the employed designated beneficiary on or before the due date (including extensions) of the designated beneficiary's income tax return for the year in which the excess compensation contributions were made. A failure to return excess compensation contributions within this time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess compensation contributions.

Additionally, in order to minimize administrative burdens for the designated beneficiary and the qualified ABLE program, for purposes of ensuring that the limit on contributions made under section 529A(b)(2)(B)(ii) is not exceeded, the final regulations, like the 2019 proposed regulations, provide that the qualified ABLE program may rely on self-certifications, made under penalties of perjury, of the designated beneficiary or the person acting on the designated beneficiary's behalf.

G. Request for the TIN of a Contributor

Because a qualified ABLE program is required to return to the contributor any excess contribution or excess aggregate contribution that is deposited into or allocated to an ABLE account (along with any net income attributable to the contribution), the 2015 proposed regulations required a qualified ABLE program to request the TIN of each contributor to the ABLE account at the time a contribution was made if the qualified ABLE program did not already have a record of that person's correct TIN.

Numerous commenters expressed concerns about the substantial burdens that they anticipate this provision would place upon qualified ABLE programs. Commenters noted that contributions are likely to come from many sources and be made in various ways (for example, payroll deduction, check, debit, automated clearing house (ACH) transfers, and others), making it difficult as a practical matter to obtain the TIN of the contributor. Commenters also conjectured that some contributors, especially those making small gifts, might be reluctant to make a contribution if they were required to provide their TIN.

As an alternative to the provision in the 2015 proposed regulations, one commenter suggested that the final regulations require the qualified ABLE program to pay an excess contribution to the designated beneficiary rather than the contributor, thereby obviating the need to procure the contributor's TIN. As noted previously, the Treasury Department and the IRS do not agree with this suggestion, because the designated beneficiary's receipt of such an excess amount could put the designated beneficiary at risk of being disqualified for his or her Federal benefits that are income or resource based, a result that would be inconsistent with the purposes of section 529A.

Other commenters suggested that a qualified ABLE program be required to collect a contributor's TIN only if the program does not have a system in place to prevent an excess contribution or excess aggregate contribution from being deposited into an ABLE account. The commenters expect that most qualified ABLE programs will adopt the automated systems currently used by section 529 qualified tuition programs either to reject such excess contributions before they are deposited into a particular ABLE account, or to escrow and immediately refund the excess contributions, again before being deposited into or allocated to a particular account. With such a system in place, qualified ABLE programs should not need to return net earnings on contributions, and thus would not need the contributor's TIN. Other commenters recommended that the obligation to request a contributor's TIN should arise only in the unlikely circumstance in which an excess contribution or excess aggregate contribution has been deposited into an individual's ABLE account and has accrued earnings or losses. One commenter suggested eliminating the TIN requirement altogether, while another suggested the collection of TINs should be required only in the case of contributions of more than a specified dollar amount.

Commenters requested interim guidance on this issue to facilitate the establishment of qualified ABLE programs by the States. In response, the Treasury Department and the IRS issued Notice 2015–81, advising that it was anticipated that the final regulations would modify the requirement that a qualified ABLE program request the TIN of a contributor at the time of the contribution. That modification, which is adopted in the final regulations, requires a qualified ABLE program to request the TIN of a contributor at the time a contribution is made (assuming the qualified ABLE program does not already have a record of the contributor's correct TIN) only if the qualified ABLE program does not have a system in place to identify and reject excess contributions and excess aggregate contributions before they are deposited into or allocated to an ABLE account. In the event that a qualified ABLE program has such a system in place but an excess contribution or excess aggregate contribution, nevertheless, is deposited into or allocated to an ABLE account, the qualified ABLE program then must request the TIN of the contributor who made the excess contribution or excess aggregate contribution in order to permit the ABLE program to file accurate and complete required reporting of the earnings attributable thereto. A return of contributions and earnings from the ABLE account is a distribution, so the IRS and the contributor must receive a Form 1099–QA, ''Distributions from ABLE Accounts'', showing the contributor's TIN.

4. Investment Direction

Consistent with section 529A(b)(4), the 2015 proposed regulations provided that a qualified ABLE program may not allow the designated beneficiary of an ABLE account to direct, either directly or indirectly, the investment of any contributions to his or her account (or any earnings thereon) more often than twice in any calendar year. The 2015 proposed regulations provided that a program does not violate this requirement merely because it permits a designated beneficiary or a person with signature authority over a designated beneficiary's account to serve as one of the program's board members or employees, or as a board member or employee of a contractor that the program hires to perform administrative services.

One commenter inquired whether the designated beneficiary would be allowed to direct investments of contributions more than twice a year due to a change in the investment

climate. Another commenter suggested that the designated beneficiary be allowed to direct the investment of contributions in his or her ABLE account at least monthly, while yet another commenter recommended up to four permitted changes per year. Because section 529A(b)(4) requires a qualified ABLE program to limit the number of times any designated beneficiary may, directly or indirectly, direct the investment of any contribution to no more than two times in any calendar year, the Treasury Department and the IRS do not adopt these suggestions in the final regulations.

Some commenters asked that the final regulations clarify that an investment direction does not include the transfer of account assets from the investment portion of an ABLE account to a money market account or similar vehicle maintained by the qualified ABLE program to process a requested distribution. The Treasury Department and the IRS agree with these commenters that moving funds from an investment fund into a cash fund within the ABLE account in order to process a distribution is not the kind of change in investment direction addressed by the statutory limit, and have made the requested clarification in the final regulations.

Another commenter suggested that the final regulations clarify that a reallocation of the assets in an ABLE account among different broad-based investment strategies offered on the qualified ABLE program's investment menu (such as a reallocation from a diversified large cap fund to a diversified bond fund, or from a small cap fund to a target date fund) does not constitute investment direction. In the commenter's view, the reallocation of a portion of an ABLE account's assets among a set of broad-based investment options offered by the qualified ABLE program, such as diversified mutual funds, age-based target date funds, or Federally-insured CDs, is not investment direction because the designated beneficiary is not exercising control over the underlying investments, as would be the case if he or she were allowed to invest in specific stocks or funds not offered as part of the qualified ABLE program's menu of broad-based strategies. The commenter asserted that, by offering a limited menu of broad-based investment options, the qualified ABLE program effectively makes the investment decisions and that giving the designated beneficiary the authority to make periodic reallocations among these options is not sufficient control to be considered an investment direction.

The Treasury Department and the IRS do not agree with this commenter. The Treasury Department and the IRS concluded that a reallocation of an account's assets among different investment vehicles or types of funds constitutes an investment direction within the meaning of section 529A(b)(4), with two exceptions. As addressed earlier in this section 4, the first exception is the transfer of assets within an ABLE account to a cash fund. The second exception is an automatic rebalancing of the assets in an ABLE account merely to maintain a particular asset allocation. The Treasury Department and the IRS concluded that such an adjustment is not a change in investment direction; instead, it is to preserve and effectuate an investment allocation or direction selected at some previous time that is needed because of the frequent fluctuations in market values of investments. Accordingly, the final regulations provide that neither of these adjustments is a change in investment direction for purposes of section 529A(b)(4).

Some commenters asked how the annual limit on investment direction applies to a successor designated beneficiary in the year in which he or she first succeeds to the ABLE account of the former designated beneficiary. The Treasury Department and the IRS understand that the former and successor designated beneficiaries may have different financial situations, and, therefore, different investment needs. These final regulations apply the contribution limits separately to each designated beneficiary, and the Treasury Department and the IRS concluded that it would be most consistent with the purpose of section 529A and its other provisions to provide that the investment change limitation also applies separately to each designated beneficiary. As a result, the final regulations provide that the successor designated beneficiary is allowed to direct the investment of contributions and earnings in the ABLE account up to two times in the calendar year in which he or she becomes the designated beneficiary of the ABLE account, regardless of whether the former designated beneficiary previously had done so in the same calendar year.

5. No Pledging of Interest as Security for a Loan

Consistent with section 529A(b)(5), the 2015 proposed regulations provided that a program will not be treated as a qualified ABLE program unless the terms of the program, or a state statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. A few commenters observed that many ABLE accounts are likely to be transactional in nature. One commenter asked whether a checking account or a debit or credit card can be issued to a designated beneficiary and linked to his or her ABLE account. Another commenter asked that the final regulations clarify that advancing funds from an ABLE account to the designated beneficiary—such as through a checking account or debit card privileges connected to the ABLE account—is neither a loan nor security for a loan. Another commenter, observing that checking accounts and debit cards likely will be associated with ABLE accounts, noted that it is unlikely that a qualified ABLE program will be able to convert an account's underlying investments into cash on the same day as the transaction to be funded occurs. In other contexts, these transactional capabilities generally are effected by an issuer's zero interest advance for a short period in order to fund the account or debit card, followed by a reimbursement of the issuer when the cash generated by the liquidation of the investment is received by the issuer. The commenter further observed that these short-term advances are distinguishable from third party loans and requested that the final regulations clarify that these short-term advances are not loans. Similarly, the commenter requested that the final regulations clarify that an advance made to an ABLE account by a qualified ABLE program before settlement of a check or other money transfer by a contributor is not a loan.

The Treasury Department and the IRS agree that it is possible for an ABLE program to permit the use of checking accounts and debit cards to facilitate the qualified ABLE program's ability to make qualified distributions. For purposes of section 529A, the final regulations do not treat these uses—which are necessary to make funds available for qualified disability expenses as intended—as pledging the interest in the ABLE account as security for a loan, provided that these uses do not result in an advance of funds to a designated beneficiary in excess of the amount in his or her ABLE account. Similarly, the program administrator's advance of funds to satisfy a withdrawal request while the proceeds from the sale of an account asset, sufficient to satisfy that withdrawal request, clear or settle will not be treated as a pledge or grant of security or as a loan for purposes of this section. However, whether a

different particular arrangement constitutes the use of an interest in a qualified ABLE program as security for a loan is a factual determination that is beyond the scope of these regulations.

6. Distributions and Transfers

A. Qualified Disability Expenses

In accordance with section 529A(e)(5), the 2015 proposed regulations defined qualified disability expenses as any expenses incurred at a time when the designated beneficiary of an ABLE account is an eligible individual that relate to the blindness or disability of the designated beneficiary, including expenses that are for the benefit of the designated beneficiary in improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral expenses, and other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. Such expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit the designated beneficiary. As an example of a qualified disability expense, the 2015 proposed regulations included the expense of buying, using, and maintaining a smartphone used by an individual with a mental impairment to help her navigate and communicate more safely and effectively. In the preamble to the 2015 proposed regulations, the Treasury Department and the IRS requested comments regarding the types of expenses that should be considered qualified disability expenses and under what circumstances.

Many commenters commended the 2015 proposed regulations' expansive definition of qualified disability expenses. Commenters generally found the example helpful. However, one commenter pointed out that the expense of maintaining a smartphone could be considered a basic living expense and need not be tied to any particular disability or impairment to be considered a qualified disability expense.

While acknowledging the difficulty of compiling an exhaustive list of qualified disability expenses, many commenters suggested a wide variety of expenses that they believed should be considered qualified disability expenses. One commenter requested that the final regulations provide more comprehensive guidance on the scope of, and exclusions from, the definition of qualified disability expenses so that a designated beneficiary may correctly determine his or her tax liability. Believing that most, if not all, expenses of an eligible individual could be considered qualified disability expenses, another commenter suggested defining types of expenses that are not qualified disability expenses. The commenter suggested that expenses that do not directly benefit the designated beneficiary, such as the expense of a gift for someone other than the designated beneficiary, are not qualified disability expenses. One commenter suggested that an online list of examples be maintained and accessible to the public. Another commenter recommended that all disbursements be deemed to be for qualified disability expenses until proven otherwise.

The Treasury Department and the IRS continue to view the definition of qualified disability expenses as expansive. Whether a particular expense is a qualified disability depends on each designated beneficiary's unique circumstances and whether the expense is for maintaining or improving the health, independence, or quality of life of the designated beneficiary. Therefore, the Treasury Department and the IRS cannot provide either a comprehensive list of qualified disability expenses or a short list of expenses that would not satisfy that standard. The Treasury Department and the IRS note that Congress did not define a qualified disability expense as any expenditure for the benefit of an eligible individual, nor did Congress define a qualified disability expense as an expense that benefits only the eligible individual. The ABLE Act mandates different tax treatment for those expenses that are qualified disability expenses and those that are not. Consequently, the final regulations retain the 2015 proposed regulations' broad, but not unlimited, definition of a qualified disability expense.

One commenter requested that the same permissible categories of expenses be used to define a qualified disability expense for purposes of both section 529A and SSA programs to provide consistency for disabled individuals. Because the categories suggested in that comment are identical to those included in the 2015 proposed regulations, no change is required in response to this comment. Further, because the Treasury Department and the IRS have no authority with regard to any program administered by the SSA, it is up to SSA to decide whether or not to adjust SSA's definitions.

A few commenters asked that the final regulations provide a process for appealing a determination on examination by the IRS that a particular expense is not a qualified disability expense. The Treasury and the IRS note that an appeals process already exists under the IRS' examination procedures. For more information, visit the IRS Office of Appeals' website at *https://www.irs.gov/appeals/considering-an-appeal,* or consult IRS Publication 5: Your Appeal Rights and How to Prepare a Protest If You Don't Agree.

The 2015 proposed regulations provided that a qualified ABLE program is required to establish safeguards to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the SSI program of the SSA. One commenter requested a more specific definition of housing expenses, but other commenters noted that, because the identification of housing expenses is relevant only for purposes of determining eligibility for certain Social Security benefits and has no relevance for Federal income tax purposes, any reference to classifying distributions as housing expenses should be eliminated from the regulations. The Treasury Department and the IRS agree, and the final regulations do not require a qualified ABLE program to identify or record whether distributions were made for housing expenses.

Commenters also expressed concerns regarding the requirement that a qualified ABLE program must establish safeguards to distinguish between distributions for qualified disability expenses and other distributions. Commenters emphasized that requiring a qualified ABLE program to determine how a distribution will be used prior to making the distribution would be unduly burdensome for both the program and the designated beneficiary, and they explained that the actual use of a distribution might not be known by the designated beneficiary and thus by the ABLE program when the distribution is made. The commenters recommended that any requirement or suggestion that the qualified ABLE program classify distributions be removed from the regulations. The Treasury Department and the IRS agree that it would be burdensome and unadministrable to require the qualified ABLE programs to categorize and keep track of the actual use of each distribution by the designated beneficiary. Consistent with Notice 2015–81, the final regulations do not

require, for any Federal income tax purpose, a qualified ABLE program to establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions.

Commenters also expressed concerns that the 2015 proposed regulations require designated beneficiaries to report or to justify the reason for each distribution at the time of the distribution. Another commenter requested clarification that distributions may be made for qualified disability expenses through entities including section 501(c)(3) charitable organizations and special needs trusts as described in 42 U.S.C. 1396p(d)(4). The Treasury Department and the IRS wish to clarify that the statute, the 2015 proposed regulations, and the final regulations do not require the designated beneficiary to report his or her qualified disability expenses to the qualified ABLE program or to the IRS when filing a tax return. However, just as with qualified higher education expenses under section 529, the designated beneficiary will need to categorize distributions from the ABLE account in order to properly determine his or her Federal income tax obligations. Therefore, the designated beneficiary should maintain adequate records for determining and supporting his or her qualified disability expenses for each taxable year. The final regulations clarify that the payment of administrative or investment fees charged by a qualified ABLE program is not a distribution. The Treasury Department and the IRS note that distributions may be made for all qualified disability expenses of the designated beneficiary, regardless of whether the payee is an individual, organization, or trust.

B. Taxation of Distributions

Consistent with section 529A(c)(1), the 2015 proposed regulations provide that, if distributions do not exceed the designated beneficiary's qualified disability expenses for the year, no amount is includible in the designated beneficiary's gross income. Otherwise, the earnings portion of the distributions from the ABLE account as determined under section 72, reduced by the product of such earnings portion and the ratio of the qualified disability expenses for the year to the total distributions in that year, is includible in the gross income of the designated beneficiary to the extent not otherwise excluded from income. For purposes of applying section 72 to amounts distributed from an ABLE account, the 2015 proposed regulations provided that: (1) All distributions during a taxable year are treated as one distribution; and (2) the value of the contract, income on the contract, and investment in the contract are computed as of the close of the calendar year in which the designated beneficiary's taxable year began.

For purposes of determining whether distributions from an ABLE account exceed qualified disability expenses in any given year, one commenter suggested that the final regulations allow qualified disability expenses incurred before April 15 of any given year to count as qualified disability expenses for the immediately preceding year. The commenter expressed concern that a distribution taken late in one year but not used to pay for qualified disability expenses until the next year could cause a designated beneficiary's distributions to exceed his or her qualified disability expenses in the year of the distribution. Another commenter recommended that the final regulations require a nexus between a distribution from an ABLE account and the payment of qualified disability expenses by prescribing a period of time (for example, 60, 90, or 120 days) after a distribution is made during which the proceeds must be used to pay for a qualified disability expense. Some commenters also raised questions regarding the relevance of incurring versus paying the expenses for purposes of comparing the total qualified disability expenses to the total distributions in the designated beneficiary's taxable year.

The Treasury Department and the IRS understand that a designated beneficiary could take a distribution in anticipation of an expense that does not materialize and thus want to redeposit the distribution into the ABLE account, or that an expense incurred in one year may be billed and paid in the following year. The Treasury Department and the IRS concluded that, for purposes of determining the designated beneficiary's income tax liability, the distributions from an ABLE account should be compared to the qualified disability expenses that are paid, rather than just incurred, during the year because it is payments that appear in a taxpayer's records and that generally determine income tax consequences. However, to relieve the possible disadvantage to a designated beneficiary from a potential timing mismatch of the distribution and the payment of the expense, and to permit the redeposit of an unused distribution, the Treasury Department and the IRS agree that it is appropriate and helpful to allow a grace period. Therefore, the final regulations provide that a designated beneficiary may treat qualified disability expenses paid by the sixtieth day immediately following the end of the designated beneficiary's taxable year as if they had been paid in the immediately preceding taxable year, but any expense so treated may not be counted again with respect to the year in which it is paid.

Section 529A(c)(1)(A) provides that any distribution under a qualified ABLE program is includible in the gross income of the distributee in the manner provided under section 72 to the extent not otherwise excluded from gross income under any other provision of the Code. Noting the similarities between the taxation of distributions under sections 529 and 529A, a few commenters recommended that the method for determining the earnings ratio of a distribution from an ABLE account be made consistent with the rule applicable to section 529 programs under Notice 2001–81, which provided that the Treasury Department and the IRS expect that final regulations under section 529, when issued, will require section 529 programs to determine the earnings portion of each distribution from a section 529 account separately as of the date of its distribution. The commenters advised that the imposition of a different method with respect to qualified ABLE programs would require service providers to build a separate recordkeeping system specific to ABLE accounts, thereby increasing program costs. Moreover, determining the earnings portion of a distribution as of the date of distribution facilitates the administration of partial rollovers and program-to-program transfers, the earnings of which must be calculated as of the date of distribution rather than at the end of the year. These commenters also explained that using the date of each distribution rather than a year-end total would not change the income tax impact on the designated beneficiary because his or her taxable income is determined by a ratio applied to total earnings.

The Treasury Department and the IRS agree with the commenters. Harmonizing how the earnings ratio is determined under section 529A with how it is determined under section 529 should reduce administrative costs of the qualified ABLE programs, making the programs more cost-effective. Therefore, the final regulations provide that the earnings ratio, as applied to a particular distribution, is determined as of the date of distribution, and is equal to the amount of earnings attributable to the account as of the date of distribution divided by the total account balance on that date.

C. Change of Designated Beneficiary

Section 529A(c)(1)(C) addresses the tax consequences of a change of designated beneficiary of an ABLE account. With respect to such a change, the 2015 proposed regulations described the circumstances in which amounts will be includible in the designated beneficiary's income. The 2015 proposed regulations provided that a change of designated beneficiary is not treated as a distribution, and therefore does not result in gross income, but this rule applies only if the new designated beneficiary is both (1) an eligible individual for his or her taxable year in which the change is made and (2) a sibling of the former designated beneficiary.

The 2015 proposed regulations required a qualified ABLE program to permit a change in the designated beneficiary of an ABLE account, but only during the lifetime of the designated beneficiary, and only if the successor designated beneficiary is an eligible individual. Because the designated beneficiary could be subject to gift tax and/or GST tax if the successor designated beneficiary is not a sibling of the designated beneficiary, the Treasury Department and the IRS requested comments on whether the final regulations should allow States to limit a permissible successor designated beneficiary to a sibling of the designated beneficiary.

Several commenters recommended that the final regulations require any successor designated beneficiary to be a sibling of the designated beneficiary. However, one commenter pointed out that a designated beneficiary might not have a sibling who is an eligible individual, and recommended that qualified ABLE programs not be permitted to limit the successor designated beneficiary to a sibling who is an eligible individual, but recommended that a change to any other eligible individual require notice to the designated beneficiary of the adverse tax implications for that designated beneficiary. Another commenter asked whether a qualified ABLE program could limit the successor designated beneficiary to a sibling of the designated beneficiary if the final regulations do not impose that limitation.

The Treasury Department and the IRS concluded that, although section 529A imposes income and transfer tax consequences on a change of designated beneficiary if the successor designated beneficiary is not an eligible individual who is a sibling of the former designated beneficiary, the statute does not prohibit such changes. Therefore, the final regulations do not impose such a restriction. However, in order to minimize the potential that the designated beneficiary will have adverse tax consequences, the final regulations permit a qualified ABLE program to limit successor designated beneficiaries to a sibling, provided that the successor designated beneficiary also is an eligible individual. If a successor designated beneficiary is not a sibling of the former designated beneficiary, the former designated beneficiary will have received a deemed distribution of the amount transferred to the successor designated beneficiary that is subject to all of the tax provisions in section 529A(c).

One commenter suggested that the final regulations define ''member of the family'' broadly, as in the proposed regulations under section 529, to include descendants and ancestors of the designated beneficiary, rather than only a sibling. The Treasury Department and the IRS note that the term ''member of the family'' is expressly defined by section 529A(e)(4). Therefore, the final regulations do not expand the meaning of that term to also include descendants and ancestors of the designated beneficiary.

Several commenters asked that the final regulations allow the designated beneficiary or the person with signature authority over an ABLE account to designate an individual, who is both an eligible individual and a sibling of the designated beneficiary, to be the successor designated beneficiary of the account, effective upon the death of the designated beneficiary. Commenters suggested that such a designation should be conditioned on the named successor designated beneficiary being an eligible individual at the time of the designated beneficiary's death. One commenter suggested permitting the naming of a secondary successor designated beneficiary. Commenters suggested that, if the successor designated beneficiary already has an ABLE account, the funds of the deceased designated beneficiary's ABLE account should be rolled into the ABLE account of the successor designated beneficiary, and one commenter requested that the final regulations exempt such a rollover from the restriction under section 529A(c)(1)(C)(iii) preventing more than one rollover to the same designated beneficiary within a 12-month period. One commenter asked that the final regulations allow a reasonable bereavement period (for example, one year) after the death of the designated beneficiary, during which the guardian of the deceased designated beneficiary, the executor of his or her estate, or a court could transfer the ABLE account to a sibling of the deceased designated beneficiary who is then an eligible individual. Finally, one commenter asked that the final regulations allow the distribution of a deceased designated beneficiary's ABLE account to the section 529 account of his or her child or to a health savings account for his or her family.

The Treasury Department and the IRS recognize the difficulties faced by the family, friends, and caregivers of a designated beneficiary at the end of the designated beneficiary's life. In order to alleviate some of these difficulties, the final regulations allow a qualified ABLE program to permit a successor designated beneficiary to be named during the lifetime of the designated beneficiary that will take effect upon the death of the designated beneficiary. The designation must be made before the designated beneficiary's death. If no successor designated beneficiary is named, the assets in the ABLE account are payable to the estate of the deceased designated beneficiary. Before any transfer to the successor designated beneficiary, however, the ABLE account is subject to the Federal estate tax imposed by chapter 11 of the Code upon the estate of the deceased designated beneficiary, as well as to the payment of any outstanding qualified disability expenses of the decedent and any State claim under section 529A(f).

D. Rollovers and Program-to-Program Transfers

Under section 529A(c)(1)(C), a rollover from an ABLE account is not treated as a distribution includible in the gross income of the distributee. The 2015 proposed regulations defined a rollover as an amount withdrawn from the ABLE account of a designated beneficiary and contributed, within 60 days of the date of the withdrawal, to another ABLE account of the designated beneficiary, or to the ABLE account of an eligible individual who is a sibling of the designated beneficiary, provided that, in the case of a contribution to the ABLE account of the same designated beneficiary, no rollover has been made to an ABLE account of the designated beneficiary within the prior 12 months.

The 2015 proposed regulations also provided that a program-to-program transfer is not a distribution and is not includible in income. A ''program-to-program transfer'' is the direct transfer of the entire balance of an ABLE account that will be closed upon completion of the transfer into an ABLE account of the same designated beneficiary, or the direct transfer of part

or all of the balance to an ABLE account of another eligible individual who is a sibling of the former designated beneficiary, without any intervening distribution or deemed distribution to the designated beneficiary or former designated beneficiary. In the preamble to the 2015 proposed regulations, the Treasury Department and the IRS stated that a program-to-program transfer may be preferable to a rollover in protecting the designated beneficiary's eligibility for benefits under Federal and State means-tested programs. A program-to-program transfer also could facilitate the transfer of information concerning contributions and accumulated earnings. In light of these expected benefits, the Treasury Department and the IRS requested comments as to whether and to what extent a qualified ABLE program should be permitted to require that funds from another State's ABLE program be accepted only through program-to-program transfers.

Many commenters expressed approval of the rules allowing program-to-program transfers, but several of these commenters recommended that the final regulations continue to allow the use of a rollover as a means of transferring funds from one qualified ABLE program to another. Consistent with section 529A(c)(1)(C), the final regulations continue to permit rollovers and do not require the use of a program-to-program transfer. However, the Treasury Department and the IRS recognize that qualified ABLE programs may differ in determining how best to administer their programs. For example, a qualified ABLE program may choose to require that a transfer of funds from one ABLE account to another under the program or to or from an ABLE account under another qualified ABLE program be by a program-to-program transfer.

Like the 2015 proposed regulations, the final regulations provide that, upon a rollover or program-to-program transfer, all the attributes of the former ABLE account relevant for purposes of calculating the investment in the account and applying the cumulative limits on contributions are applicable to the recipient account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made becomes an investment in the recipient ABLE account. Similarly, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made constitutes earnings of the recipient account. For purposes of the annual contribution limit, contributions do not include program-to-program transfers or rollovers.

Several commenters asked that the final regulations permit a tax-free rollover from a qualified tuition account under section 529 to an ABLE account for the same designated beneficiary. The commenters believe that such a provision would be particularly important to the designated beneficiary of a qualified tuition account who becomes disabled and is unable to attend college. Since the issuance of the 2015 proposed regulations, the TCJA amended section 529 to permit, before January 1, 2026, a limited rollover from a section 529 account to an ABLE account of the same designated beneficiary or a member of his or her family as defined expansively under section 529 to include, among others, a designated beneficiary's ancestors and descendants. The Treasury Department and the IRS issued Notice 2018–58, 2018–33 I.R.B. 305 (Aug. 13, 2018) announcing how they intended to provide clarification regarding the rollover provision. In light of this change, the final regulations define ''contribution'' to include this limited rollover from such a section 529 account.

Similarly, one commenter asked that final regulations permit the tax-free rollover from the ABLE account of an individual to a qualified tuition account under section 529 for the benefit of a child of that individual. The Code does not provide for a tax-free transfer from a qualified ABLE account to a qualified tuition account under section 529 because such a distribution would not be for a qualified disability expense. Accordingly, this comment is not adopted in the final regulations.

E. Post-Death Payments

Consistent with section 529A(f), the 2015 proposed regulations required that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary (after providing for the payment of all outstanding qualified disability expenses of the designated beneficiary) be distributed to a State that files a claim against the designated beneficiary or against the ABLE account with respect to benefits provided to the designated beneficiary under that State's Medicaid plan (Medicaid reimbursement claim). The payment of such claim is limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account over the amount of any premiums paid to a Medicaid Buy-In program under any State Medicaid plan.

One commenter asked for confirmation that a State's ABLE program will not fail to qualify as a qualified ABLE program merely because State law prohibits the State's Medicaid agency from filing Medicaid reimbursement claims. The Treasury Department and the IRS agree that a State law mandating that the State's Medicaid agency refrain from filing Medicaid reimbursement claims will not jeopardize the status of the State's ABLE program as a qualified ABLE program. Section 529A(f) does not require a State to file a Medicaid reimbursement claim.

Commenters asked whether a qualified ABLE program may make distributions, including payment on an existing contract for funeral expenses, before it receives a State Medicaid reimbursement claim. Commenters also asked whether a qualified ABLE program has an obligation to determine the validity or accuracy of a state's Medicaid reimbursement claim or whether multiple States are able to file a claim.

Consistent with section 529A, the final regulations provide that a qualified ABLE program may satisfy a State's Medicaid reimbursement claim only after providing for the payment of any outstanding qualified disability expenses of the deceased designated beneficiary, including the designated beneficiary's funeral and burial expenses, whether or not the subject of a pre-death contract for those services. The final regulations do not impose an obligation on the qualified ABLE program to verify the validity or accuracy of a State's Medicaid reimbursement claim. However, as noted previously, the payment of any claim is limited to the amount of total medical assistance paid for the designated beneficiary after the establishment of the ABLE account, net of any premiums paid (whether from the ABLE account or otherwise by or on behalf of the designated beneficiary) to a State Medicaid Buy-In program. In addition, no obligation is imposed on the qualified ABLE program to determine whether claims could be filed by multiple States. After the expiration of the applicable statute of limitations for filing Medicaid claims against the designated beneficiary's estate, a qualified ABLE program may distribute the balance of the ABLE account to the successor designated beneficiary or, if none, to the deceased designated beneficiary's estate.

The 2015 proposed regulations required a qualified ABLE program to file an annual information return on Form 1099–QA, or any successor form, with respect to each ABLE account from which any distribution is made during the calendar year, on which is reported

the aggregate amount of distributions from the ABLE account during the calendar year. One commenter asked whether a qualified ABLE program should report the payment of a Medicaid reimbursement claim on Form 1099–QA. The final regulations clarify that the term ''distribution'' does not include a payment in satisfaction of a Medicaid reimbursement claim. Therefore, the payment is not reported on Form 1099–QA.

7. Gift and Generation-Skipping Transfer (GST) Taxes

The final regulations, like the 2015 proposed regulations, provide that contributions to an ABLE account by a person other than the designated beneficiary are treated as completed gifts to the designated beneficiary of the account, and that such gifts are neither gifts of a future interest nor a qualified transfer under section 2503(e). Accordingly, no distribution from an ABLE account to the designated beneficiary of that account is treated as a taxable gift. Finally, consistent with section 529A(c)(2)(C), neither gift nor GST taxes apply to the change of designated beneficiary of an ABLE account if the new designated beneficiary is an eligible individual who is a sibling of the former designated beneficiary.

8. Unrelated Business Income Tax

A qualified ABLE program generally is exempt from Federal income taxation. A qualified ABLE program is subject, however, to the unrelated business income tax imposed under section 511 on its unrelated business taxable income. For purposes of this tax, certain administrative and other fees do not constitute unrelated business taxable income to the ABLE program. One commenter asked for clarification regarding the definition and possible application of the unrelated business income tax.

Further guidance on the unrelated business income tax provisions of the Code already is set forth in the regulations under sections 511 through 514. Those rules generally are applicable to qualified ABLE programs and other tax-exempt entities. If any unrelated business income tax liability exists, the tax is paid by the qualified ABLE program. If it has any unrelated taxable income, a qualified ABLE program is required to file Form 990–T, ''Exempt Organization Business Income Tax Return,'' as though it were an organization described in §§ 1.6012–2(e) and 1.6012–3(a)(5).

One commenter stated that the reporting requirements in the 2015 proposed regulations are burdensome to ABLE account holders, and recommended that the final regulations eliminate the need for any individual to file a Form 990–T. Form 990–T is for the use of a qualified ABLE program to report and pay tax on its unrelated business taxable income under section 512, if any, and is not for the use of individuals such as the designated beneficiaries of ABLE accounts.

9. Recordkeeping and Reporting Requirements

As in the 2015 proposed regulations, the final regulations set forth recordkeeping and reporting requirements. A qualified ABLE program must maintain records that enable the program to account to the Secretary with respect to all contributions, distributions, returns of excess contributions or additional accounts, income earned, and account balances for any designated beneficiary's ABLE account. In addition, a qualified ABLE program must report to the Secretary the establishment of each ABLE account, including the name, address, and TIN of the designated beneficiary, information regarding the disability certification or other basis for eligibility of the designated beneficiary, and other relevant information regarding each account. Information regarding contributions is reported on Form 5498–QA, ''ABLE Account Contribution Information.'' Information regarding distributions from ABLE accounts is reported on Form 1099–QA, ''Distributions from ABLE Accounts.'' The final regulations and instructions to the Forms 1099–QA and 5498–QA contain more detail on how the information must be reported.

One commenter stated that the reporting requirements in the 2015 proposed regulations would increase the cost to qualified ABLE programs of offering ABLE accounts, and therefore recommended that the final regulations eliminate the requirement to file Form 5498–QA. The Treasury Department and the IRS note that Form 5498–QA is necessary to allow the qualified ABLE program to provide the notice of establishment of an ABLE account required under section 529A(d)(3), to report contributions to an ABLE account required under section 529A(d)(1), and to report other information necessary for the public reports required under section 529A(d)(2). Because the statute requires this reporting, the final regulations do not incorporate this suggestion. Additionally, the filing of Form 5498–QA satisfies certain statutory requirements regarding the disability certification.

The 2015 proposed regulations provided that the qualified ABLE program is required to furnish a statement to the designated beneficiary of the ABLE account for which it is required to file a Form 5498–QA, which statement is required to include, among other things, the name, address, and TIN of the designated beneficiary. One commenter recommended that final regulations permit the exclusion of the TIN of the designated beneficiary from the statement required to be furnished to the designated beneficiary. The Treasury Department and the IRS confirm that a qualified ABLE program may truncate the TIN of the designated beneficiary (by replacing the first five digits of the 9-digit number with asterisks or Xs) on the copy of the Form 5498–QA (or substitute statement) that is provided to the designated beneficiary, but must include the full, untruncated TIN on the return it files with the IRS. See the General Instructions for Certain Information Returns.

In addition, section 529A(b)(3) requires that a qualified ABLE program provide separate accounting for each designated beneficiary. Separate accounting requires that contributions for the benefit of a designated beneficiary, as well as earnings attributable to those contributions, are allocated to that designated beneficiary's account. Whether or not a program ordinarily provides each designated beneficiary an annual account statement showing the income and transactions related to the account, the program must give this information to the designated beneficiary upon request.

The preamble to the 2015 proposed regulations stated that section 529A(d)(4) provides that, for purposes of section 4 of the ABLE Act, States are required to submit electronically to the Commissioner of Social Security, on a monthly basis and in the manner specified by the Commissioner of Social Security, statements on relevant distributions and account balances from all ABLE accounts. Commenters remarked that such reporting requirements may be unduly burdensome on qualified ABLE programs, and will require designated beneficiaries of ABLE accounts to justify all expenditures on a nearly continuous basis to the qualified ABLE program. One commenter suggested that the designated beneficiary self-certify, under penalties of perjury, at the time of a distribution, that the distribution will be used for (i) housing expenses,

(ii) other qualified disability expenses, or (iii) non-qualifying expenses, which information the qualified ABLE program could use to report the designated beneficiary's housing expenses to the SSA. The final regulations do not require that housing or other qualified disability expenses be reported to the IRS by either the designated beneficiary or the ABLE program. The Treasury Department and the IRS note that the reporting requirement in section 529A(d)(4) concerns reporting by the qualified ABLE program to the SSA, not to the IRS, and thus is beyond the appropriate scope of these regulations.

10. Transition Relief

Notice 2015–18 and the preamble to the 2015 proposed regulations stated that the Treasury Department and the IRS intend to provide transition relief to enable qualified ABLE programs and ABLE accounts established before the issuance of final regulations to be brought into compliance with the requirements of the final regulations. One commenter asked that State legislatures and qualified ABLE programs be given a period of not less than one full taxable year after the issuance of final regulations to bring their legislation and programs into full compliance with Federal standards. Another commenter asked that the final regulations provide transition relief to qualified ABLE programs that begin operations within the six-month period following the issuance of final regulations, while still another asked that the relief be provided for programs that launch during the transition period.

The final regulations provide transition relief for all qualified ABLE programs, including programs that begin operation after the publication of the final regulations. The final regulations provide that, generally, a program and each account established under that program will be treated as a qualified ABLE program and as an ABLE account, respectively, during the transition period, provided that the program is established and operated in accordance with a reasonable, good faith interpretation of section 529A. Establishment and operation in accordance with the regulations under section 529A as proposed in 80 FR 35602 and as supplemented by Notice 2015–81, 2015–49 I.R.B. 784, and 84 FR 54529 is deemed to be establishment and operation in accordance with a reasonable, good faith interpretation of section 529A. However, such a program and all accounts established under that program must meet the requirements of these final regulations before the later of November 21, 2022, or the first day of the qualified ABLE program's first taxable year beginning after the close of the first regular session of the State legislature that begins after November 19, 2020. If a State has a two-year legislative session, each calendar year of the session is deemed to be a separate regular session of the State legislature.

One commenter expressed concern for individuals who are eligible to establish an ABLE account under the 2015 proposed regulations but who later fail to meet the eligibility criteria under the final regulations. The commenter suggested that the final regulations allow such individuals to be ''grandfathered'' into a qualified ABLE program provided the individual continues to meet the eligibility requirements under the 2015 proposed regulations. Because the definition of an eligible individual and the criteria for establishing satisfaction of that definition has not been changed in the final regulations, the Treasury Department and the IRS do not adopt this suggestion.

11. Miscellaneous

Numerous comments were received concerning programs administered by the SSA or the Centers for Medicare & Medicaid Services (CMS). For example, several of these comments requested confirmation that the provisions of section 103 of the ABLE Act, which exclude ABLE accounts from the assets and income of the designated beneficiary in determinations of eligibility for certain public benefits, continue to apply in certain specific situations not addressed in the 2015 proposed regulations. Because these are not tax issues, the final regulations do not address these and other comments regarding matters that are outside of the jurisdiction of the Treasury Department and the IRS. The IRS, however, has shared these comments with the SSA and the CMS.

A few other comments were received regarding non-legal issues that are not within the scope of these final regulations. Several other minor changes were made throughout the final regulations to increase clarity and consistency and to comply with **Federal Register** requirements, none of which substantively change the 2015 or 2019 proposed regulations.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

1. Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control numbers 1545–2262 and 1545–2293. The collections of information in this final regulation are in §§ 1.529A–2, 1.529A–5, 1.529A–6, and 1.529A–7. The collection of information flows from sections 529A(d)(1), (d)(2), (d)(3), (e)(1), and (e)(2) of the Code. Section 529A(d)(1) requires qualified ABLE programs to provide reports to the Secretary and to designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require. Section 529A(d)(2) directs the Secretary to make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions from the qualified ABLE program. Section 529A(d)(3) requires qualified ABLE programs to provide notice to the Secretary upon the establishment of an ABLE account, containing the name of the designated beneficiary and such other information as the Secretary may require. Section 529A(e)(1) requires that a disability certification with respect to certain individuals be filed with the Secretary. Section 529A(e)(2) provides that the disability certification include a certification to the satisfaction of the Secretary that the individual has a described medically determinable physical or mental impairment that occurred before the date on which the individual attained age 26, as well as a copy of a physician's diagnosis. The burden under §§ 1.529A–5, 1.529A–6, and 1.529A–7 is reflected in the burden under Form 5498–QA, ''ABLE Account Contribution Information,'' and Form 1099–QA, ''Distributions from ABLE Accounts,'' respectively.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

2. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will not impact a substantial number of small entities. These regulations primarily affect states and individuals and therefore will not have a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the NPRMs preceding these regulations were submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business. No comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

Drafting Information

The principal authors of these regulations are Terri Harris and Julia Parnell of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1, 25, 26, 301, and 602 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry for §§ 1.529A–0 through 1.529A–8 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805, unless otherwise noted.

* * * * *

Sections 1.529A–0 through 1.529A–8 also issued under 26 U.S.C. 529A(g).

* * * * *

■ **Par. 2.** Section 1.511–2 is amended by adding paragraph (e) to read as follows:

§ 1.511–2 Organizations subject to tax.

* * * * *

(e) *ABLE programs*—(1) *Unrelated business taxable income.* A qualified ABLE program described in section 529A and § 1.529A–1(b)(14) generally is exempt from Federal income taxation, but is subject to taxes imposed by section 511 relating to the imposition of tax on unrelated business income. A qualified ABLE program is required to file Form 990–T, ''Exempt Organization Business Income Tax Return,'' if such filing would be required under the rules of §§ 1.6012–2(e) and 1.6012–3(a)(5) if the ABLE program were an organization described in those sections.

(2) *Applicability date.* This paragraph (e) applies to taxable years beginning after December 31, 2020.

■ **Par. 3.** Section 1.513–1 is amended as follows:

■ 1. Redesignating the first full sentence following the heading in paragraph (d)(4)(i) as (d)(4)(i)(A);

■ 2. Redesignating the second sentence in paragraph (d)(4)(i) as (d)(4)(i)(B) introductory text;

■ 3. Adding a heading to newly designated paragraph (d)(4)(i)(A);

■ 4. In newly designated paragraph (d)(4)(i)(B), adding a heading and removing from the introductory text ''principle'' and adding ''paragraph (d)(4)(i)'' in its place;

■ 5. Redesignating undesignated *Examples 1* through *3* following newly designated paragraph (d)(4)(i)(B) introductory text as paragraphs (d)(4)(i)(B)(*1*) *through* (*3*); and

■ 6. Adding paragraph (d)(4)(i)(B)(*4*).

The additions read as follows:

§ 1.513–1 Definition of unrelated trade or business.

* * * * *

(d) * * *

(4) * * *

(i) * * *

(A) *In general.* * * *

(B) *Examples.* * * *

(*4*) *Example 4.* P is a qualified ABLE program described in section 529A and § 1.529A–1(b)(14). P receives amounts in order to establish or maintain ABLE accounts, as administrative or maintenance fees and other similar fees including service charges. Because the payment of these amounts is essential to the operation of a qualified ABLE program, the income generated from the activity does not constitute gross income from an unrelated trade or business.

* * * * *

■ **Par. 4.** An undesignated center heading and §§ 1.529A–0 through 1.529A–8 are added immediately following § 1.528–10 to read as follows:

Qualified Able Programs

§ 1.529A–0 Table of contents.
§ 1.529A–1 Exempt status of qualified ABLE program and definitions.
§ 1.529A–2 Qualified ABLE program.
§ 1.529A–3 Tax treatment.
§ 1.529A–4 Gift, estate, and generation-skipping transfer taxes.
§ 1.529A–5 Reporting of the establishment of and contributions to an ABLE account.
§ 1.529A–6 Reporting of distributions from and termination of an ABLE account.
§ 1.529A–7 Electronic furnishing of statements to designated beneficiaries and contributors.
§ 1.529A–8 Applicability dates and transition relief.

Qualified Able Programs

§ 1.529A–0 Table of contents.

This section lists the following captions contained in §§ 1.529A–1 through 1.529A–8.

§ 1.529A–1 *Exempt status of qualified ABLE program and definitions.*
(a) In general.
(b) Definitions.
(1) ABLE account.
(2) Contribution.
(3) Designated beneficiary.
(4) Disability certification.
(5) Distribution.
(6) Earnings.
(7) Earnings ratio.
(8) Eligible individual.
(9) Excess contribution.
(10) Excess aggregate contribution.
(11) Investment in the account.
(12) Member of the family.
(13) Program-to-program transfer.
(14) Qualified ABLE program.
(15) Qualified disability expenses.
(16) Rollover.
(c) Applicability date.
§ 1.529A–2 *Qualified ABLE program.*
(a) In general.
(b) Established and maintained by a State or agency or instrumentality of a State.
(1) Established.
(2) Maintained.
(i) In general.
(ii) Multiple States, agencies, or instrumentalities.
(3) Community Development Financial Institutions (CDFIs).
(c) Establishment of an ABLE account and signature authority.
(1) Establishment of the ABLE account.
(2) Signature authority.
(3) Only one ABLE account.
(4) Beneficial interest.
(d) Eligible individual.

(1) Documentation.
(2) Frequency of recertification.
(3) Loss of qualification as an eligible individual.
(e) Disability certification.
(1) In general.
(2) Marked and severe functional limitations.
(3) Compassionate allowance list.
(4) Additional guidance.
(5) Restriction on use of certification.
(f) Change of designated beneficiary.
(1) In general.
(2) Change effective upon death.
(g) Contributions.
(1) Permissible property.
(2) Annual contributions limit.
(3) Cumulative limit.
(4) Return of excess contributions, excess compensation contributions, and excess aggregate contributions.
(5) Restriction of contributors.
(h) Qualified disability expenses.
(1) In general.
(2) Example.
(i) Separate accounting.
(j) Program-to-program transfers.
(k) Carryover of attributes.
(1) In general.
(2) Annual contribution limit.
(3) Investment direction limit.
(l) Investment direction.
(m) No pledging of interest as security.
(n) No sale or exchange.
(o) Post-death payments.
(p) Reporting requirements.
(q) Applicability date.

§ 1.529A–3 *Tax treatment.*

(a) Taxation of distributions.
(1) In general.
(2) Additional period.
(b) Additional exclusions from gross income.
(1) Rollover.
(2) Program-to-program transfers.
(3) Change of designated beneficiary.
(4) Payments to creditors post-death.
(c) Computation of earnings.
(d) Additional tax on amounts includible in gross income.
(1) In general.
(2) Exceptions.
(e) Tax on excess contributions.
(f) Filing requirements.
(g) No inference outside section 529A.
(h) Applicability date.

§ 1.529A–4 *Gift, estate, and generation-skipping transfer taxes.*

(a) Contributions.
(1) In general.
(2) Generation-skipping transfer (GST) tax.
(3) Designated beneficiary as contributor.
(b) Distributions.
(c) Transfer to another designated beneficiary.
(d) Transfer tax on death of designated beneficiary.
(e) Applicability date.

§ 1.529A–5 *Reporting of the establishment of and contributions to an ABLE account.*

(a) In general.
(b) Additional definitions.
(1) Filer.
(2) TIN.
(c) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Time and manner of filing return.
(d) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.
(3) Copy of Form 5498–QA.
(e) Request for TIN of designated beneficiary.
(f) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(g) Applicability date.

§ 1.529A–6 *Reporting of distributions from and termination of an ABLE account.*

(a) In general.
(b) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Information excluded.
(4) Time and manner of filing return.
(c) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.
(3) Copy of Form 1099–QA.
(d) Request for TIN of contributor(s).
(1) In general.
(2) Exception.
(e) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(f) Applicability date.

§ 1.529A–7 *Electronic furnishing of statements to designated beneficiaries and contributors.*

(a) Electronic furnishing of statements.
(1) In general.
(2) Consent.
(3) Required disclosures.
(4) Format.
(5) Notice.
(6) Access period.
(b) Applicability date.

§ 1.529A–8 *Applicability dates and transition relief.*

(a) Applicability dates.
(b)Transition relief.
(1) In general.
(2) Transition period.
(3) Compliance after transition period.

§ 1.529A–1 Exempt status of qualified ABLE program and definitions.

(a) *In general.* A qualified ABLE program described in section 529A is exempt from Federal income tax, except for the tax imposed under section 511 on any unrelated business taxable income of that program. See § 1.511-2(e).

(b) *Definitions.* For purposes of section 529A, this section and §§ 1.529A–2 through 1.529A-8—

(1) *ABLE account* means an account established under a qualified ABLE program and owned by the designated beneficiary of that account.

(2) *Contribution* means any payment directly allocated to an ABLE account for the benefit of a designated beneficiary, including amounts transferred to an ABLE account between December 22, 2017, and January 1, 2026, from a qualified tuition program described in section 529.

(3) *Designated beneficiary* means the individual for whom the account was established at a time when he or she was an eligible individual or who has succeeded the former designated beneficiary in that capacity (successor designated beneficiary). The designated beneficiary is the owner of the ABLE account. If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to have an ABLE account established but not to exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the person with signature authority over the account. See § 1.529A–2(c)(1) and (2).

(4) *Disability certification* means a certification to establish a certain level of an individual's physical or mental impairment that meets the requirements described in § 1.529A–2(e).

(5) *Distribution* means any payment from an ABLE account. However, a program-to-program transfer, a Medicaid reimbursement under § 1.529A–2(o), or a payment of administrative or investment fees charged by a qualified ABLE program is not a distribution.

(6) *Earnings* attributable to an ABLE account are the excess of the total account balance on a particular date over the investment in the account as of that date.

(7) *Earnings ratio* as applied to a particular distribution means the amount of earnings attributable to the ABLE account as of the date of the distribution, divided by the total account balance on that same date.

(8) *Eligible individual* for a taxable year means an individual who either:

(i) Is receiving benefits under title II or XVI of the Social Security Act based on blindness or disability or whose entitlement to such benefits under title XVI has been suspended solely due to excess income or resources, provided that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); or

(ii) Is the subject of a disability certification filed with the Secretary of the Treasury or his delegate (Secretary) for that taxable year.

(9) *Excess contribution* means the amount by which the amount contributed during the taxable year of the designated beneficiary to an ABLE account exceeds the limit in effect

under section 2503(b) for the calendar year in which the taxable year of the designated beneficiary begins.

(10) *Excess aggregate contribution* means—

(i) The amount contributed during the taxable year of the designated beneficiary that causes the total of amounts contributed since the establishment of the ABLE account (or of an ABLE account for the same designated beneficiary that was rolled into the current ABLE account) to exceed the limit in effect under section 529(b)(6); or

(ii) In the context of the safe harbor in § 1.529A–2(g)(3), the amount contributed that causes the account balance to exceed the limit in effect under section 529(b)(6).

(11) *Investment in the account* means—

(i) The sum of all contributions made to the ABLE account, reduced by the aggregate amount of contributions included in distributions, if any, made from the account; or

(ii) In the case of a rollover contribution into an ABLE account, the amount of the rollover contribution that constituted the amount described in paragraph (b)(11)(i) of this section with respect to the ABLE account from which the rollover contribution was made.

(12) *Member of the family* means a sibling, whether by blood or by adoption, and includes a brother, sister, stepbrother, stepsister, half-brother, and half-sister.

(13) *Program-to-program transfer* means—

(i) The direct transfer of the entire balance of an ABLE account into an ABLE account of the same designated beneficiary after which the transferor ABLE account is closed upon completion of the transfer; or

(ii) The direct transfer of part or all of the balance to an ABLE account of another eligible individual who is a member of the family of the former designated beneficiary.

(14) *Qualified ABLE program* means a program established and maintained by a State, or agency or instrumentality of a State, under which an ABLE account may be established by and for the benefit of the account's designated beneficiary who is an eligible individual, and that meets the requirements described in § 1.529A–2.

(15) *Qualified disability expenses* means any expenses incurred at a time when the designated beneficiary is an eligible individual that relate to the blindness or disability of the designated beneficiary of an ABLE account, including expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life. See § 1.529A–2(h). However, any expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529A–1(b)(8)(i) or § 1.529A–2(e)(1)(i), even if the designated beneficiary is an eligible individual for that entire taxable year, do not relate to blindness or disability and therefore are not qualified disability expenses.

(16) *Rollover* means a contribution to an ABLE account of a designated beneficiary (or of an eligible individual who is a member of the family of the designated beneficiary) of all or a portion of an amount distributed from the designated beneficiary's ABLE account, provided the contribution is made within 60 days of the date of the withdrawal and, in the case of a rollover to the designated beneficiary's ABLE account, no rollover has been made to an ABLE account of the designated beneficiary within the 12 month period immediately preceding the rollover to the ABLE account.

(c) *Applicability date.* This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–2 Qualified ABLE program.

(a) *In general.* A qualified ABLE program is a program established and maintained by a State, or an agency or instrumentality of a State, that satisfies all of the requirements of this section and under which—

(1) An ABLE account may be established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account;

(2) A designated beneficiary is limited to only one ABLE account at a time except as otherwise provided in paragraph (c)(3) of this section;

(3) Any person may make contributions to such an ABLE account, subject to the limitations described in paragraph (g) of this section; and

(4) Distributions (other than returns of contributions as described in paragraph (g)(4) of this section) may be made only to or for the benefit of the designated beneficiary of the ABLE account.

(b) *Established and maintained by a State or agency or instrumentality of a State*—(1) *Established.* A program is established by a State or its agency or instrumentality if the program is initiated by State statute or regulation or by an act of a State official or agency with the authority to act on behalf of the State.

(2) *Maintained*—(i) *In general.* A program is maintained by a State or an agency or instrumentality of a State if—

(A) The State or its agency or instrumentality sets all of the terms and conditions of the program, including but not limited to who may contribute to the program, who may be a designated beneficiary of the program, and what benefits the program may provide; and

(B) The State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising the implementation of decisions relating to the investment of assets contributed under the program. Factors that are relevant in determining whether a State or its agency or instrumentality is actively involved in the administration of the program include, but are not limited to: Whether the State or its agency or instrumentality provides services to designated beneficiaries that are not provided to persons who are not designated beneficiaries; whether the State or its agency or instrumentality establishes detailed operating rules for administering the program; whether officials of the State or its agency or instrumentality play a substantial role in the operation of the program, including selecting, supervising, monitoring, auditing, and terminating the relationship with any private contractors that provide services under the program; whether the State or its agency or instrumentality holds the private contractors that provide services under the program to the same standards and requirements that apply when private contractors handle funds that belong to the State or its agency or instrumentality or provide services to the State or its agency or instrumentality; whether the State or its agency or instrumentality provides funding for the program; and whether the State or its agency or instrumentality acts as trustee or holds program assets directly or for the benefit of the designated beneficiaries. For example, if the State or its agency or instrumentality exercises the same authority over the funds invested in the program as it does over the investments in or pool of funds of a State employees' defined benefit pension plan, then the State or its agency or instrumentality will be considered actively involved on an ongoing basis in the administration of the program.

(ii) *Multiple States, agencies, or instrumentalities.* A program may be maintained by two or more States or the agencies or instrumentalities of two or more States if the program meets the requirements of paragraph (b)(2)(i) of this section for each of the States represented. If a State or an agency or instrumentality of a State participates in such a consortium of States or agencies

or instrumentalities of States, the consortium's program is considered to be the program of each State represented.

(3) *Community Development Financial Institutions (CDFIs).* In addition to having the ability to contract with private contractors as provided in paragraph (b)(2)(i)(B) of this section, a State or its agency or instrumentality or qualified ABLE program may contract with one or more Community Development Financial Institutions (CDFIs) (as defined in 12 U.S.C. 4702(5) and 12 CFR 1805.104) to perform some or all of the services described in paragraphs (b)(2)(i)(A) and (B) of this section.

(c) *Establishment of an ABLE account and signature authority*—(1) *Establishment of the ABLE account*—(i) *In general.* A qualified ABLE program must provide that an ABLE account may be established only for an eligible individual.

(A) The ABLE account may be established by the eligible individual;

(B) The ABLE account may be established by a person selected by the eligible individual; or

(C) If an eligible individual (whether a minor or adult) is unable to establish his or her own ABLE account, an ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by a conservator or legal guardian, spouse, parent, sibling, grandparent of the eligible individual, or a representative payee appointed for the eligible individual by the Social Security Administration (SSA), in that order.

(ii) *Authority.* A qualified ABLE program may accept a certification, made under penalties of perjury, from the person seeking to establish an ABLE account as to the basis for the person's authority to establish the ABLE account, and that there is no other person with a higher priority, under paragraphs (c)(1)(i)(A), (B), and (C) of this section, to establish the ABLE account.

(2) *Signature authority*—(i) *Signatory.* In general, the designated beneficiary will have signature authority over his or her ABLE account. However, if an individual other than the designated beneficiary establishes the account in accordance with paragraph (c)(1)(i)(B) or (C) of this section, such individual will have signature authority.

(A) At any time, the designated beneficiary may remove and replace any person with signature authority over the designated beneficiary's ABLE account. The replacement may be the designated beneficiary or any other person selected by the designated beneficiary.

(B) The designated beneficiary may designate a successor to the person with signature authority. In the absence of any designation of a successor by the designated beneficiary, a person with signature authority over the designated beneficiary's ABLE account may designate a successor, consistent with the ordering rules in paragraph (c)(1)(i)(C) of this section.

(ii) *Co-signatories.* A qualified ABLE program may permit an ABLE account to have co-signatories, consistent with paragraph (c)(1)(i)(C) of this section. If co-signatories are permitted, all of the other provisions of this paragraph (c)(2) continue to apply, and references to the *signatory* refer to the co-signatories acting separately or jointly, as determined by that qualified ABLE program.

(iii) *Authority over sub-accounts.* The person with signature authority over the ABLE account may appoint and from time to time may remove, replace, or name a successor for any person with signature authority over a sub-account described in paragraph (c)(3)(iii) of this section.

(3) *Only one ABLE account*—(i) *In general.* Except as provided in paragraph (c)(3)(ii) of this section, a designated beneficiary is limited to one ABLE account at a time, regardless of where located. To ensure that this requirement is met, a qualified ABLE program must obtain a verification, signed under penalties of perjury by the person establishing the ABLE account, that the individual establishing the ABLE account neither knows nor has reason to know that the eligible individual already has an existing ABLE account (other than an ABLE account that will terminate with the rollover or program-to-program transfer of its assets into the new ABLE account) before that program can permit the establishment of an ABLE account for that eligible individual. In the case of a rollover, the ABLE account from which amounts were distributed must be closed as of the 60th day after the date of the distribution in order to allow the account receiving the rollover to be treated as an ABLE account.

(ii) *Treatment of additional accounts.* If an individual is the designated beneficiary of an ABLE account established in accordance with paragraph (c)(1) of this section, no other account subsequently established for that individual under a qualified ABLE program (additional account) will be an ABLE account. The preceding sentence does not apply to an additional account, and that additional account is an ABLE account, if—

(A) The additional account is established for the purpose of receiving a rollover or program-to-program transfer;

(B) All of the contributions to the additional account are returned in accordance with the rules that apply to the return of excess contributions and excess aggregate contributions under paragraph (g)(4) of this section; or

(C) All amounts in the additional account are transferred to the designated beneficiary's preexisting ABLE account and any excess contributions and excess aggregate contributions are returned in accordance with the rules that apply to the return of excess contributions and excess aggregate contributions under paragraph (g)(4) of this section.

(iii) *Sub-accounts.* A qualified ABLE program may establish an ABLE account (primary account) that may include multiple sub-accounts. The person with signature authority over the ABLE account, at any time and from time to time, may create one or more sub-accounts, may transfer funds in the ABLE account to one or more of the sub-accounts, and may close one or more of the sub-accounts, to facilitate the acquisition of certain goods or services for the designated beneficiary. Each sub-account may have a different person with signature authority over that sub-account, appointed in accordance with the rules of paragraph (c)(2)(iii) of this section, and that person's authority is limited to making distributions from that sub-account. The primary account and the sub-accounts collectively constitute a single ABLE account and therefore must be aggregated for all purposes, including without limitation the limit on the number of permissible changes in investment direction under paragraph (l) of this section, the contribution limits under paragraphs (g)(2) and (3) of this section, the computation of gross income and other tax provisions, and the reporting requirements.

(iv) *Investment options.* A qualified ABLE program may offer different investment options within each ABLE account without violating the only-one-ABLE-account rule in this paragraph (c)(3). For example, an ABLE account may include a cash fund as well as one or more stock or bond funds.

(4) *Beneficial interest.* A person other than the designated beneficiary with signature authority over the ABLE account of the designated beneficiary may neither have nor acquire any beneficial interest in the ABLE account during the lifetime of the designated beneficiary and must administer the ABLE account for the benefit of the designated beneficiary of the account.

(d) *Eligible individual*—(1) *Documentation*—(i) *In general.* Whether an individual is an eligible individual is determined for each taxable year of that individual, and that determination applies for the entire year. A qualified ABLE program must specify the documentation that an individual must provide, both at the time an ABLE account is established and thereafter, in order to ensure that the designated beneficiary of the ABLE account is, and continues to be, determined an eligible individual. For purposes of determining whether an individual is an eligible individual, a disability certification as described in paragraph (e)(1) of this section will be deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program will file in accordance with the filing requirements under § 1.529A–5(c)(2)(iv).

(ii) *Safe harbor.* A qualified ABLE program may establish that an individual is an eligible individual if the person establishing the ABLE account certifies under penalties of perjury—

(A) The basis for the individual's status as an eligible individual (entitlement to benefits based on blindness or disability under title II or XVI of the Social Security Act, or a disability certification described in paragraph (e)(1) of this section);

(B) That the individual is blind or has a medically determinable physical or mental impairment as described in paragraph (e)(1)(i) of this section;

(C) That such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday);

(D) If the basis of the individual's eligibility is a disability certification, that the individual has received and agrees to retain a written diagnosis as described in paragraph (e)(1)(iii) of this section, accompanied by the name and address of the diagnosing physician and the date of the written diagnosis;

(E) The applicable diagnostic code from those listed on Form 5498–QA (or in the instructions to such form) identifying the type of the individual's impairment;

(F) That the person establishing the account is the individual who will be the designated beneficiary of the account or is the person authorized under paragraph (c)(1)(i) of this section to establish the account; and

(G) If required by the qualified ABLE program, the information provided by the diagnosing physician as to the categorization of the disability that may be used to determine, under the particular State's program, the appropriate frequency of required recertifications.

(2) *Frequency of recertification*—(i) *In general.* A determination of eligibility must be made annually unless the qualified ABLE program adopts a different method of ensuring a designated beneficiary's continuing status as an eligible individual. Alternative methods may include, without limitation, the use of certifications by the designated beneficiary under penalties of perjury, and the imposition of different recertification frequencies for different types of impairments.

(ii) *Considerations.* In developing its rules on recertification, a qualified ABLE program may take into consideration whether an impairment is incurable and, if so, the likelihood that a cure may be found in the future. For example, a qualified ABLE program may provide that the initial certification will be deemed to be valid for a stated number of years, which may vary with the type of impairment. Even if the qualified ABLE program imposes an enforceable obligation on the designated beneficiary or other person with signature authority over the ABLE account to promptly report changes in the designated beneficiary's condition that would result in the designated beneficiary's failing to satisfy the definition of an eligible individual, the designated beneficiary will be considered an eligible individual until the end of the taxable year in which the change in the designated beneficiary's condition occurred. A qualified ABLE program that is compliant with the rules regarding recertification will not be considered to be noncompliant solely because a designated beneficiary fails to comply with this enforceable obligation.

(3) *Loss of qualification as an eligible individual.* If the designated beneficiary of an ABLE account ceases to be an eligible individual, then for each taxable year in which the designated beneficiary is not an eligible individual, the account will continue to be an ABLE account, the designated beneficiary will continue to be the designated beneficiary of the ABLE account (and will be referred to as such), and the ABLE account will not be deemed to have been distributed. However, beginning on the first day of the designated beneficiary's first taxable year for which the designated beneficiary does not satisfy the definition of an eligible individual, additional contributions to the designated beneficiary's ABLE account must not be accepted by the qualified ABLE program. In addition, no expense incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529A–1(b)(8)(i) or § 1.529A–2(e)(1)(i), whichever had applied, is a qualified disability expense even if the individual is an eligible individual for the rest of the year under paragraph (d)(1)(i) of this section. If the designated beneficiary subsequently again satisfies the definition of an eligible individual, contributions to the designated beneficiary's ABLE account again may be accepted, subject to the contribution limits under section 529A, and expenses that are incurred thereafter may meet the definition of a qualified disability expense in § 1.529A–1(b)(15) and paragraph (h) of this section.

(e) *Disability certification*—(1) *In general.* Except as provided in paragraph (e)(3) of this section or in additional guidance described in paragraph (e)(4) of this section, a disability certification with respect to an individual, that will be deemed filed with the Secretary as provided in paragraph (d)(1)(i) of this section, and is deemed satisfactory to the Secretary, is a certification signed under penalties of perjury by the individual, or by another individual establishing the ABLE account for the individual, that—

(i) Certifies that the individual—

(A) Has a medically determinable physical or mental impairment that results in marked and severe functional limitations (as defined in paragraph (e)(2) of this section), and that—

(*1*) Can be expected to result in death; or

(*2*) Has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) Is blind (within the meaning of section 1614(a)(2) of the Social Security Act);

(ii) Certifies that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); and

(iii) Includes a certification that the individual has obtained and will continue to retain a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)) and including the name and address of the diagnosing physician and the date of the diagnosis.

(2) *Marked and severe functional limitations.* For purposes of paragraph (e)(1) of this section, the phrase *marked and severe functional limitations* means the standard of disability in the Social Security Act for children claiming Supplemental Security Income for the Aged, Blind, and Disabled (SSI) benefits based on disability (see 20 CFR 416.906), but without regard to age or to whether the individual engages in substantial gainful activity. Specifically, this is a level of severity that meets, medically equals, or functionally equals the severity of any listing in appendix 1 of subpart P of 20 CFR part 404. See 20 CFR 416.906, 416.924 and 416.926a. Such phrase also includes any impairment or standard of disability identified in future guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). Consistent with the regulations promulgated by the SSA, the level of severity is determined by taking into account the effect of the individual's prescribed treatment. See 20 CFR 416.930.

(3) *Compassionate allowance list.* Conditions listed in the ''List of Compassionate Allowances Conditions'' maintained by the SSA are deemed to meet the requirements of section 529A(e)(1)(B) regarding the filing of a disability certification, if the condition was present and produced marked and severe functional limitations before the date on which the individual attained age 26. To establish that an individual with such a condition satisfies the definition of an eligible individual, the individual must identify the condition and certify to the qualified ABLE program both the presence of the condition and its resulting marked and severe functional limitations prior to age 26, in a manner specified by the qualified ABLE program.

(4) *Additional guidance.* Additional guidance on conditions deemed to meet the requirements of section 529A(e)(1)(B) may be identified in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter.

(5) *Restriction on use of certification.* No inference may be drawn from a disability certification described in this paragraph (e) for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

(f) *Change of designated beneficiary*—(1) *In general.* A qualified ABLE program must permit a change in the designated beneficiary of an ABLE account made during the life of the designated beneficiary. At the time when the change becomes effective, the successor designated beneficiary must be an eligible individual. However, a qualified ABLE program may limit the change in designated beneficiary to a member of the family as defined in § 1.529A–1(b)(12) of the current designated beneficiary.

(2) *Change effective upon death.* A qualified ABLE program may permit a change in the designated beneficiary of an ABLE account, made during the life of the designated beneficiary, to take effect upon the death of the designated beneficiary. The amount to be transferred pursuant to such a beneficiary designation is first subject to the payment of any qualified disability expenses incurred before the designated beneficiary's death but not yet paid and those described in paragraph (o) of this section, and is subject to the provisions of § 1.529A–4.

(g) *Contributions*—(1) *Permissible property.* Except in the case of a program-to-program transfer or a change in designated beneficiary to a new designated beneficiary who is an eligible individual and a member of the family of the former designated beneficiary, contributions to an ABLE account may be made only in cash. A qualified ABLE program may allow cash contributions to be made in the form of a check, money order, credit card, electronic transfer, after-tax payroll deduction, or similar method.

(2) *Annual contributions limit*—(i) *In general.* Except as provided in paragraph (g)(2)(ii) of this section, a qualified ABLE program must provide that no contribution to an ABLE account will be accepted to the extent such contribution, when added to all other contributions (whether from the designated beneficiary or one or more other persons) to that ABLE account made during the designated beneficiary's taxable year causes the total of such contributions during that year to exceed the amount in effect under section 2503(b) for the calendar year in which the designated beneficiary's taxable year begins. See paragraph (k)(2) of this section for purposes of applying the rules in this paragraph (g)(2) to rollovers, program-to-program transfers, and designated beneficiary changes.

(ii) *Additional contributions by an employed designated beneficiary*—(A) *In general.* An employed designated beneficiary defined in paragraph (g)(2)(iii)(A) of this section may contribute amounts up to the limit specified in paragraph (g)(2)(ii)(B) of this section in addition to the amount specified in paragraph (g)(2)(i) of this section. Although a designated beneficiary's contributions subject to this compensation income limit do not have to be made from that compensation income, any contribution of the designated beneficiary's compensation income made directly by the designated beneficiary's employer is a contribution made by the designated beneficiary. Once the designated beneficiary has made contributions equal to the limit described in paragraph (g)(2)(ii)(B) of this section, additional contributions by the designated beneficiary may be made if permissible under paragraph (g)(2)(i) of this section.

(B) *Amount of additional permissible contribution.* Any additional contribution made by the designated beneficiary pursuant to paragraph (g)(2)(ii)(A) of this section is limited to the lesser of—

(*1*) The designated beneficiary's compensation as defined by section 219(f)(1) for the taxable year; or

(*2*) An amount equal to the applicable poverty line, as defined in paragraph (g)(2)(iii)(B) of this section, for a one-person household for the calendar year preceding the calendar year in which the designated beneficiary's taxable year begins.

(iii) *Additional definitions.* In addition to the definitions in § 1.529A–1(b), the following definitions also apply for the purposes of this section—

(A) *Employed designated beneficiary* means a designated beneficiary who is an employee (including an employee within the meaning of section 401(c)), with respect to whom no contribution is made for the taxable year to—

(*1*) A defined contribution plan (within the meaning of section 414(i)) with respect to which the requirements of sections 401(a) or 403(a) are met;

(*2*) An annuity contract described in section 403(b); and

(*3*) An eligible deferred compensation plan described in section 457(b).

(B) *Applicable poverty line* means the amount provided in 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) for the State of residence of the employed designated beneficiary. If the designated beneficiary lives in more than one State during the taxable year, the applicable poverty line is the poverty line for the State in which the designated beneficiary resided longer than in any other State during that year.

(C) *Excess compensation contribution* means the amount by which the amount contributed during the taxable year of an employed designated beneficiary to the designated beneficiary's ABLE account exceeds the limit in effect under section 529A(b)(2)(B)(ii) and

paragraph (g)(2)(ii)(B) of this section for the calendar year in which the taxable year of the employed designated beneficiary begins.

(iv) *Example.* The provisions of paragraph (g)(2)(ii) of this section may be illustrated by the following example: In 2020, A, an employed designated beneficiary as defined in paragraph (g)(2)(iii)(A) of this section, lives in Hawaii. A's compensation, as defined by section 219(f)(1), for 2020 is $20,000. The poverty line for a one-person household in Hawaii was $14,380 in 2019. Because A's compensation exceeded the applicable poverty line amount, A's additional permissible contribution in 2019 is limited to $14,380, the amount of the 2019 applicable poverty line.

(v) *Ensuring contribution limit is met*—(A) *Responsibility.* The employed designated beneficiary, or the person acting on his or her behalf, is solely responsible for ensuring that the requirements in section 529A(b)(2)(B)(ii) and paragraph (g)(2)(ii) of this section are met and for maintaining adequate records for that purpose.

(B) *Certification.* A qualified ABLE program may allow a designated beneficiary (or the person acting on his or her behalf) to certify, under penalties of perjury, and in the manner specified by the qualified ABLE program that—

(*1*) The designated beneficiary is an employed designated beneficiary; and

(*2*) The designated beneficiary's contributions of compensation are not excess compensation contributions.

(3) *Cumulative limit*—(i) *In general.* A qualified ABLE program must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by that State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions on behalf of a designated beneficiary include contributions to any prior ABLE account maintained by any State or its agency or instrumentality for the same designated beneficiary, or any former designated beneficiary to the extent his or her ABLE account funds were transferred to the designated beneficiary's ABLE account. The transfer of a designated beneficiary's ABLE account from one qualified ABLE program to another with a lower cumulative limit will not violate this rule, but qualified ABLE programs must prohibit subsequent contributions under this general rule. For purposes of this paragraph (g)(3), contributions do not include rollovers, program-to-program transfers or a designated beneficiary change to a new designated beneficiary who is an eligible individual and member of the family of the former designated beneficiary as defined in § 1.529A–1(b)(12).

(ii) *Safe harbor.* A qualified ABLE program maintained by a State or its agency or instrumentality satisfies the requirement under section 529A(b)(6) if it refuses to accept any additional contribution to an ABLE account (except as provided to the contrary in paragraph (g)(3)(i) of this section) while the balance in that account equals or exceeds the limit established by that State under section 529(b)(6). Nevertheless, without regard to the categories of transfers that caused the account balance to exceed the State limit, once the account balance falls below that limit, additional contributions, subject to the annual contributions limit under paragraph (g)(2) of this section and the limit established by such State under section 529(b)(6), again may be accepted.

(4) *Return of excess contributions, excess compensation contributions, and excess aggregate contributions.* If an excess contribution as defined in § 1.529A–1(b)(9), an excess compensation contribution as defined in paragraph (g)(2)(iii)(C) of this section, or an excess aggregate contribution as defined in § 1.529A–1(b)(10) is deposited into or allocated to the ABLE account of a designated beneficiary, a qualified ABLE program must return that excess contribution, excess compensation contribution, or excess aggregate contribution, including all net income attributable to that contribution, as determined under the rules set forth in § 1.408–11 (treating references to an IRA as references to an ABLE account and references to returned contributions under section 408(d)(4) as references to excess contributions or excess aggregate contributions), to the person or persons who made that contribution. Each excess contribution, excess compensation contribution, and excess aggregate contribution must be returned to its contributor(s) on a last-in-first-out basis until the entire excess, along with all net income attributable to such excess, has been returned. In the case of an excess compensation contribution, the employed designated beneficiary, or the person acting on the employed designated beneficiary's behalf, is responsible for identifying any excess compensation contribution and for requesting the return of the excess compensation contribution. Returned contributions must be received by the contributor(s) on or before the due date (including extensions) of the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. See § 1.529A–3(a) for Federal income tax considerations for the contributor(s). If an excess contribution or excess aggregate contribution and the net income attributable to the excess contribution or excess aggregate contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return. No notification is required if amounts are rejected by the qualified ABLE program before they are deposited into or allocated to the designated beneficiary's ABLE account.

(5) *Restriction of contributors.* A qualified ABLE program may allow the designated beneficiary, from time to time, to restrict who may make contributions to the designated beneficiary's ABLE account.

(h) *Qualified disability expenses*—(1) *In general.* Qualified disability expenses are expenses incurred that relate to the blindness or disability of the designated beneficiary of the ABLE account and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. See § 1.529A–1(b)(15). Such expenses include, but are not limited to, expenses related to the designated beneficiary's education, housing, transportation, employment training and support, assistive technology and related services, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses, as well as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit an individual with a disability.

(2) *Example.* The following example illustrates this paragraph (h): B, an individual, has a medically determined mental impairment that causes marked and severe limitations on B's ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping B to maintain B's independence and to improve B's quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be a qualified disability expense.

(i) *Separate accounting.* A program will not be treated as a qualified ABLE program unless it provides separate accounting for each ABLE account. Separate accounting requires that contributions for the benefit of a designated beneficiary and any earnings attributable thereto must be allocated to that designated beneficiary's ABLE account. Whether or not a program provides each designated beneficiary an annual account statement showing the total account balance, the investment in the account, the accrued earnings, and the distributions from the account, the program must give this information to the designated beneficiary upon request.

(j) *Program-to-program transfers.* A qualified ABLE program may permit a change of qualified ABLE program or a change of designated beneficiary by means of a program-to-program transfer as defined in § 1.529A–1(b)(13). In that event, subject to any contrary provisions or limitations adopted by the qualified ABLE program, rules similar to the rules of § 1.401(a)(31)–1, Q&A–3 and 4 (which apply for purposes of a direct rollover from a qualified plan to an eligible retirement plan) apply for purposes of determining whether an amount is paid in the form of a program-to-program transfer.

(k) *Carryover of attributes*—(1) *In general.* Upon a rollover, program-to-program transfer, or change of designated beneficiary, all of the attributes of the former ABLE account relevant for purposes of calculating the investment in the account are applicable to the recipient ABLE account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made is added to investment in the recipient ABLE account. In addition, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made is added to the earnings of the recipient ABLE account.

(2) *Annual contribution limit.* Upon a rollover or program-to-program transfer, for purposes of applying the annual contribution limit under paragraph (g)(2) of this section to the transferee account, annual contributions to the designated beneficiary's transferor ABLE account during the taxable year in which the rollover or program-to-program transfer occurs are included. However, upon a change of designated beneficiary, or upon a rollover or program-to-program transfer to the ABLE account of a different designated beneficiary who is both a member of the family as defined in § 1.529A–1(b)(12) and an eligible individual, no amounts contributed to the prior designated beneficiary's ABLE account are included when applying the annual contribution limit under paragraph (g)(2) of this section.

(3) *Investment direction limit.* Upon a rollover or program-to-program transfer, the number of investment directions by the designated beneficiary include the number of investment directions made prior to the rollover or program-to-program transfer during the same taxable year for purposes of paragraph (l) of this section. However, upon a change of designated beneficiary, or upon a rollover or program-to-program transfer to the ABLE account of a different designated beneficiary who is both a member of the family as defined in § 1.529A–1(b)(12) and an eligible individual, the number of investment directions made for the prior designated beneficiary's ABLE account are not included in determining the number of investment directions made for the new designated beneficiary's ABLE account in that same year.

(l) *Investment direction.* A program will not be treated as a qualified ABLE program unless it provides that the designated beneficiary of an ABLE account established under such program may direct, whether directly or indirectly, the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year. Such an investment direction does not include a request to transfer any part of the account balance from an investment option to a cash equivalent option to effectuate a distribution, or the automatic rebalancing of the assets of an ABLE account to maintain the asset allocation level chosen when the account was established or by a subsequent investment direction.

(m) *No pledging of interest as security for a loan.* A program will not be treated as a qualified ABLE program unless the terms of the program, or a State statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. For this purpose, the program administrator's advance of funds to satisfy a withdrawal request during the period between the sale of an asset in the ABLE account (whose value is sufficient to satisfy the withdrawal request) and the clearing or settlement of that sale, does not constitute a loan, pledge, or grant of security for a loan. Similarly, the use of checking accounts or debit cards to facilitate a qualified ABLE program's ability to make distributions will not be treated as a pledge or grant of security for a loan during the period between the use of the check or debit card and the clearing or settlement of that transaction, provided that the ABLE program does not advance funds to a designated beneficiary in excess of the amount in the designated beneficiary's ABLE account.

(n) *No sale or exchange.* A qualified ABLE program must ensure that no interest in an ABLE account may be sold or exchanged.

(o) *Post-death payments.* A qualified ABLE program must provide that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLE account of the designated beneficiary's funeral and burial expenses (including the unpaid balance of a pre-death contract for those services) and all outstanding payments due for his or her other qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account over the amount of any premiums paid, whether from the ABLE account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan. The establishment of the ABLE account is the date on which the ABLE account was established or, if earlier, the date on which was established any ABLE account for the same designated beneficiary from which amounts were rolled over or transferred to the ABLE account, but in no event earlier than the date on which the designated beneficiary became the designated beneficiary of the account from which amounts were transferred. After the expiration of the applicable statute of limitations for filing Medicaid claims against the designated beneficiary's estate, a qualified ABLE program may distribute the balance of the ABLE account to the successor designated beneficiary or, if none, to the deceased designated beneficiary's estate. A State law prohibiting the filing of such a claim against either the ABLE account or the designated beneficiary's estate will not prevent that State's program from being a qualified ABLE program.

(p) *Reporting requirements.* A qualified ABLE program must comply

with all applicable reporting requirements, including without limitation those described in §§ 1.529A–5 through 1.529A–7.

(q) *Applicability date.* This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–3 Tax treatment.

(a) *Taxation of distributions*—(1) *In general.* Each distribution from an ABLE account consists of an earnings portion of the account (computed in accordance with paragraph (c) of this section) and investment in the account. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year does not exceed the qualified disability expenses of the designated beneficiary paid during that year, no amount distributed is includible in the gross income of the designated beneficiary for that year. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year exceeds the qualified disability expenses of the designated beneficiary paid during that year (regardless of when incurred), the distributions from the ABLE account, except to the extent excluded from gross income under this section or any other provision of chapter 1 of the Internal Revenue Code, must be included in the gross income of the designated beneficiary in the manner provided under this section and section 72. The amount to be included in gross income is based on the earnings portion of each distribution, computed in accordance with paragraph (c) of this section. The earnings portion that is includible in gross income is the sum of the earnings portion of all distributions made in that year, reduced by an amount that bears the same ratio to the total earnings portion as the amount of qualified disability expenses paid during the year bears to such total distributions during the year. If an excess contribution or excess aggregate contribution is returned within the time period required in § 1.529A–2(g)(4), any net income distributed is includible in the gross income of the contributor(s) in the taxable year in which the excess contribution or excess aggregate contribution was made.

(2) *Additional period.* The designated beneficiary may treat as having been paid during the preceding taxable year qualified disability expenses paid on or before the 60th day immediately following the end of the designated beneficiary's preceding taxable year. Qualified disability expenses treated, pursuant to the rule in the preceding sentence, as having been paid during the designated beneficiary's taxable year immediately prior to the year of their actual payment may not be included in the total qualified disability expenses for the year in which they were paid.

(b) *Additional exclusions from gross income*—(1) *Rollover.* A rollover as defined in § 1.529A–1(b)(16) is not included in gross income under paragraph (a) of this section.

(2) *Program-to-program transfers.* A program-to-program transfer as defined in § 1.529A–1(b)(13) is not a distribution and is not included in gross income under paragraph (a) of this section.

(3) *Change of designated beneficiary*—(i) *In general.* A change of designated beneficiary of an ABLE account is not treated as a distribution for purposes of section 529A, and is not included in gross income under paragraph (a) of this section, if the successor designated beneficiary is—

(A) An eligible individual for the taxable year in which the change is made; and

(B) A member of the family (as defined in § 1.529A–1(b)(12)) of the former designated beneficiary.

(ii) *Other designated beneficiary changes.* In the case of any change of designated beneficiary not described in paragraph (b)(3)(i) of this section, the former designated beneficiary of that ABLE account will be treated as having received a distribution of the fair market value of the assets in that ABLE account on the date on which the change is made to the new designated beneficiary.

(4) *Payments to creditors post-death.* Distributions made after the death of the designated beneficiary in payment of outstanding obligations due for qualified disability expenses, as well as the funeral and burial expenses of the designated beneficiary, are not included in gross income of the designated beneficiary or his or her estate. Included among these obligations is the post-death payment of any part of a claim filed against the deceased designated beneficiary or his or her estate or ABLE account by a State with respect to benefits provided to the designated beneficiary under that State's Medicaid plan.

(c) *Computation of earnings.* The earnings portion of a distribution is equal to the product of the amount of the distribution and the earnings ratio, as defined in § 1.529A–1(b)(7). The balance of the distribution (the amount of the distribution minus the earnings portion of that distribution) is the portion of that distribution that constitutes the return of investment in the account.

(d) *Additional tax on amounts includible in gross income*—(1) *In general.* If any amount of a distribution from an ABLE account is includible in the gross income of a person for any taxable year under paragraph (a) of this section (includible amount), the income tax imposed on that person by chapter 1 of the Internal Revenue Code will be increased by an amount equal to 10 percent of the includible amount.

(2) *Exceptions*—(i) *Distributions on or after the death of the designated beneficiary.* Paragraph (d)(1) of this section does not apply to any distribution made from the ABLE account on or after the death of the designated beneficiary to the estate of the designated beneficiary, to an heir or legatee of the designated beneficiary, or to a creditor described in paragraph (b)(4) of this section.

(ii) *Returned excess contributions and additional accounts.* Paragraph (d)(1) of this section does not apply to any return made in accordance with § 1.529A–2(g)(4) of an excess contribution as defined in § 1.529A–1(b)(9), an excess compensation contribution as defined in § 1.529A–2(g)(2)(iii)(C), excess aggregate contribution as defined in § 1.529A–1(b)(10), or an additional account as referenced in § 1.529A–2(c)(3)(ii)(A), (B), or (C).

(e) *Tax on excess contributions.* Under section 4973(h), a contribution to an ABLE account in excess of the annual contributions limit described in § 1.529A–2(g)(2) is subject to an excise tax in an amount equal to 6 percent of the excess contribution. However, any the excess contribution or excess compensation contribution as defined in § 1.529A–2(g)(2)(iii)(C) returned in accordance with the provisions of § 1.529A–2(g)(4) is not treated as a contribution.

(f) *Filing requirements.* A qualified ABLE program is not required to file Form 990, ''Return of Organization Exempt From Income Tax,'' Form 1041, ''U.S. Income Tax Return for Estates and Trusts,'' or Form 1120, ''U.S. Corporation Income Tax Return.'' However, a qualified ABLE program is required to file Form 990–T, ''Exempt Organization Business Income Tax Return,'' if such filing would be required under the rules of §§ 1.6012–2(e) and 1.6012–3(a)(5) if the ABLE program were an organization described in those sections.

(g) *No inference outside section 529A.* The rules provided in this section concerning the Federal tax treatment of contributions apply only for purposes of the application of section 529A. No

inference is intended with respect to the application of any other Code provisions or Federal tax doctrines. For example, a contribution made by an employer to the ABLE account of an employee or an employee's family member is subject to the rules governing the Federal taxation of compensation.

(h) *Applicability date.* This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–4 Gift, estate, and generation-skipping transfer taxes.

(a) *Contributions*—(1) *In general.* Each contribution by a person to an ABLE account other than by the designated beneficiary of that account is treated as a completed gift to the designated beneficiary of the account for gift tax purposes. Under the applicable Federal gift tax rules, a contribution from a corporation, partnership, trust, estate, or other entity is treated as a gift by the shareholders, partners, or other beneficial owners in proportion to their respective ownership interests in the entity. See § 25.2511–1(c) and (h) of this chapter. A gift to an ABLE account is not treated as either a gift of a future interest in property, or a qualified transfer under section 2503(e). To the extent a contributor's gifts to the designated beneficiary, including gifts paid into the designated beneficiary's ABLE account, do not exceed the annual limit in section 2503(b), the contribution is not a taxable gift. This provision, however, does not change any other provision applicable to the transfer. For example, a contribution by the employer of the designated beneficiary's parent continues to constitute earned income to the parent and then a gift by the parent to the designated beneficiary. The timely return of an excess contribution or an excess aggregate contribution in accordance with § 1.529A–2(g)(4) is not a taxable gift.

(2) *Generation-skipping transfer (GST) tax.* To the extent the contribution into an ABLE account is a nontaxable gift for Federal gift tax purposes, the inclusion ratio for purposes of the GST tax will be zero pursuant to section 2642(c)(1).

(3) *Designated beneficiary as contributor.* A designated beneficiary may make a contribution to fund his or her own ABLE account. That contribution is not a gift.

(b) *Distributions.* No distribution from an ABLE account to or for the benefit of the designated beneficiary is treated as a taxable gift to that designated beneficiary.

(c) *Transfer to another designated beneficiary.* Neither gift tax nor generation-skipping transfer tax applies to the transfer (by rollover, program-to-program transfer, or change of beneficiary) of part or all of an ABLE account to the ABLE account of a different designated beneficiary if the successor designated beneficiary is both an eligible individual and a member of the family (as described in § 1.529A–1(b)(12)) of the designated beneficiary. Any other transfer will constitute a gift by the designated beneficiary to the successor designated beneficiary, and the usual gift and GST tax rules will apply.

(d) *Transfer tax on death of designated beneficiary.* Upon the death of the designated beneficiary, the designated beneficiary's ABLE account is includible in his or her gross estate for estate tax purposes under section 2031. The payment of outstanding qualified disability expenses and the payment of certain claims made by a State under its Medicaid plan may be deductible for estate tax purposes if the requirements of section 2053 are satisfied.

(e) *Applicability date.* This section applies to calendar years beginning on or after January 1, 2021. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–5 Reporting of the establishment of and contributions to an ABLE account.

(a) *In general.* A filer defined in paragraph (b)(1) of this section must, with respect to each ABLE account—

(1) File an annual information return, as described in paragraph (c) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (d) of this section, to the designated beneficiary of the ABLE account.

(b) *Additional definitions.* In addition to the definitions in § 1.529A–1(b), the following definitions also apply for purposes of this section—

(1) *Filer* means the State or its agency or instrumentality that establishes and maintains the qualified ABLE program under which an ABLE account is established. The filing may be done by either an officer or employee of the State or its agency or instrumentality having control of the qualified ABLE program, or the officer's or employee's designee.

(2) *TIN* means taxpayer identification number as defined in section 7701(a)(41).

(c) *Requirement to file return*—(1) *Form of return.* For purposes of reporting the information described in paragraph (c)(2) of this section, the filer must file Form 5498–QA, ''ABLE Account Contribution Information,'' or any successor form, together with Form 1096, ''Annual Summary and Transmittal of U.S. Information Returns.''

(2) *Information included on return.* With respect to each ABLE account, the filer must include on the return—

(i) The name, address, and TIN of the designated beneficiary of the ABLE account;

(ii) The name, address, and TIN of the filer;

(iii) Information regarding the establishment of the ABLE account, as required by the form and its instructions;

(iv) Information regarding the disability certification or other basis for eligibility of the designated beneficiary, as required by the form and its instructions. For further information regarding eligibility and disability certification, see § 1.529A–2(d) and (e), respectively;

(v) The total amount of any contributions made with respect to the ABLE account during the calendar year; such contributions do not include any contribution rejected and returned to the contributor before being deposited into or allocated to the ABLE account or any excess contributions, excess compensation contributions, or excess aggregate contributions returned as described in § 1.529A–2(g)(4);

(vi) The fair market value of the ABLE account as of the last day of the calendar year; and

(vii) Any other information required by the form, its instructions, or published guidance. See §§ 601.601(d) and 601.602 of this chapter.

(3) *Time and manner of filing return*—(i) *In general.* Except as provided in paragraph (c)(3)(ii) of this section, the information returns required under this paragraph must be filed on or before May 31 of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time.* See §§ 1.6081–1 and 1.6081–8 for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing.* See § 301.6011–2 of this chapter for rules relating to electronic filing. See also Instructions for Forms 1099–QA and 5498–QA, Distributions From ABLE Accounts and ABLE Account Contribution Information.

(iv) *Substitute forms.* The filer may file the returns required under this paragraph (c) on an acceptable substitute form. See Publication 1179, ''General Rules and Specifications for Substitute Forms 1096, 1098, 1099,

5498, and Certain Other Information Returns.''

(d) *Requirement to furnish statement*—(1) *In general.* The filer must furnish a statement to the designated beneficiary of the ABLE account for which it is required to file a Form 5498–QA (or any successor form). The statement must include—

(i) The information required under paragraph (c)(2) of this section;

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 5498–QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general.* Except as provided in paragraph (d)(2)(ii) of this section, the filer must furnish the statement described in paragraph (d)(1) of this section to the designated beneficiary on or before March 15 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the designated beneficiary's last known address. The statement may be furnished electronically, as provided in § 1.529A–7.

(ii) *Extensions of time.* The Internal Revenue Service may, at its discretion, grant an extension of time to furnish statements required in this section.

(3) *Copy of Form 5498–QA.* The filer may satisfy the requirement of this paragraph (d) by furnishing either a copy of Form 5498–QA (or successor form) or an acceptable substitute form. See Publication 1179, ''General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.''

(e) *Request for TIN of designated beneficiary.* The filer must request the TIN of the designated beneficiary at the time the ABLE account is established if the filer does not already have a record of the designated beneficiary's correct TIN. The filer must clearly notify the designated beneficiary that the law requires the designated beneficiary to furnish a TIN so that it may be included on an information return to be filed by the filer. The designated beneficiary may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W–9, ''Request for Taxpayer Identification Number and Certification,'' may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(f) *Penalties*—(1) *Failure to file return.* The section 6693 penalty may apply to the filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. See section 6693 and § 301.6693–1 of this chapter.

(2) *Failure to furnish TIN.* The section 6723 penalty may apply to any designated beneficiary who fails to furnish his or her TIN to the filer. See section 6723, and § 301.6723–1 of this chapter, for rules relating to the penalty for failure to furnish a TIN.

(g) *Applicability date.* The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2020. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–6 Reporting of distributions from and termination of an ABLE account.

(a) *In general.* The filer as defined in § 1.529A–5(b)(1) must, with respect to each ABLE account from which any distribution is made or which is terminated during the calendar year—

(1) File an annual information return, as described paragraph (b) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (c) of this section, to the designated beneficiary of the ABLE account and to each contributor who received a returned contribution in accordance with § 1.529A–2(g)(4) attributable to the calendar year.

(b) *Requirement to file return*—(1) *Form of return.* For purposes of reporting the information in paragraph (b)(2) of this section, the filer must file Form 1099–QA, ''Distributions From ABLE Accounts,'' or any successor form, together with Form 1096, ''Annual Summary and Transmittal of U.S. Information Returns.''

(2) *Information included on return.* The filer must include on the return—

(i) The name, address, and TIN of the recipient of the payment, whether the designated beneficiary of the ABLE account or any contributor who received a returned contribution in accordance with § 1.529A–2(g)(4) attributable to the calendar year;

(ii) The name, address, and TIN of the filer;

(iii) Whether the return is being filed with respect to the designated beneficiary or to a contributor;

(iv) The aggregate amount of distributions or returned contributions (including net income attributable to the returned contributions) from the ABLE account to the recipient during the calendar year;

(v) Information as to basis and earnings with respect to such distributions or returns of contributions;

(vi) Information regarding termination (if any) of the ABLE account if the recipient is the designated beneficiary;

(vii) Information regarding each program-to-program transfer from the ABLE account during the designated beneficiary's taxable year; and

(viii) Any other information required by the form, its instructions, or published guidance. See §§ 601.601(d) and 601.602 of this chapter.

(3) *Information excluded.* A State filing a claim against the estate or ABLE account of a deceased designated beneficiary with respect to benefits provided to the designated beneficiary under that State's Medicaid plan is a creditor, and not a beneficiary, so the payment of the claim is not a distribution from the ABLE account and should not be reported as such on the Form 1099–QA for that year.

(4) *Time and manner of filing return*—(i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, the Forms 1099–QA and 1096 must be filed on or before February 28 (March 31 if filing electronically) of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time.* See §§ 1.6081–1 and 1.6081–8 for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing.* See § 301.6011–2 of this chapter for rules relating to electronic filing. See also Instructions for Forms 1099–QA and 5498–QA, Distributions From ABLE Accounts and ABLE Account Contribution Information.

(iv) *Substitute forms.* The filer may file the return required under this paragraph (b) on an acceptable substitute form. See Publication 1179, ''General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.''

(c) *Requirement to furnish statement*—(1) *In general.* The filer must furnish a statement to the designated beneficiary and each contributor (if any) of the ABLE account for which it is required to file a Form 1099–QA (or any successor form). The statement must include—

(i) The information required under paragraph (b)(2) of this section.

(ii) A legend that identifies the statement as important tax information

that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 1099–QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general.* Except as provided in paragraph (c)(2)(ii) of this section, a filer must furnish the statement described in paragraph (c)(1) of this section to the designated beneficiary or contributor on or before January 31 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the recipient's last known address. The statement may be furnished electronically, as provided in § 1.529A–7.

(ii) *Extensions of time.* The Internal Revenue Service may, at its discretion, grant an extension of time to furnish statements required in this section.

(3) *Copy of Form 1099–QA.* A filer may satisfy the requirement of this paragraph (c) by furnishing either a copy of Form 1099–QA (or successor form) or an acceptable substitute form. See Publication 1179, ''General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.''

(d) *Request for TIN of contributor(s)*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, a filer must request the TIN of each contributor to the ABLE account at the time a contribution is made, if the filer does not already have a record of that person's correct TIN.

(2) *Exception.* If the filer has a system in place to identify and reject amounts that either would constitute an excess contribution or excess aggregate contribution (as defined in § 1.529A–1(b)(9) or (10), respectively) or were contributed to an additional ABLE account as described in § 1.529A–2(c)(3)(ii)(C) (excess amounts) before those excess amounts are deposited into or allocated to an ABLE account, the filer need not request the TIN of each contributor at the time of contribution. A filer with such a system must request a contributor's TIN only if and when an excess contribution or excess aggregate contribution nevertheless is deposited into or allocated to an account and the filer must return the excess amounts including net income to the contributor. The filer must clearly notify each such contributor to the account that the law requires that person to furnish a TIN so that it may be included on an information return to be filed by the filer. The contributor may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W–9, ''Request for Taxpayer Identification Number and Certification,'' may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(e) *Penalties*—(1) *Failure to file return.* The section 6693 penalty may apply to a filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. See section 6693 and § 301.6693–1 of this chapter.

(2) *Failure to furnish TIN.* The section 6723 penalty may apply to any contributor who fails to furnish his or her TIN to the filer in accordance with paragraph (d) of this section. See section 6723, and § 301.6723–1 of this chapter, for rules relating to the penalty for failure to furnish a TIN.

(f) *Applicability date.* The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2020. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) *Electronic furnishing of statements*—(1) *In general.* A filer required under § 1.529A–5 or § 1.529A–6 to furnish a written statement to a designated beneficiary of or contributor to an ABLE account may furnish the statement in an electronic format in lieu of a paper format. A filer who meets the requirements of paragraphs (a)(2) through (6) of this section is treated as furnishing the required statement.

(2) *Consent*—(i) *In general.* The recipient of the statement must have affirmatively consented to receive the statement in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically.

(ii) *Withdrawal of consent.* The consent requirement of this paragraph (a)(2) is not satisfied if the recipient withdraws the consent and the withdrawal takes effect before the statement is furnished. The filer may provide that a withdrawal of consent takes effect either on the date it is received by the filer or on another date no more than 60 days later. The filer also may provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) *Change in hardware or software requirements.* If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access the statement, the filer must, prior to changing the hardware or software, provide the recipient with a notice. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the filer if the recipient does not want to withdraw the consent. After implementing the revised hardware and software, the filer must obtain from the recipient, in the manner described in paragraph (a)(2)(i) of this section, a new consent or confirmation of consent to receive the statement electronically.

(iv) *Examples.* For purposes of the following examples that illustrate the rules of this paragraph (a)(2), assume that the requirements of § 1.529A–7(a)(3) have been met:

(A) *Example 1.* Filer F sends Recipient R a letter stating that R may consent to receive statements required under § 1.529A–5 or § 1.529A–6 electronically on a website instead of in a paper format. The letter contains instructions explaining how to consent to receive the statements electronically by accessing the website, downloading the consent document, completing the consent document, and emailing the completed consent back to F. The consent document posted on the website uses the same electronic format that F will use for the electronically furnished statements. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(B) *Example 2.* Filer F sends Recipient R an email stating that R may consent to receive statements required under § 1.529A–5 or § 1.529A–6 electronically instead of in a paper format. The email contains an attachment instructing R how to consent to receive the statements electronically. The email attachment uses the same electronic format that F will use for the electronically furnished statements. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(C) *Example 3.* Filer F posts a notice on its website stating that Recipient R may receive statements required under § 1.529A–5 or § 1.529A–6 electronically instead of in a paper format. The website contains instructions on how R may access a secure web page and consent to receive the statements electronically. By accessing the secure web page and giving consent, R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(3) *Required disclosures*—(i) *In general.* Prior to, or at the time of, a recipient's consent, the filer must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (a)(3)(ii) through (viii) of this section.

(ii) *Paper statement.* The recipient must be informed that the statement will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) *Scope and duration of consent.* The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to statements furnished every year after the consent is given until it is withdrawn in the manner described in paragraph (a)(3)(v)(A) of this section, or only to the statement required to be furnished on or before the due date immediately following the date on which the consent is given.

(iv) *Post-consent request for a paper statement.* The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the consent and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) *Withdrawal of consent.* The recipient must be informed that—

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, and email address is provided in the disclosure statement;

(B) The filer will confirm, in writing (electronically or on paper), the withdrawal and the date on which it takes effect; and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (a) before the date on which the withdrawal of consent takes effect.

(vi) *Notice of termination.* The recipient must be informed of the conditions under which a filer will cease furnishing statements electronically to the recipient.

(vii) *Updating information.* The recipient must be informed of the procedures for updating the information needed by the filer to contact the recipient. The filer must inform the recipient of any change in the filer's contact information.

(viii) *Hardware and software requirements.* The recipient must be provided with a description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the website.

(4) *Format.* The electronic version of the statement must contain all required information. See Publication 1179, ''General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.''

(5) *Notice*—(i) *In general.* If the statement is furnished on a website, the filer must notify the recipient that the statement is posted on a website. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, ''IMPORTANT TAX RETURN DOCUMENT AVAILABLE.'' If the notice is provided by electronic mail, the foregoing statement must be in the subject line of the electronic mail.

(ii) *Undeliverable electronic address.* If an electronic notice described in paragraph (a)(5)(i) of this section is returned as undeliverable, and the correct electronic address cannot be obtained from the filer's records or from the recipient, then the filer must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(iii) *Corrected statements.* If the filer has corrected a recipient's statement that was furnished electronically, the filer must furnish the corrected statement to the recipient electronically. If the recipient's statement was furnished through a website posting and the filer has corrected the statement, the filer must notify the recipient that it has posted the corrected statement on the website within 30 days of such posting in the manner described in paragraph (a)(5)(i) of this section. The corrected statement or the notice must be furnished by mail or in person if—

(A) An electronic notice of the website posting of an original statement or the corrected statement was returned as undeliverable; and

(B) The recipient has not provided a new email address.

(6) *Access period.* Statements furnished on a website must be retained on the website through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday). The filer must maintain access to corrected statements that are posted on the website through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected statements are posted, whichever is later. The rules in this paragraph (a)(6) do not replace the filer's obligation to keep records under section 6001 and § 1.6001–1(a).

(b) *Applicability date.* This section applies to statements required to be furnished after December 31, 2020. See § 1.529A–8 for the provision of transition relief.

§ 1.529A–8 Applicability dates and transition relief.

(a) *Applicability dates.* Except as otherwise provided in paragraph (b) of this section, §§ 1.529A–1 through 1.529A–4 apply for calendar years beginning on or after January 1, 2021, §§ 1.529A–5 and 1.529A–6 apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2020, and § 1.529A–7 applies to statements required to be furnished after December 31, 2020.

(b) *Transition relief*—(1) *In general.* Any program purporting to be a qualified ABLE program will not be disqualified during the transition period set forth in paragraph (b)(2) of this section (transition period) solely because of noncompliance with one or more provisions of §§ 1.529A–1 through 1.529A–7, provided that the program is established and operated in accordance with a reasonable, good faith interpretation of section 529A. Similarly, no ABLE account established and maintained under a program that meets the requirements of this paragraph will fail to qualify as an ABLE account during the transition period. However, to be a qualified ABLE program and an ABLE account under such a program after the transition period, the program and each account established and maintained under the program must be in compliance with §§ 1.529A–1 through 1.529A–7 by the end of the transition period. In no event, however, will a complete failure to file and furnish reports, information returns and payee statements required under section 529A(d)(1) for any accounts established and maintained under the

program (including for calendar years beginning prior to January 1, 2021), be deemed to be due to reasonable cause for purposes of avoiding penalties imposed under section 6693.

(2) *Transition period.* For purposes of paragraph (b)(1) of this section, the transition period begins with the establishment of the program purporting to be a qualified ABLE program and continues through the later of—

(i) November 21, 2022; or

(ii) The day immediately preceding the first day of the qualified ABLE program's first taxable year beginning after the close of the first regular session of the State legislature that begins after November 19, 2020. If a State has a two-year legislative session, each calendar year of such session will be deemed to be a separate regular session of the State legislature for purposes of this paragraph.

(3) *Compliance after transition period.* After the transition period, a program and an account established and maintained under that program must be in compliance with §§ 1.529A–1 through 1.529A–7.

PART 25—GIFT TAXES; GIFTS MADE AFTER DECEMBER 31, 1954

■ **Par. 5.** The authority citation for part 25 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

■ **Par. 6.** Section 25.2501–1 is amended by adding a sentence to the end of paragraph (a)(1) to read as follows:

§ 25.2501–1 Imposition of tax.

(a) * * *

(1) * * * For gift tax rules related to an ABLE account established under section 529A, see § 1.529A–4 of this chapter.

* * * * *

■ **Par. 7.** Section 25.2503–3 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 25.2503–3 Future interests in property.

(a) * * * A contribution to an ABLE account established under section 529A is not a future interest.

* * * * *

■ **Par. 8.** Section 25.2503–6 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 25.2503–6 Exclusion for certain qualified transfer for tuition or medical expenses.

(a) * * * A contribution to an ABLE account established under section 529A is not a qualified transfer.

* * * * *

■ **Par. 9.** Section 25.2511–2 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 25.2511–2 Cessation of donor's dominion and control.

(a) * * * For gift tax rules related to an ABLE account established under section 529A, see § 1.529A–4 of this chapter.

* * * * *

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

■ **Par. 10.** The authority citation for part 26 continues to read in part as follows:

Authority: 26 U.S.C. 7805 and 26 U.S.C. 2663.

* * * * *

■ **Par. 11.** Section 26.2642–1 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 26.2642–1 Inclusion ratio.

(a) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, see § 1.529A–4 of this chapter.

* * * * *

■ **Par. 12.** Section 26.2652–1 is amended by adding a sentence to the end of paragraph (a)(1) to read as follows:

§ 26.2652–1 Transferor defined; other definitions.

(a) * * *

(1) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, see § 1.529A–4 of this chapter.

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 13.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

§ 301.6011–2 [Amended]

■ **Par. 14.** Section 301.6011–2 is amended by adding the word ''series'' after ''5498'' in the first sentence of paragraph (b)(1).

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 15.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 16.** In § 602.101, the paragraph (b) table is amended by adding the following entries in numerical order to the table to read as follows:

§ 602.101 OMB Control Numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * *	*
1.529A–2	1545–2293
1.529A–5	1545–2262
1.529A–6	1545–2262
1.529A–7	1545–2262
* * *	*

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: September 29, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–22144 Filed 11–18–20; 8:45 am]

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Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for the Upper Coosa River Distinct Population Segment of Frecklebelly Madtom and Designation of Critical Habitat; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2020–0058; FF09E21000 FXES11110900000 212]

RIN 1018–BE87

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for the Upper Coosa River Distinct Population Segment of Frecklebelly Madtom and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the frecklebelly madtom (*Noturus munitus*), a fish species from Louisiana, Mississippi, Alabama, Georgia, and Tennessee, as an endangered or threatened species and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After a review of the best available scientific and commercial information, we find that listing the frecklebelly madtom as an endangered or a threatened species throughout all of its range is not warranted. However, we determined that listing is warranted for a distinct population segment (DPS) of the frecklebelly madtom in the Upper Coosa River in Georgia and Tennessee. Accordingly, we propose to list the Upper Coosa River DPS of the frecklebelly madtom as a threatened species with a rule issued under section 4(d) of the Act (''4(d) rule''). If we finalize this rule as proposed, it would add this DPS to the List of Endangered and Threatened Wildlife and extend the Act's protections to the DPS. We also propose to designate critical habitat for the Upper Coosa River DPS under the Act. In total, approximately 134 river miles (216 kilometers) in Georgia and Tennessee fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for the Upper Coosa River DPS.

DATES: We will accept comments received or postmarked on or before January 19, 2021. 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. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 4, 2021.

ADDRESSES: *Written comments:* You may submit 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–2020–0058, 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, check 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–2020–0058, 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 Information Requested, below, for more information).

Availability of supporting materials: The species status assessment (SSA) report and other materials relating to this proposal can be found on the Southeast Region website at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058.

For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the administrative record and are available at *https://www.fws.gov/southeast/,* at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058, and at the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for the critical habitat designation will also be available at the Service website and field office set out above and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: William Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office, 1208–B Main Street, Daphne, AL 36526; telephone 251–441–5870. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if we determine that a species may be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. To the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designation of critical habitat can only be completed by issuing a rule.

What this document does. This rule proposes the listing of the Upper Coosa River distinct population segment (DPS) of frecklebelly madtom as a threatened species with a rule under section 4(d) of the Act and proposes the designation of critical habitat for the DPS.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the factors driving the status of the Upper Coosa River DPS are habitat destruction and degradation caused by agriculture and developed land uses resulting in poor water quality (Factor A).

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the

impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Peer review. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of 10 appropriate specialists regarding the SSA report. We received responses from two specialists, and their input informed this proposed rule. The purpose of peer review is to ensure that our listing determinations, critical habitat designations, and 4(d) rules are based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in the biology, habitat, and threats to the species.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the Upper Coosa River DPS is endangered instead of threatened, or we may conclude that the DPS does not warrant listing. Such final decisions would be a logical outgrowth of this proposal, as long as we: (1) Base the decisions on the best scientific and commercial data available after considering all of the relevant factors; (2) do not rely on factors Congress has not intended us to consider; and (3) articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion.

Information Requested

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

We particularly seek comments concerning:

(1) The frecklebelly madtom's biology, range, distribution, and population trends, particularly in the upper Coosa River watershed in Georgia and Tennessee, including:

(a) Biological or ecological requirements of the frecklebelly madtom, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

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

(e) Past and ongoing conservation measures for the frecklebelly madtom, its habitat, or both.

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

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the frecklebelly madtom and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of the frecklebelly madtom, and specifically the Upper Coosa River DPS, including the locations of any additional populations of the frecklebelly madtom.

(5) Information on regulations that are necessary and advisable to provide for the conservation of the Upper Coosa River DPS of frecklebelly madtom and that the Service can consider in developing a 4(d) rule for the DPS, including information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule. We particularly seek comments concerning:

(a) Whether we should add a provision to except incidental take resulting from silvicultural practices and forest management activities that implement State-approved best management practices and comply with forest practice guidelines related to water quality standards.

(b) Whether there are additional provisions the Service may wish to consider for the section 4(d) rule in order to conserve, recover, and manage the Upper Coosa River DPS.

(6) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information to inform the following factors that the regulations identify as reasons why designation of critical habitat may be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act; or

(c) No areas meet the definition of critical habitat.

(7) Specific information on:

(a) The amount and distribution of Upper Coosa River DPS habitat;

(b) Information on the physical or biological features essential to the conservation of the DPS;

(c) What areas, that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the DPS, such as the Coosawattee River in Georgia, should be included in the critical habitat designation and why;

(d) The methods we used, particularly the use of environmental DNA, to identify occupied critical habitat for each of the units;

(e) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(f) What areas not occupied at the time of listing are essential for the conservation of the DPS and should be included as critical habitat and why. We particularly seek comments:

(i) Regarding whether occupied areas are adequate for the conservation of the DPS; and

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the DPS and contain at least one physical or biological feature essential to the conservation of the DPS.

(8) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(9) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(10) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(11) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area

outweigh the benefits of including that area under section 4(b)(2) of the Act.

(12) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

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

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

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

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy 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 this proposed rule, will be available for public inspection on *http://www.regulations.gov.*

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On April 20, 2010, we were petitioned by the Center for Biological Diversity and others to list 404 aquatic species in the southeastern United States, including the frecklebelly madtom, under the Act. In response to the petition, we completed a partial 90-day finding on September 27, 2011 (76 FR 59836), in which we announced our finding that the petition contained substantial information indicating that listing may be warranted for numerous species, including the frecklebelly madtom. On April 15, 2015, the Center for Biological Diversity amended a complaint against the Service for failure to complete a 12-month finding for the frecklebelly madtom in accordance with statutory deadlines. On September 9, 2015, the Service and the Center for Biological Diversity filed stipulated settlements in the District of Columbia, agreeing that the Service would submit to the **Federal Register** a 12-month finding for the frecklebelly madtom no later than September 30, 2020 (*Center for Biological Diversity* v. *Jewell,* case 1:15–CV–00229–EGS). This document constitutes our concurrent 12-month warranted petition finding, proposed listing rule, and proposed critical habitat rule.

Supporting Documents

An SSA team prepared an SSA report for the frecklebelly madtom. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The Service sent the SSA report to 10 independent peer reviewers and received 2 responses. The Service also sent the SSA report for review to 13 partners, including scientists with expertise in fish biology, stream and riverine ecology, and factors negatively and positively affecting the species. We received review from two partners, Mississippi Museum of Natural Science and Georgia Department of Natural Resources.

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the frecklebelly madtom (*Noturus munitus*) is presented in the SSA report (version 1.2; Service 2020, pp. 5–15; available at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058).

The frecklebelly madtom is a catfish species that inhabits the main channels and larger tributaries of large river systems in Louisiana, Mississippi, Alabama, Georgia, and Tennessee. The species has a broad but disjunct distribution across the Pearl River watershed and Mobile River Basin, with populations in the Pearl River and Bogue Chitto River in the Pearl River watershed and the Upper Tombigbee, Alabama, Cahaba, Etowah, and Conasauga river systems in the Mobile River Basin (Piller *et al.* 2004, p. 1004; Bennett *et al.* 2010, pp. 507–508). Throughout its range, the frecklebelly madtom primarily occupies streams and rivers within the Gulf Coastal Plain physiographic province; however, it also occurs in the Ridge and Valley physiographic province in the Conasauga River and Piedmont Upland physiographic province in the Etowah River (Mettee *et al.* 1996, pp. 408–409).

The frecklebelly madtom is a small, stout catfish reaching 99 millimeters (mm) (3.9 inches (in)) in length (Etnier and Starnes 1993, p. 324) and distinctively marked with dark saddles (Suttkus and Taylor 1965, p. 171). The color of the frecklebelly madtom is a mixture of light yellows with brownish patches and a combination of many scattered specks or freckles on the underside, which provides camouflage in its preferred habitats and inspired its common name (Suttkus and Taylor 1965, p. 176; Vincent 2019, unpaginated). The fins' colors are typically mottled or blotched (Etnier and Starnes 1993, p. 324). The frecklebelly madtom is armed with venomous pectoral and dorsal spines used to defend against predation and has barbels around the mouth that act as sensory organs.

The species belongs in the family Ictaluridae, and all species in the genus *Noturus,* referred to as madtoms, are diminutive and possess long and low adipose fins (*i.e.,* found on the back behind the dorsal fin) (Page and Burr 2011, p. 207). The currently recognized taxon is *Noturus munitus* (Suttkus and Taylor 1965, entire; Rhode 1978, p. 465). Since the time of description, uncertainty regarding the taxonomic status of some populations of frecklebelly madtom has arisen. In 1998, the name ''Coosa madtom'' (*Noturus sp. cf. N. munitus*) was coined to describe the madtoms, previously identified as frecklebelly madtom, in the Conasauga and Etowah Rivers that were morphologically distinct from the

frecklebelly madtom found elsewhere (Boschung and Mayden 2004, p. 347; Neely 2018, p. 1). However, a recent analysis of the existing morphological and genetic datasets documented substantial genetic divergence between all populations from distinct watersheds. The Pearl and Mobile basin populations exhibited the strongest genetic divergence, followed by Tombigbee and Alabama River (Cahaba and Coosa) populations (Neely 2018, entire). The Cahaba and Coosa populations exhibited the lowest genetic differentiation and could not be reliably diagnosed based on morphology. Therefore, because the data indicate divergence between populations but do not support the description of distinct subspecies or species, we consider each population of frecklebelly madtom to be a separate evolutionary significant unit (ESU) (Neely 2018, p. 10) for purposes of this determination. ESUs are partially defined as a population that ''represents an important component in the evolutionary legacy of a species'' (Waples 1991, p. 12). Because evolution is a continual process, elements that represent a species' evolutionary legacy are also important elements of a species' adaptive capacity. Therefore, the ESUs recommended by Neely (2018, entire) were used to inform our analysis on the frecklebelly madtom's representation, an attribute of the species' viability (Service 2020, pp. 3, 35–37).

For the frecklebelly madtom to survive and reproduce, individuals need suitable habitat that supports essential life functions at all life stages. Three elements appear to be essential to the survival and reproduction of individuals: Flowing water, stable substrate, and aquatic vegetation. The frecklebelly madtom typically occurs over firm gravel substrates, such as shoals and riffles, in small to large swift-flowing streams often associated with large rivers and their tributaries (Suttkus and Taylor 1965, pp. 177–178; Mettee *et al.* 1996, p. 409; Vincent 2019, unpaginated). However, the species will use streams dominated with sand substrates if suitable cover such as large woody debris is present (Wagner 2019, pers. comm.). Cover is an important habitat factor for the species, as it provides for concealment against predators (Vincent 2019, unpaginated), foraging habitat, and nesting habitat. In some rivers where the species is found, the frecklebelly madtom is often associated with aquatic vegetation, such as river weed (*Podostemum*), and under large, flat rocks (Mettee *et al.* 1996, p. 409, Freeman *et al.* 2003, p. iii). In the upper Etowah and Conasauga Rivers, the frecklebelly madtom has been collected in moderate to swift currents over boulders, rubble, cobble, and coarse gravel and around concentrations of river weed.

The frecklebelly madtom is likely nocturnal and most active at night. The species has a lifespan of approximately 5 years (Mettee *et al.* 1996, pp. 408–409) and is reproductively mature in the second summer after birth, similar to other madtom species (Burr and Stoeckel 1999, p. 65). In the wild, reproduction is thought to occur between June and July (Trauth *et al.* 1981, p. 66). At the Private John Allen National Fish Hatchery in Tupelo, MS, frecklebelly madtoms have been observed spawning between the end of May to mid-August (Schwarz 2020, unpublished report). The female produces 50 to 70 eggs, which are released all at one time (Trauth *et al.* 1981, p. 66). Fecundity in madtoms is among the lowest for North American freshwater fishes due to their small size, relatively large egg size, and high level of parental care given to the fertilized eggs (embryos) and larvae (Dinkins and Shute 1996, pp. 58–60; Burr and Stoeckel 1999, pp. 66–67). However, the frecklebelly madtom is considered highly fecund for a madtom and among the highest fecundity known for its subgenus, *Rabida* (Bennett *et al.* 2010, p. 507).

Nesting sites for madtoms are typically cavities under natural material (rocks, logs, empty mussel shells) or human litter (inside cans or bottles, under boards). Madtoms construct cavities on the bottoms of streams by moving substrate using their heads to push gravel or their mouths to carry and transport gravel and pebbles (Vincent 2019, unpaginated). Both males and females may construct nesting cavities (Burr and Stoeckel 1999, p. 69).

The species is an opportunistic insectivore feeding on a variety of aquatic insects and larvae, including caddisflies, mayflies, blackflies, and midges (Miller 1984, p. 9). There appear to be seasonal shifts in food preference between the sexes, with males typically preferring caddisflies in the fall months, and the females preferring midges during the same time (Miller 1984, p. 10).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

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

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

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

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

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

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

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

existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

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

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

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be proposed for listing as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058.

To assess frecklebelly madtom viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. For frecklebelly madtom populations to be resilient, the needs of individuals (flowing water, substrate, and aquatic vegetation) must be met at a large scale. Stream reaches with suitable habitat must be large enough to support an appropriate number of individuals to avoid issues associated with small population sizes, such as inbreeding depression. At the species level, the frecklebelly madtom needs a sufficient number and distribution of healthy populations to withstand environmental stochasticity (resiliency) and catastrophes (redundancy) and to adapt to biological and physical changes in its environment (representation). To evaluate the current and future viability of the frecklebelly madtom, we assessed a range of conditions to allow us to consider the current and future effects on resiliency, representation, and redundancy.

Delineating Representation and Resilience Units

We delineated representation and resilience units for the frecklebelly madtom. Representation units were delineated to describe the breadth of known genetic, phenotypic, and ecological diversity within the species. There is evidence of differentiation in habitat use, morphology, and genetics for areas that the frecklebelly madtom occupies, which are disconnected spatially across the landscape. Resilience units were delineated to describe at a local scale how the species withstands stochastic events. These resilience units are not meant to represent individual populations as they may represent multiple or portions of groups of demographically linked interbreeding individuals.

In total, we identified six representation units for the frecklebelly madtom: Pearl River (A), upper Tombigbee River (B), lower Tombigbee/Alabama Rivers (C), Alabama River (D), Cahaba River (E), and upper Coosa River (F) (see table 1, below). Four representation units (Pearl River (A), upper Tombigbee River (B), Cahaba River (E), and upper Coosa River (F)) are the ESUs based on the evaluation of morphometric and genetic datasets (Neely 2018, entire). Morphometric and genetic data from the remaining two representation units (lower Tombigbee/Alabama Rivers (C) and Alabama River (D)) were not available to be analyzed in the 2018 study (Neely 2018, entire) and, therefore, were not identified as ESUs in that study.

The lower Tombigbee/Alabama Rivers (C) and Alabama River (D) representation units reflect occurrences of the species in the Mobile River Basin that are the farthest downstream and within a large river habitat type that is distinct from the remainder of the units in the Mobile River Basin. Furthermore, these reaches are disconnected from the nearest adjacent representation units by dams that act as dispersal barriers for the species. Therefore, these reaches are assessed as two individual representation units. The Alabama River (D) representation unit consists of a single HUC 10 watershed that is isolated

from other representation units by dams. The remaining unit, lower Tombigbee/Alabama Rivers (C), is disconnected from the upper Tombigbee River and Alabama River units by dams.

Resilience units were delineated as aggregations of adjacent U.S. Geological Survey Hydrological Unit Code (HUC) 10 watershed boundaries that contain a frecklebelly madtom observation and are not disconnected by dams or other major habitat alterations that may present a barrier to movement. While resiliency is typically assessed at the scale of a population, there was little information to delineate populations of the frecklebelly madtom. By using HUC 10 watersheds, we are able to delineate resilience units that can be measured and evaluated at a local scale similar to that we would expect for a population. We determined this to be the most appropriate scale for measuring resiliency. We identified 16 resilience units consisting of 66 HUC10 watersheds across the range of the frecklebelly madtom (see table 1, below).

TABLE 1—REPRESENTATION UNITS AND RESILIENCE UNITS USED TO ASSESS VIABILITY OF THE FRECKLEBELLY MADTOM

Representation units	Resilience units
Pearl River (A)	Bogue Chitto River (A1).
	Pearl River (A2).
Upper Tombigbee River (B)	East Fork Tombigbee (B1).
	Sipsey River (B2).
	Luxapallila Creek (B3).
	Buttahatchee River (B4).
	Bull Mountain Creek (B5).
	Upper Tombigbee River (mainstem) (B6).
Lower Tombigbee/Alabama Rivers (C)	Lower Tombigbee River (C1).
	Lower Alabama River (C2).
Alabama River (D)	Alabama River (D1).
Cahaba River (E)	Cahaba River (E1).
	Alabama River/Big Swamp (E2).
Upper Coosa River (F)	Conasauga River (F1).
	Coosawattee River (F2).
	Etowah River (F3).

Methods To Assess Current Condition

We assessed the current resiliency (ability of populations to withstand stochastic events) of frecklebelly madtom resilience units by considering occurrence data throughout the species' range. We used occurrence data to estimate range extent and range geometry (*i.e.,* number of named streams with occurrences). These metrics can be useful for evaluating resiliency, as larger areas of occupied habitat and multiple occupied streams (more complex ranges) are more robust to stochastic events (*i.e.,* a single more localized event would be unlikely to negatively affect the entire population or unit if many and larger reaches of streams were occupied). Occurrence data for the frecklebelly madtom are only available for five of the six representation units: The Pearl River (A), upper Tombigbee River (B), Alabama River (D), Cahaba River (E), and upper Coosa River (F). Therefore, we conducted our assessment of occurrences only on resilience units within those representation units, and we categorized current resiliency into high, moderate, low, or likely extirpated conditions, based on our evaluation of total number of occurrences, the number of occupied stream reaches, the length of discrete stream reaches, and the maximum occupied stream reach estimate and available literature (Service 2020, pp. 34–53). The Lower Tombigbee/Alabama Rivers (C) representation unit was categorized to have unknown resiliency (see discussion below regarding environmental DNA).

Environmental DNA (eDNA, which is DNA that is shed into the environment by an organism during its life) belonging to the frecklebelly madtom was collected in the Conasauga River (F1), Coosawattee River (F2), Etowah River (F3), and portions of the lower Alabama River (C2) and lower Tombigbee River (C1) (Freeman and Bumpers 2018, entire; Janosik and Whittaker 2018, entire). Within the Coosawattee River (F2), the lower Alabama River (C2), and the lower Tombigbee River (C1), eDNA is the only evidence of the species' presence within the period of record (1950–2019). Collecting and analyzing water samples for eDNA provides a means of rapidly surveying aquatic habitats to help identify potentially occupied sites for a species. However, uncertainty of these data revolves around the origin and fate of the individuals that shed the DNA and the length of time the eDNA persists in the environment. For the purposes of this analysis, we used eDNA data as evidence to support our conclusion that the probability of the species being present in a particular unit is greater than zero. As described above, we used occurrence data to assess resiliency. If units are known only from eDNA data, an unknown resiliency was determined since we have no occurrence information.

We assessed representation for the frecklebelly madtom as the number of resilient populations within a representation unit. Finally, we assessed frecklebelly madtom redundancy (ability of species to withstand catastrophic events) by evaluating the number and distribution of resilient populations throughout the species' range.

Current Condition of Frecklebelly Madtom

The historical range for the frecklebelly madtom includes two large river basins that enter into the Gulf of Mexico: The Pearl River Basin and the Mobile River Basin. The Pearl River Basin is in eastern Louisiana and southern Mississippi (identified as Pearl River (A) representation unit in the SSA). The Mobile River Basin consists of the Tombigbee River in eastern Mississippi and western Alabama (Upper Tombigbee (B) representation unit); the upper Alabama (Alabama

River (D) representation unit) and Cahaba Rivers (Cahaba River (E) representation unit) in central Alabama; the Etowah River (part of the Upper Coosa River (F) representation unit) in northern Georgia; and the Conasauga River (part of the Upper Coosa River (F) representation unit) in northern Georgia and southeastern Tennessee. Historically, the species was likely more widespread in the Mobile Bay drainage but was extirpated from large river habitats after the creation of numerous impoundments, and thus, the species' current representation has been reduced from historical levels. Currently, the species is known to be extant in four (Pearl River (A), Upper Tombigbee River (B), Cahaba River (E), and Upper Coosa River (F)) of the six representation units.

Within the Pearl River (A) representation unit, there are two resilience units (Bogue Chitto River (A1) and Pearl River (A2)) assessed to have high resiliency to stochastic events based on stable populations and complex range geometry with 15 occupied streams in the Pearl River. In addition, recent surveys (2009–2019) observed frecklebelly madtom at 83 percent of known historical sites (*i.e.,* any site in which the species was previously observed) (Wagner *et al.* 2018, entire; Service 2020, p. 59).

Within the Upper Tombigbee River (B) representation unit, there is one resilience unit (Buttahatchee River (B4)) assessed to have high resiliency, three (East Fork Tombigbee River (B1), Sipsey River (B2), and Luxapallila Creek (B3)) have moderate resiliency, and two are likely extirpated (Upper Tombigbee River (B6) and Bull Mountain Creek (B5)). The Buttahatchee River (B4) unit has been identified as a stronghold of the species where it has consistently been collected in higher numbers (Shepard *et al.* 1997, p. 23, Bennett *et al.* 2008, p. 470). For the East Fork of the Tombigbee River (B1) unit, the species has recent (2009–2019) collections of more than 100 individuals per survey event (*i.e.,* occurrence) of frecklebelly madtom. However, there has been a loss of habitat, altered water quality, and loss of connectivity in the East Fork with numerous structures installed for the Tennessee-Tombigbee Waterway (Tenn-Tom Waterway) (Millican *et al.* 2006, p. 3–4). Within the Sipsey River (B2) unit, experts have indicated that the habitat is excellent with few threats and the populations appear stable, albeit few records for them exist (Shepard *et al.* 1997, pp. 9, 23). Frecklebelly madtom persists in Luxapallila Creek (B3) with stable populations and recent (2009–2019) collections of almost 100 individuals per survey event (*i.e.,* occurrence).

Historically, the mainstem of the upper Tombigbee River (mainstem, B6) unit was considered to support robust populations of the frecklebelly madtom with some sites producing single collections of over 300 individuals during the assessment period from 1950–1987 (Bennet *et al.* 2008, p. 466; Service 2020, p. 49). However, the construction of the Tenn-Tom Waterway, a canal system that connects the Tombigbee River to the Tennessee River for commercial navigation, eliminated the suitable gravel-cobble habitat for the species (Shepard *et al.* 1997, p. 4). Despite fish assemblage surveys undertaken since the construction of the waterway (*e.g.,* Millican *et al.* 2006, entire), observations of the species cease in the mainstem of the upper Tombigbee River (B6) after 1980 (Bennett *et al.* 2008, p. 466), thus supporting the species' likely extirpation from this formerly occupied habitat. The frecklebelly madtom has not been observed in the Bull Mountain Creek (B5) unit since 1978–1987 assessment period; this unit was also drastically altered by the construction of the Tenn-Tom Waterway and is currently bisected by the canal system (Millican *et al.* 2006, p. 3). The habitat lost from this major construction and engineering activity has likely caused the extirpation of the frecklebelly madtom in the upper Tombigbee River (B6) (Millican *et al.* 2006 p. 84; Shepard 2004, p. 221; Bennett *et al.* 2008, p. 467) and Bull Mountain Creek (B5) (Shepard 2004, p. 221) resilience units.

Within the Lower Tombigbee/Alabama Rivers (C) representation unit, there are two resilience units (Lower Tombigbee River (C1) and Lower Alabama River (C2)) assessed to have unknown resiliency. There are no traditional occurrence data of this species for either resilience unit; however, eDNA of frecklebelly madtom was found in both units (Janosik and Whittaker 2018, p. 7).

Within the Alabama River (D) representation unit, there is one resilience unit (Alabama River (D1)) assessed to be likely extirpated. Following the construction of the Miller's Ferry Lock and Dam and Claiborne Dam in the late 1960s, there have been no occurrences of this species in the Alabama River (D1) unit, despite efforts to locate the species (Shepherd *et al.* 1997, p. 18).

Within the Cahaba River (E) representation unit, one resilience unit (Cahaba River (E1)) was estimated to have moderate resiliency to stochastic events. The Cahaba River system is believed to be a stronghold for the species (Neely 2018, p. 11) where it appears to be abundant (Bennet *et al.* 2008, p. 467). The Alabama River-Big Swamp Creek (E2) resilience unit is likely extirpated; no observations have been made of this species in the unit since the late 1960s after the construction of Miller's Ferry Lock and Dam and Claiborne Dam despite efforts to locate the species (Shepherd *et al.* 1997, p. 18; Bennet *et al.* 2008, p. 464).

Within the Coosa River (F) representation unit, one resilience unit (Conasauga River (F1)) was estimated to have low resiliency, one with moderate resiliency (Etowah River (F3)), and one with unknown resiliency (Coosawattee River (F2)). In the Conasauga River (F1), fish assemblage and abundance from the 1990s–2000s documented declines in several fish species, including the frecklebelly madtom, and after 2000, the frecklebelly madtom was no longer detected in fish surveys (Freeman *et al.* 2003, pp. 569–570; Bennett *et al.* 2008 p. 466). These surveys indicate a reduced resiliency in the Conasauga River (F1), because the best available occurrence data present a transition from a measurable population of the frecklebelly madtom to an unmeasurable one. Despite a 20-year lapse since the last observation of the frecklebelly madtom, the current presence of the species in the Conasauga River (F1) is supported by eDNA that was collected in 2017 and 2018 (Freeman and Bumper 2018, entire), as described above. Furthermore, the Conasauga River (F1) has not experienced the same type of habitat modifications as other rivers that have caused localized extirpation of the species (dams, impoundments, and channelization), and the species has been observed more recently in river surveys than in river sections where it is considered extirpated. Therefore, we determined that the species remains present in the Conasauga River but with low resiliency to stochastic events, as estimated from the occurrence data. Within the Etowah River (F3), frecklebelly madtom populations appear stable, albeit at lower levels of abundance, as the patterns of occurrence in the most recent time period is similar to time periods prior to 1998. There are no historical occurrence data or direct observations of the species from the Coosawattee River (F2) resilience unit. Environmental DNA for the frecklebelly madtom was found in portions of this unit (Freeman and Bumpers 2018, p. 9); therefore, we assessed this unit as having an unknown resiliency.

Overall, the frecklebelly madtom was assessed to have three units with high resiliency, five units with moderate resiliency, one unit with low resiliency, three units with unknown resiliency (eDNA only), and four units that are likely extirpated.

For species' redundancy, we assessed the number and distribution of resilient populations across the frecklebelly madtom's range, and we considered catastrophic events that could impact frecklebelly madtom. Catastrophic events may include chemical spills, large and rapid changes in upstream land use that alter stream characteristics and water quality downstream, new impoundments or other engineered devices that alter natural hydrological processes, and potential effects of climate change, such as drought and increases in occurrence of flash flooding events. Given the broad distribution of extant resilience units and several units assessed as having moderate to high resiliency, it is unlikely that a catastrophic event would impact the entire species' range. Therefore, the frecklebelly madtom exhibits a moderate to high degree of redundancy and that level of redundancy has remained relatively stable over time.

Risk Factors for Frecklebelly Madtom

We reviewed the potential risk factors (see discussion of section 4(a)(1) of the Act, above) that are affecting the frecklebelly madtom now and are expected to affect it into the future. We have determined that habitat destruction and degradation caused by agriculture and development resulting in poor water quality (Factor A) pose the largest risk to the current and future viability of the frecklebelly madtom. Other potential stressors to the species are habitat degradation resulting from channelization, dams, and impoundments (Factor A) and climate change (Factor E). We find the species does not face significant threats from overutilization (Factor B), disease or predation (Factor C), or invasive species (Factor E). We also reviewed the conservation efforts being undertaken for the habitat in which the frecklebelly madtom occurs. A brief summary of relevant stressors is presented below; for a full description, refer to chapter 4 of the SSA report (Service 2020, entire).

Water Quality

The frecklebelly madtom, like other benthic aquatic species, is sensitive to poor water quality (Warren *et al.* 1997, p. 125) and needs clean, flowing water to survive; thus water quality degradation is considered a threat to the species. Changes in water chemistry and flow patterns, resulting in a decrease in water quality and quantity have detrimental effects on madtoms, because they can render aquatic habitat unsuitable for occupancy.

Inputs of point (discharge from particular pipes) and nonpoint (diffuse land surface runoff) source pollution across the frecklebelly madtom range are numerous and widespread. Point source pollution can be generated from inadequately treated effluent from industrial plants, sanitary landfills, sewage treatment plants, active surface mining, drain fields from individual private homes, and others (Service 2000, pp. 14–15). Nonpoint pollution originates from agricultural activities, poultry and cattle feedlots, abandoned mine runoff, construction, failing septic tanks, and contaminated runoff from urban areas (Deutsch *et al.* 1990, entire; Service 2000, pp. 14–15). These sources contribute pollution to streams via sediments, heavy metals, fertilizers, herbicides, pesticides, animal wastes, septic tank and gray water leakage, and oils and greases. Water quality and native aquatic fauna decline as a result of this pollution through nitrification, decreases in dissolved oxygen concentration, increases in acidity and conductivity, or direct introduction of toxicants. These alterations likely have direct (*e.g.,* decreased survival and/or reproduction) and indirect (*e.g.,* loss, degradation, and fragmentation of habitat) effects. For some aquatic species, including the frecklebelly madtom, submergent vegetation provides critical spawning habitat for adults, refugia from predators, and habitat for prey of all life stages (Jude and Pappas 1992, pp. 666–667, Freeman *et al.* 2003, p. 54). Degraded water quality and the high algal biomass that result from pollutant inputs cause loss of these critical submergent plant species (Chow–Fraser *et al.*1998, pp. 38–39) that are vital habitat for the frecklebelly madtom.

The frecklebelly madtom is intolerant to sedimentation (Shepard 2004, p. 221; MMNS 2014, p. 35), and sedimentation is a concern throughout the species' range. Researchers have documented a negative relationship between occurrence of the frecklebelly madtom and human-induced increases of sediment within the upper Tombigbee River (mainstem), Alabama River, Cahaba River, Luxapallila Creek, Etowah River, and Conasauga River (Burkhead *et al.* 1997, pp. 406–413; Shepherd *et al.* 1997, pp. 15–19; Freeman *et al.* 2002, pp. 18–19; Freemen *et al.* 2017, pp. 429–430). Human-induced increases in sediment are likely a factor in local declines of the species. In addition, the frecklebelly madtom's habitat requirements make it vulnerable to activities that disturb substrate integrity. The species is restricted to habitat with pea-sized gravel, cobble, or slab-rock substrates not embedded in large amounts of silt (Bennett *et al.* 2008, p. 467; Bennett and Kuhajda. 2010, p. 510), although it has also been found to occupy some stable streams with a sandy yet stable substrate. Degradation from sedimentation, physical habitat disturbance, and contaminants threaten the habitat and water quality on which the frecklebelly madtom depends. Sedimentation from an array of land uses (*e.g.,* urbanization, agriculture, channel maintenance activities) could negatively affect the species by reducing growth rates, disease tolerance, and gill function; reducing spawning habitat, reproductive success, and egg (embryo), larva, and juvenile development; reducing food availability through reductions in prey; reducing foraging efficiency; and reducing shelter.

A wide range of current activities and land uses, including agricultural practices, construction, stormwater runoff, unpaved roads, poor forest management, utility crossings, and mining, can lead to excessive sedimentation within streams. Fine sediments not only smother streams during current ongoing activities, historical land use practices may have substantially altered hydrological and geological processes such that sediments continue to be input into streams for several decades after those activities cease (Harding *et al.* 1998, p. 14846).

Water quality for frecklebelly madtom is particularly impacted by three processes: Channel modification (*i.e.,* dredging and channelization), agriculture, and development, which are further discussed below.

Channel Modification

Dredging and channelization have led to loss of aquatic habitat in the Southeast (Neves *et al.* 1997, p. 71). Dredging and channelization projects are extensive throughout the region for flood control, navigation, sand and gravel mining, and conversion of wetlands into croplands (Neves *et al.* 1997, p. 71; Herrig and Shute 2002, pp. 542–543). Dredging and channelization modify and destroy habitat for aquatic species by destabilizing the substrate, increasing erosion and siltation, removing woody debris, decreasing habitat heterogeneity, and stirring up contaminants that settle onto the substrate (Williams *et al.* 1993, pp. 7–8; Buckner *et al.* 2002, entire; Bennett *et*

al. 2008, pp. 467–468). Channelization can also lead to head cutting (an erosional process in a stream channel with a vertical cut or drop that migrates upstream over time), which causes further erosion and sedimentation (Hartfield 1993, pp. 131–141). Dredging can involve snagging (the removal of woody debris from the channel), which not only contributes to destabilization of the channel but also removes the woody debris that provides important cover and nest locations for many fish species, including the frecklebelly madtom (Bennett *et al.* 2008, pp. 467–468).

The frecklebelly madtom was eliminated from much of the mainstem of the Tombigbee River after the construction of the Tenn-Tom Waterway. Tributaries to the upper Tombigbee River have also been affected by channel modification of the Tenn-Tom Waterway due to head cutting and other geomorphic and flow modifications (Raborn and Schramm 2003, pp. 289–301; Roberts *et al.* 2007, pp. 250–256; Tipton *et al.* 2004, pp. 49–61), and fewer tributaries currently maintain the habitat needed by the frecklebelly madtom in this system (Millican *et al.* 2006, p. 84; Shepard 2004, pp. 220–222; Shepard *et al.* 1997, pp. 3–4). Similarly, channel geomorphology and substrate are likely being affected by head cutting due to impoundment of the Alabama River (Bennett *et al.* 2008, p. 468).

Alternatively, frecklebelly madtom abundances have remained stable in the Cahaba River throughout the modification periods that affected surrounding drainages. The Cahaba River, Conasauga River, and some tributaries to the upper Tombigbee River are the only remaining waters within the range of the frecklebelly madtom that have escaped large-scale human modification through damming or channelization (Bennet *et al.* 2008, p. 468).

Agriculture

Agricultural practices such as traditional farming, feedlot operations, and associated land use practices can contribute pollutants to rivers. These practices can also degrade habitat by eroding stream banks, which results in alterations to stream hydrology and geomorphology. Nutrients, bacteria, pesticides, and other organic compounds are generally found in higher concentrations in agricultural areas rather than forested areas. Contaminants associated with agriculture (*e.g.,* fertilizers, pesticides, herbicides, and animal waste) can degrade water quality and negatively impact instream habitats by causing oxygen deficiencies, excess nutrification, and excessive algal growths, which can have a direct impact on fish community composition (Petersen *et al.* 1999, p. 6).

Areas within the current range of the frecklebelly madtom, which are predominantly agricultural, are impacted by nonpoint source sediment and agrochemical discharges altering the physical and chemical characteristics of its habitat, thus potentially impeding its ability to feed, seek shelter from predators, and successfully reproduce. A negative relationship between the species and nonpoint source stressors attributed to agriculture has been described particularly within the Conasauga River (Freeman *et al.* 2017, pp. 429–430). Over the past two decades, an increase in the use of agricultural chemicals and practices, such as use of glyphosate-based herbicides for weed control and land dispersion of animal waste for soil amendment, has corresponded with marked declines in populations of fish and mussel species in the Upper Conasauga River watershed in Georgia and Tennessee (Freeman *et al.* 2017, p. 429). Nutrient enrichment of streams was found to be widespread with high levels of nitrate and phosphorus (reported at over 5 milligrams per liter and over 300 micrograms per liter, respectively, within the Conasauga River) likely associated with eutrophication, and hormone concentrations in sediments were often above those shown to cause endocrine disruption in fish, which was possibly related to the widespread application of poultry litter and manure (Lasier *et al.* 2016, entire). Estrogens, a hormone and type of endocrine disruptor that can be found in poultry litter, also have been identified as a threat to aquatic fauna in the Conasauga River system (Jacobs 2015, entire). Increased levels of estrogens can lead to decreases in spawning success and potentially population collapse within short timeframes (Kidd *et al.* 2007, p. 8899). Aquatic species declines observed in the Conasauga watershed may be at least partially due to hormones, as well as excess nutrients, herbicides, and surfactants (Freeman *et al.* 2017, p. 429).

The amount (acreage) of agricultural land is declining across the eastern United States with a net loss of 6.5 percent between 1973 and 2000 (Sayler *et al.* 2016, p. 12). As discussed below under *Future Scenarios,* within the watersheds in which frecklebelly madtom occurs, the declining trend of agricultural land is consistent with broader trends in the eastern United States showing agricultural land declines with time (Sayler *et al.* 2016, p. 12). These agricultural lands are mostly being converted to developed and forested lands (Sayler *et al.* 2016, p. 12). Despite the declining trend, agricultural practices leading to poor water quality conditions currently influence and will continue to influence the viability of frecklebelly madtom across its range.

Development

Development is a significant source of water quality degradation that can reduce the survival of aquatic organisms, including the frecklebelly madtom. Urban development can stress aquatic systems in a variety of ways, including increasing the frequency and magnitude of high flows in streams; increasing sedimentation and nutrient loads; increasing contaminants and toxicity; decreasing the diversity of fish, aquatic insects, plants, and amphibians; and changing stream morphology and water chemistry (Coles *et al.* 2012, entire; CWP 2003; entire). Sources and risks of an acute or catastrophic contamination event, such as a leak from an underground storage tank or a hazardous materials spill on a highway, increase as urbanization increases.

Urbanization has also been shown to impair stream quality by impacting riparian health (Diamond *et al.* 2002, p. 1150). Riparian impairment resulting from urbanization or agricultural land use can amplify negative effects of nonpoint source pollution within the watershed as well as impact stream quality independent of land use within the watershed. Impacts from impervious cover can be mitigated through riparian forest cover and good riparian health (Roy *et al.* 2005, p. 2318; Walsh *et al.* 2007, entire); however, the benefit of the riparian cover diminishes when impervious cover (*i.e.,* urban cover) exceeds approximately 10 percent within the watershed (Booth and Jackson 1997, p. 1084; Goetz *et al.* 2003, p. 205).

Currently, larger population centers, such as the cities of Atlanta, Georgia, Jackson, Mississippi, and Birmingham, Alabama, contribute substantial runoff to the watersheds occupied by the frecklebelly madtom. In the future, urbanization is predicted to increase in several areas across the range of the frecklebelly madtom (see below under *Future Scenarios*). All watersheds, but especially the Etowah River watershed, upstream of Lake Allatoona in Georgia are expected to experience additional urbanization (Albanese *et al.* 2018, p. 39). Conservation concerns in the Etowah River watershed have focused on potential effects of this predicted urban growth on imperiled fishes

(Burkhead *et al.* 1997, pp. 959–968; Wenger *et al.* 2010, pp. 11–21), and previous analyses show negative correlations between occurrence of native fishes and increases in impervious cover associated with urban development (Wenger *et al.* 2008, p. 1260). In the Etowah Basin in Georgia, models indicated that urbanization lowered fish species richness and density and led to predictable changes in species composition. Darters, sculpin, minnows, and endemic species declined along the urban gradient, whereas sunfishes persisted and became the dominant group (Walters *et al.* 2005, pp. 10–11). In the future, we anticipate increased development to amplify as a population-level factor influencing the viability of frecklebelly madtom.

Impoundments

Impoundment of rivers is a stressor to aquatic species in the southeast (Benz and Collins 1997, pp. 22–23, 63, 91, 205, 273, 291, 397, 399, 401–406, 446; Buckner *et al.* 2002, pp. 10–11). Dams modify habitat conditions and aquatic communities both upstream and downstream of an impoundment (Winston *et al.* 1991, pp. 103–104; Mulholland and Lenat 1992, pp. 193–231; Soballe *et al.* 1992, pp. 421–474). Upstream of dams, habitat is flooded and in-channel conditions change from flowing to still water, with increased depth, decreased levels of dissolved oxygen, and increased sedimentation. Sedimentation alters substrate conditions by filling in interstitial spaces between rocks, which provide habitat for many species (Neves *et al.* 1997, pp. 63–64), including the frecklebelly madtom. Downstream of dams, flow regime fluctuates with resulting fluctuations in water temperature and dissolved oxygen levels, the substrate is scoured, and downstream tributaries are eroded (Neves *et al.* 1997, pp. 63–64; Schuster 1997, p. 273; Buckner *et al.* 2002, p. 11). Negative ''tailwater'' effects on habitat can extend many kilometers downstream (Neves *et al.* 1997, p. 63). Dams fragment habitat for aquatic species by blocking corridors for migration and dispersal, resulting in population isolation and heightened susceptibility to extinction (Neves *et al.* 1997, p. 63). Dams also preclude the ability of aquatic organisms to escape from polluted waters and accidental spills (Buckner *et al.* 2002, p. 10).

Damming of streams and springs is also extensive throughout the Southeast and occurs within the large river habitats of the frecklebelly madtom (Etnier 1997, pp. 88–89; Morse *et al.* 1997, pp. 22–23; Shute *et al.* 1997, pp. 458–459, Bennett *et al.* 2008, p. 467). Many streams have both small ponds in their headwaters and large reservoirs in their lower reaches (Morse *et al.* 1997, p. 23). Small streams on private lands are regularly dammed to create ponds for cattle, irrigation, recreation, and fishing, with significant ecological effects due to the sheer abundance of these structures (Morse *et al.* 1997, pp. 22–23). In addition, small headwater streams are increasingly being dammed in the Southeast to supply water for municipalities (Buckner *et al.* 2002, p. 11).

Dams are known to have caused the extirpation and extinction of many southeastern species, and existing and proposed dams pose an ongoing threat to many aquatic species (Folkerts 1997, p. 11; Neves *et al.* 1997, p. 63; Riciarddi and Rasmussen 1999, p. 1222; Service 2000, p. 15; Buckner *et al.* 2002, p. 11, Olden 2016, pp. 112–122), including the frecklebelly madtom. The construction of 10 lock and dam structures on the Tenn-Tom Waterway, which artificially connects the Tennessee River to the Gulf of Mexico, led to the extirpation of many species, including the frecklebelly madtom, from the main river channel (Bennett *et al.* 2008, p. 467). The frecklebelly madtom is considered extirpated from the Alabama River, likely due to the construction of three dams in the late 1960s and early 1970s (Bennett *et al.* 2008, p. 467). In addition, the construction of one dam on the Etowah River may have affected the frecklebelly madtom, since the species is dependent on large-river gravel shoal substrate (Bennett *et al.* 2008, p. 470). As discussed above in *Current Condition of Frecklebelly Madtom,* four resilience units are likely extirpated as a result of dam construction and large scale river modifications.

Climate Change

In the southeastern United States, several climate change models have projected more frequent drought, more extreme heat (resulting in increases in air and water temperatures), increased heavy precipitation events (*e.g.,* flooding), more intense storms (*e.g.,* frequency of major hurricanes increases), and rising sea level and accompanying storm surge (IPCC 2013, entire). When taking into account future climate projections for temperature and precipitation where the frecklebelly madtom occurs, warming is expected to be greatest in the summer, which is predicted to increase drought frequency. Nevertheless, annual mean precipitation is expected to increase slightly, leading to a slight increase in flooding events (Alder and Hostetler 2013, unpaginated; IPCC 2013, entire; USGS 2020, unpaginated). Changes in climate may affect ecosystem processes and communities by altering the abiotic conditions experienced by biotic assemblages, resulting in potential effects on community composition and individual species interactions (DeWan *et al.* 2010, p. 7).

The frequency, duration, and intensity of droughts are likely to increase in the southeastern United States as a result of global climate change (Konrad *et al.* 2013, p. 34), which could negatively affect stream flows in the region. Stream flow is strongly correlated with important physical and chemical parameters that limit the distribution and abundance of riverine species (Power *et al.* 1995, entire; Resh *et al.* 1988, pp. 438–439) and regulates the ecological integrity of flowing water systems (Poff *et al.* 1997, p. 770).

To understand how climate change is projected to affect where frecklebelly madtom occurs, we used the National Climate Change Viewer (NCCV), a climate-visualization tool developed by the U.S. Geological Survey (USGS), to generate future climate projections across the range of the species. The NCCV is a web-based tool for visualizing and assessing projected changes in climate and water balance at watershed, State, and county scales (USGS 2020, unpaginated). To evaluate the effects of climate change in the future, we used projections from Representative Concentration Pathway (RCP) 4.5 and RCP 8.5 to characterize projected future changes in climate and water resources, averaged for the South-Atlantic Gulf Region encompassing the range of the frecklebelly madtom (Service 2020, pp. 27–31). The projections estimate changes in mean annual values for maximum air temperature, minimum air temperature, monthly precipitation, and monthly runoff, among other factors, from historical (1981–2010) to future (2050–2074) time series.

Within the range of the frecklebelly madtom, the NCCV projects that, under the RCP 4.5 scenario, maximum air temperature will increase by 1.9 degrees Celsius (°C) (3.4 degrees Fahrenheit (°F)), minimum air temperature will increase by 1.8 °C (3.2 °F), precipitation will increase by 5.36 millimeters (0.2 inches) per month, and runoff will remain the same in the 2050–2074 time period (USGS 2020, unpaginated). Under the more extreme RCP 8.5 scenario, the NCCV projects that maximum air temperature will increase by 2.8 degrees Celsius (°C) (5 degrees Fahrenheit (°F)), minimum air

temperature will increase by 2.7 °C (4.9 °F), precipitation will increase by 5.36 millimeter (0.2 inches) per month, and runoff will remain the same in the 2050–2074 time period (USGS 2020, unpaginated). These estimates indicate that, despite projected minimal increases in annual precipitation, anticipated increases in maximum and minimum air temperatures will likely offset those gains. Based on these projections, the frecklebelly madtom will on average be exposed to increased air temperatures across its range, despite limited increases in precipitation; however, these projections are not a one-to-one air to stream water temperature comparison.

Despite the recognition of climate effects on ecosystem processes, there is uncertainty within each model and model ensembles about what the exact climate future will be, and there is uncertainty in how the ecosystems and species will respond. Although there are several potential risks associated with long-term climate change as described above, there is uncertainty regarding how the frecklebelly madtom will respond to these risks. The species occupies some tributaries throughout its range, but the frecklebelly madtom has a preference for habitat in larger rivers and this may provide a buffer to changes induced by climate change, particularly from issues associated with drought. Therefore, we do not consider climate change to be a primary risk factor for the species at this time.

Conservation Efforts

The frecklebelly madtom is recognized as a species of concern in all States where it occurs and is protected by State statute in four States where it occurs. This species is listed as endangered by the State of Georgia (GADNR 2015, p. 74), endangered by the State of Mississippi (Mississippi Museum of Natural Science 2015, p. 36), and threatened by the State of Tennessee (TWRA 2015, Appendix C). In Alabama, the frecklebelly madtom is designated as a protected nongame species under Alabama Code 220–2–.92. In general, the protections accorded to the frecklebelly madtom by Mississippi, Alabama, Georgia, and Tennessee prohibit direct exploitation of the species without a permit within those States.

Beginning in 2017, the Private John Allen National Fish Hatchery partnered with the Mississippi Department of Wildlife Fisheries and Parks to collect individuals of the frecklebelly madtom within that State to study marking techniques, establish captive husbandry methods, and conduct life-history studies. This effort has led to successful propagation of the species, documented important components of the species' life history, and collected data that can be used to develop long-term, captive-propagation efforts, although no individuals have been released.

Throughout the range of the species, portions of occupied rivers and surrounding lands are owned and managed by State and Federal entities that prioritize conservation as a management objective. Generally, these entities help to maintain the natural ecosystem functioning of a river by managing terrestrial areas in a more natural state and limiting disturbance adjacent to rivers. However, properties managed by the Service, U.S. Forest Service, and the Dawson Forest Wildlife Management Area (WMA) managed by the Georgia Department of Natural Resources, are known to specifically consider and manage for the conservation of aquatic species and their habitats. It is expected that the frecklebelly madtom will be positively affected by management on these lands. These conservation lands and the adjacent rivers occupied by the frecklebelly madtom include: Portions of the Bogue Chitto and Pearl Rivers within the Bogue Chitto National Wildlife Refuge (NWR, Service) in Louisiana; portions of the Bogue Chitto River within Bogue Chitto State Park (Louisiana Department of Culture, Recreation, and Tourism) in Louisiana; portions of the Pearl River within the Pearl River WMA (Louisiana Department of Wildlife and Fisheries) in Louisiana; portions of the Cahaba River within the Cahaba NWR (Service) in Alabama; portions of the Conasauga River within the Cherokee National Forest (U.S. Department of Agriculture (USDA) U.S. Forest Service) in Georgia; and portions of the Etowah River within the Dawson Forest WMA (Georgia Department of Natural Resources) in Georgia. In addition, the Etowah River catchment area upstream of habitat occupied by the frecklebelly madtom and managed by the Chattahoochee-Oconee National Forest (USDA U.S. Forest Service) is expected to benefit the species by providing good water quality to lower river reaches.

The Natural Resources Conservation Service (NRCS), USDA, designated the Conasauga River as a Working Lands for Wildlife (WLFW) landscape in 2017 (USDA 2020, unpaginated) and will provide additional funds and human-power to improve water quality and aquatic habitat in the watershed. The project will provide technical and financial assistance to help landowners improve water quality and help producers plan and implement a variety of conservation activities or practices that benefit aquatic species. The frecklebelly madtom will likely benefit from water quality improvements in portions of the Conasauga River that are affected by agricultural practices implemented through the WLFW project.

Synergistic and Cumulative Effects

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and primary threats cumulatively. Our current and future condition (see below) assessment is iterative, because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

In addition to impacting frecklebelly madtom individually, it is possible that several of the above summarized risk factors are acting synergistically or cumulatively on the species. The combined impact of multiple stressors is likely more harmful than a single stressor acting alone. The dual stressors of climate change and direct human impact have the potential to affect aquatic ecosystems by altering stream flows and nutrient cycles, eliminating habitats, and changing community structure (Moore *et al.* 1997, p. 942). Increased water temperatures and a reduction in stream flow are the climate change effects that are most likely to affect stream communities (Poff 1997, entire), and each of these variables is strongly influenced by land use patterns. For example, in agricultural areas, lower precipitation may trigger increased irrigation resulting in reduced stream flow (Backlund *et al.* 2008, pp. 42–43). In forested areas, trees influence instream temperatures through the direct effects of shading. Reductions in temperature by vegetative cover may be particularly important in low-order streams, where canopy vegetation significantly reduces the magnitude and

variation of the stream temperature compared with that of clear-cut areas (Ringler and Hall, 1975, pp. 111–121).

Future Scenarios

To evaluate the future viability of the frecklebelly madtom and address uncertainty associated with the degree and extent of potential future stressors and their impacts to the madtom, we analyzed three future scenarios and assessed the resiliency, representation, and redundancy of the madtom for each scenario. We devised these scenarios by identifying information on the following primary threats that are anticipated to affect the frecklebelly madtom in the future: Agriculture and developed land use. We considered projected changes in agricultural and developed land uses in assessing future resiliency of each resilience unit for frecklebelly madtom. We assessed these land uses to understand the future impacts to habitat degradation and destruction resulting from poor water quality, a primary threat to frecklebelly madtom. The three scenarios capture the range of variability in the changing human population footprint on the landscape and how frecklebelly madtom populations will respond to these changing conditions. All three scenarios were projected out to the year 2050 (*i.e.,* 30 years), because we were reasonably certain we could forecast patterns in land-use change and understand how these land uses will interact with the frecklebelly madtom and its habitat over this time period given the species' life span.

In our development of future scenarios, we used projected trends in land use change from two models, the National Land Cover Database (NLCD) and the Slope, Land use, Excluded, Urban, Transportation and Hillshade (SLEUTH) model (Jantz *et al.* 2010, entire). Future projections for agricultural land use were developed from NLCD data by calculating a 15-year trend in agricultural land use change between 2001 and 2016 for each resilience unit and converting that to an annual rate of agricultural land use change for each resilience unit. We used the annual rate of agricultural land use change to project changes to 30 years from the present. The annual rate of agricultural land use change was held constant for each resilience unit across all scenarios; however, the rate of change in agricultural area varied among the resilience units we evaluated in our analysis. With the exception of the Alabama River resilience unit, which has an increase in the amount of agricultural land use over time, we found an overall decline in the amount of land used for agriculture. This result is consistent with broader trends that show the amount of agricultural land is declining with time in the eastern United States (Sayler *et al.* 2016, p. 12).

For our future developed land use projections, we used the SLEUTH datasets from the year 2050 (closest to 30 years in the future) and examined development across resilience units. We then developed three scenarios that varied development probabilities: (1) Low development, (2) moderate development, and (3) high development. For the low development scenario, we considered all areas predicted to be developed at a greater than 90 percent probability (*i.e.,* only including areas that are almost certain to be developed); the moderate development scenario considered all areas to be developed at a greater than 50 percent probability; and the high development scenario considered all areas to be developed at a greater than 10 percent probability (*i.e.,* including the majority of areas with any potential to be developed). The results of the future projections for agriculture and developed land use were used to estimate a composite land use score, and then using a rule set, we categorized future resiliency into high, moderate, low, unknown, or likely extirpated conditions.

In the low development scenario, the frecklebelly madtom was projected to have one unit with high resiliency, seven units with moderate resiliency, one unit with low resiliency, and four units that are likely extirpated (see table 2, below). In terms of projected change from current condition, the Buttahatchee River (B4) and Pearl River (A2) resilience units are projected to decrease in resiliency from high to moderate. The Etowah River (F3) resilience unit is projected to become more developed, although the percent of developed land does not reach a point where a change in resiliency is anticipated. All other units are projected to retain their current resiliency under the low development scenario.

TABLE 2—FUTURE RESILIENCY OF FRECKLEBELLY MADTOM RESILIENCE UNITS UNDER THREE FUTURE SCENARIOS

Representation units	Resilience units	Current	Scenario 1	Scenario 2	Scenario 3
Pearl River (A)	Bogue Chitto River (A1)	High	High	High	High.
	Pearl River (A2)	High	Moderate	Moderate	Moderate.
Upper Tombigbee River (B)	East Fork Tombigbee (B1)	Moderate	Moderate	Moderate	Moderate.
	Sipsey River (B2)	Moderate	Moderate	Moderate	Moderate.
	Luxapallila Creek (B3)	Moderate	Moderate	Moderate	Moderate.
	Buttahatchee River (B4)	High	Moderate	Moderate	Moderate.
	Bull Mountain Creek (B5)	Likely Extirpated	Likely Extirpated	Likely Extirpated	Likely Extirpated.
	Upper Tombigbee River (mainstem) (B6).	Likely Extirpated	Likely Extirpated	Likely Extirpated	Likely Extirpated.
Lower Tombigbee/Alabama Rivers (C)	Lower Tombigbee River (C1)	Unknown*	Unknown*	Unknown*	Unknown.*
	Lower Alabama River (C2)	Unknown*	Unknown*	Unknown*	Unknown.*
Alabama River (D)	Alabama River (D1)	Likely Extirpated	Likely Extirpated	Likely Extirpated	Likely Extirpated.
Cahaba River (E)	Cahaba River (E1)	Moderate	Moderate	Moderate	Moderate.
	Alabama River/Big Swamp (E2)	Likely Extirpated	Likely Extirpated	Likely Extirpated	Likely Extirpated.
Upper Coosa River (F)	Conasauga River (F1)	Low	Low	Low	Likely Extirpated.
	Coosawattee River (F2)	Unknown*	Unknown*	Unknown*	Unknown.*
	Etowah River (F3)	Moderate	Moderate	Low	Low.

* Resiliency determined as unknown since units are known only from eDNA data.

In the moderate development scenario, the frecklebelly madtom was projected to have one unit with high resiliency, six units with moderate resiliency, two units with low resiliency, and four units that are likely extirpated (see table 2, above). In terms of projected change from current condition, the Buttahatchee River (B4) and Pearl River (A2) resilience units are projected to decrease in resiliency from high to moderate. The Etowah River (F3) resilience unit is projected to become substantially more developed under this scenario, and, therefore, this unit is projected to decrease in resiliency from moderate to low. All other units are projected to retain their current resiliency.

In the high development scenario, the frecklebelly madtom was projected to

have one unit with high resiliency, six units with moderate resiliency, one unit with low resiliency, and five units that are likely extirpated (see table 2, above). In terms of projected change from current condition, the Buttahatchee River (B4) and Pearl River (A2) resilience units are projected to decrease in resiliency from high to moderate. The Etowah River (F3) resilience unit is projected to become substantially more developed under this scenario; therefore, this unit is projected to decrease in resiliency from moderate to low. The Conasauga River (F1) resilience unit is projected to decrease in resiliency from low to being likely extirpated as a result of high levels of both agriculture and developed land uses. All other units are projected to retain their current resiliency.

In summary, the resiliency of frecklebelly madtom resilience units are projected to remain similar to the current condition with eight units having moderate to high resiliency under the low development scenario (Service 2020, entire). In the moderate and high development scenarios, seven units are projected to have moderate to high resiliency; two units are projected to have low resiliency (one unit is low under current condition) in the moderate development scenario and one additional unit is projected to be likely extirpated (total of five units) in the high development scenario. The Pearl River (A) representation unit continues to be the stronghold for the species, as resiliency is projected to remain high in the Bogue Chitto (A1) resilience unit across all scenarios and the Pearl River (A2) resilience unit is projected to have moderate resiliency across all scenarios. All extant resilience units in the Upper Tombigbee (B) representation unit are projected to have moderate resiliency. The Cahaba River (E1) resilience unit is projected to maintain moderate resiliency into the future.

Within the Upper Coosa River (F) representation unit, the Etowah River (F3) resilience unit is projected to become more developed by 2050 under all scenarios; therefore, in the moderate and high development scenarios, the resiliency is projected to decrease from moderate to low, making the unit more vulnerable to stochastic events. The high level of development projected within riparian areas of the Etowah River (F3) unit will lead to an increase in impervious area, which could lead to further decreases in water quality and impact the persistence of frecklebelly madtom. In addition, although the agricultural trend projects a decrease, the amount of land in agricultural use is still projected to remain relatively high. High levels of agriculture and developed land use projections in this unit drive the projected low resiliency by the year 2050. In the Conasauga River (F1) resilience unit, developed land use under the high development scenario is projected to increase, and agriculture and developed land use are projected to be at relatively high levels by 2050. However, the Conasauga River (F1) resilience unit currently has low resiliency, and this projected increase in development is anticipated to further impact resiliency, resulting in likely extirpation of the frecklebelly madtom from this unit.

Finally, the presence of frecklebelly madtom in the Lower Tombigbee River (C1), Lower Alabama River (C2), and Coosawattee River (F2) resilience units is based on recent positive eDNA samples, and these units have been assessed as having an unknown resiliency. Based on our assessment of future land use, threat levels from agriculture and developed land use are projected to be relatively low in the Lower Tombigbee (C1) and Lower Alabama (C2) resilience units. Thus, if the species is present, there is no projected increase in threats related to agriculture or developed land use. In the Coosawattee River (F2) resilience unit, there is projected to be relatively high amounts of agricultural and developed land. If the species is present there, this land use pattern could represent a threat to the individuals occupying the unit.

Future species' representation is projected to maintain current levels in the low development scenario, as the only projected changes in resiliency are two units decreasing from high to moderate resiliency. Under the moderate and high development scenarios, the Etowah River (F3) and Conasauga River (F1) units are projected to decrease in resiliency. Therefore, the Upper Coosa River (F) representation unit is projected to be vulnerable to extirpation, resulting in a loss of species' representation. Given this unit occurs in a unique physiographic province and has populations considered as an evolutionary significant unit (Neely 2018, pp. 7–10), the projected loss of this unit would result in a lower level of representation for the species.

Species redundancy is projected to maintain current levels into the future under the low and moderate development scenarios, as no additional resilience units are projected to become extirpated. In the Upper Coosa River (F) representation unit, two resilience units are projected to decrease in resiliency under the moderate and high scenarios. Therefore, frecklebelly madtom in these units are at an increased risk of extirpation from a catastrophic event. Given the broad distribution of moderate to high resilience units, it is unlikely that a catastrophic event would impact the entire species' range.

Determination of Frecklebelly Madtom's Status

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

Status Throughout All of Its Range

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the frecklebelly madtom. We considered whether the frecklebelly madtom is presently in danger of extinction. Our review of the best available information indicates there are 16 resilience units of frecklebelly madtom within 6 representation units across the known historical range in Louisiana, Mississippi, Alabama, Georgia, and Tennessee. The species was likely more widespread historically in the Mobile Bay drainage but was extirpated from large river habitats after the creation of numerous impoundments. Currently, eight resilience units (62 percent) of frecklebelly madtom have moderate to high resiliency and are contributing to the viability of the species; impacts from habitat destruction and modification do not appear to be affecting the frecklebelly madtom at the population-level for these resilience units. Five units (38 percent) have low resiliency or are likely extirpated due to habitat destruction and degradation resulting from channelization, dams, and

impoundments, and these units are not currently contributing to the frecklebelly madtom's viability. Three units have unknown resiliency as these units have no direct observations of the species and are known only from eDNA presence surveys. The species is currently extant in four of the six representation units with at least one resilience unit having moderate to high resiliency in each of the four representation units. Given the broad distribution of the species and eight units across the range having moderate to high resiliency, a single catastrophic event is not likely to impact the species as a whole. Therefore, the frecklebelly madtom across its range is currently at a low risk of extinction from habitat destruction and other stressors. Thus, we determine that proposing an endangered status for the species is not appropriate.

We forecasted the viability of the frecklebelly madtom under three plausible scenarios 30 years into the future (summarized above in *Future Scenarios*). We assessed relevant risk factors that may be acting on the frecklebelly madtom in the future and whether we could make reliable predictions about these factors and how they may impact the viability of the species. We assessed how agriculture and developed land use is projected to influence the viability of the frecklebelly madtom 30 years in the future (2050). Based on the modeling and scenarios evaluated, we considered our ability to make reliable predictions in the future and the uncertainty in how and to what degree the species could respond to those risk factors in this timeframe. Based on this information, we determine the appropriate timeframe for assessing whether this species is likely to become in danger of extinction in the foreseeable future is 30 years.

Taking into account the impacts of the primary factors influencing the species in the future (habitat destruction and degradation caused by agriculture and developed land uses resulting in poor water quality) and the potential impacts to the species' needs, we project the frecklebelly madtom will continue to remain resilient to stochastic events across much of its range. We project that numerous resilience units will have moderate to high resiliency over the next 30 years across the broad geographic range of the species, including within the four currently extant representation units, depending on scenario. Although two of our scenarios indicated a decline in the number of resilience units contributing to viability of the frecklebelly madtom, eight units in the low development scenario and seven units in the moderate and high development scenarios are projected to remain viable through 2050. With the projected lower resiliency from habitat destruction and degradation within the Upper Coosa River (F) representation unit, the species' representation and redundancy is lower than current levels. However, the geographically wide distribution of resilience and representation units guards against catastrophic losses rangewide. We find the multiple resilience units across multiple representation units provide resiliency, representation, and redundancy levels that are likely sufficient to sustain the species into the foreseeable future. Therefore, we find that the risk of extinction of the frecklebelly madtom is sufficiently low that it is unlikely to become endangered within the foreseeable future, *i.e.,* within the next 30 years.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we conclude that the risk factors acting on the frecklebelly madtom and its habitat, either singly or in combination, are not of sufficient imminence, scope, or magnitude to rise to the level to indicate that the species is in danger of extinction now (an endangered species), or likely to become endangered within the foreseeable future (a threatened species), throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. Having determined that the frecklebelly madtom is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for the frecklebelly madtom, we chose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered or threatened. We considered whether any of the threats acting on the frecklebelly madtom are geographically concentrated in any portion of the range at a biologically meaningful scale.

We identified two portions of the species' range that may be experiencing a concentration of threats. First, the Upper Tombigbee River (B) representation unit of the frecklebelly madtom may be experiencing elevated threats resulting from construction of the Tenn-Tom Waterway (Factor A). The construction of the Tenn-Tom Waterway for commercial navigation eliminated suitable habitat for the frecklebelly madtom and has caused the likely extirpation of two of six resilience units in the Upper Tombigbee River (B) representation unit: Upper Tombigbee River (B6) and Bull Mountain Creek (B5). We evaluated current status information and concluded that the species is effectively extirpated from these two resilience units. Because we considered these extirpated units to be lost historical range, they cannot be considered as a significant portion of the range. However, we considered the effects that the loss of these two units have on the current and future viability of the frecklebelly madtom in the Upper Tombigbee River (B) representation unit. We then considered the current status of the remaining four resilience units in the Upper Tombigbee River representation unit (B), which currently have moderate to high resiliency, including the Buttahatchee River (B4)—considered a stronghold for the species. In addition, the East Fork Tombigbee River (B1) resilience unit has moderate resiliency with recent collections of over 100 individuals despite some habitat impacts from the Tenn-Tom Waterway. These four units are projected to have continued moderate resiliency into the foreseeable future. Based on these facts, we conclude that the impacts from the Tenn-Tom Waterway are not having any biologically meaningful effect on the remaining four resilience units in the Upper Tombigbee River representation unit (B), which indicates the species does not have a different status in that portion of its range. Therefore, even if the Upper Tombigbee River (B) representation unit was found to

comprise a significant portion of the frecklebelly madtom's range, we conclude that the species is not in danger of extinction or likely to become so in the foreseeable future in that portion.

We identified another portion, the Upper Coosa River (F) representation unit, of the frecklebelly madtom's range that is experiencing a concentration of the following threat, but at a biologically meaningful scale: Habitat destruction and degradation from agriculture and developed land uses resulting in poor water quality (Factor A). Currently, within the Upper Coosa River (F) representation unit, two resilience units (Conasauga River (F1) and Etowah River (F3)) have low and moderate resiliency, respectively; the Coosawattee (F2) resilience unit was determined to have an unknown resiliency as the species was not historically known to occur in this river, but eDNA for the frecklebelly madtom was found in portions of this unit in 2018. Declines from historical condition in frecklebelly madtom occurrences have been apparent in the Conasauga River (F1) resilience unit, while occurrence records in the Etowah River (F3) resilience unit are fairly widespread and considered similar to historical occurrence records. Given the current resiliency of units within the Upper Coosa River (F) representation unit, it is not likely a single catastrophic event would result in the extirpation of the species from this portion.

In the foreseeable future, we project the Upper Coosa River (F) representation unit will have declines in resiliency for both the Conasauga River (F1) and Etowah River (F3) resilience units due to habitat destruction and degradation from agriculture and developed land use. Although this threat is not unique to the Upper Coosa River (F) representation unit, the threat in this portion is great enough to project a reduction in resiliency for both of these resilience units, and, therefore, the entire representation unit is expected to decline. In the Etowah River (F3) resilience unit, urbanization under the low, moderate, and high development scenarios is projected to increase and comprise 35, 38, and 42 percent of the watershed, respectively, as compared to 14 percent of the watershed currently. Within the Conasauga River (F1) resilience unit, urbanization is projected to increase and comprise 13, 15, and 17 percent of the watershed under the low, moderate, and high development scenarios, as compared to 8 percent of the watershed currently. This projected urbanization coupled with continued agricultural activities will continue to impair, and potentially further decrease, stream habitat and water quality in the Conasauga River (F1) resilience unit, which already has elevated nitrogen, phosphorus, turbidity, and concentrations of bioavailable estrogen (Freemen *et al.* 2017, pp. 429–430). In addition, the future scenarios project the Etowah River (F3) and Conasauga River (F1) units to have low resiliency (under the moderate development scenario) and to have low resiliency and be likely extirpated, respectively (under the high development scenario), by the year 2050. This would significantly increase the risk of extirpation of the Upper Coosa (F) representation unit from a catastrophic or stochastic event. Our examination leads us to find that there is substantial information that the Upper Coosa River (F) representation unit is likely to become in danger of extinction within the foreseeable future.

We then proceeded to consider whether this portion of the range (*i.e.,* the Upper Coosa River (F) representation unit) is significant. For the purposes of this analysis, the Service is considering significant portions of the range by applying any reasonable definition of ''significant.'' We asked whether any portions of the range may be biologically meaningful in terms of the resiliency, redundancy, or representation of the entity being evaluated. This approach is consistent with the Act, our implementing regulations, our policies, and case law.

We evaluated the available information about the portion of the species that occupies the Upper Coosa River representation unit, assessing its significance. Throughout most of its range, the frecklebelly madtom occurs in rivers within the Gulf Coastal Plain physiographic province, which is an area comprising the former continental shelf and is currently above sea level (Fennemann 1928, p. 280). The Upper Coosa River (F) representation unit occurs in the Ridge and Valley (Conasauga River (F1) and Coosawattee River (F2) resilience units) and Piedmont Upland (Etowah River (F3) resilience unit) physiographic provinces. Physiographic provinces are regions divided into distinctive geographic areas based on physical geography, such as topography, soil type, and geologic history (Fenneman 1928, pp. 266–272), where areas with similar characteristics are grouped into a province. The Piedmont province contains lowlands (plains) and highlands (plateaus) with isolated mountains, and in Georgia, the elevation reaches up to 480 meters (1,500 feet) (Fennemann 1928, p. 293); the Ridge and Valley province contain a longitudinal series of valleys (lowlands) and ridges (mountains) through the Appalachians (Fennemann 1928, p. 296). Given the Upper Coosa River (F) representation unit occurs in different physiographic provinces with a distinctive physical geography from the rest of the range, frecklebelly madtoms in this unit may experience environmental conditions, such as soils, water chemistry, hydrological regimes, and nutrient cycling, that are different from the rest of the range. These rivers in the Upper Coosa River (F) representation unit, flowing through unique physiographic provinces, are also removed from the nearest Coastal Plain physiographic province resilience units by approximately 418 river miles (673 river kilometers) and represent the most eastern and northern resilience units of the frecklebelly madtom.

Historically and currently, the Upper Coosa River (F) representation unit represents a small portion (less than 15 percent based on current occurrences and occupied stream reaches; less than 24 percent based on historical occurrences) of the frecklebelly madtom's range. If the Upper Coosa River (F) representation unit was extirpated, the frecklebelly madtom would lose some representation and redundancy, but the loss of this portion of the species' range would still leave sufficient resiliency (populations with moderate to high resiliency), redundancy, and representation in the remainder of the species' range such that it would not notably reduce the viability of the species. Therefore, despite the Upper Coosa River (F) representation unit occurring in different physiographic provinces and being disjunct from the remainder of the range, this unit only represents a small portion of the frecklebelly madtom's historical and current range and does not represent a significant portion of the frecklebelly madtom's range. We conclude that the frecklebelly madtom is not in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range. Our approach is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* 321 F. Supp. 3d 1011 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the frecklebelly madtom. Because the species is neither in danger of extinction now nor likely to become so in the foreseeable future throughout all or any significant portion of its range, the frecklebelly madtom does not meet the definition of an

endangered species or threatened species. Therefore, we find that listing the frecklebelly madtom as an endangered or threatened species under the Act is not warranted at this time. This constitutes the conclusion of the Service's 12-month finding on the 2010 petition to list the frecklebelly madtom as an endangered or threatened species. A detailed discussion of the basis for this finding can be found in the SSA report and other supporting documents (available on the internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058).

We ask the public to submit to us any new information that becomes available concerning the taxonomy, biology, ecology, or status of the frecklebelly madtom, or stressors to the frecklebelly madtom, whenever it becomes available. Please submit any new information, materials, comments, or questions concerning this finding to the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Distinct Population Segment (DPS) Analysis

Under the Act, we have the authority to consider for listing any species, subspecies, or, for vertebrates, any distinct population segment (DPS) of these taxa if there is sufficient information to indicate that such action may be warranted. To guide the implementation of the DPS provisions of the Act, we and the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries), published the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under our DPS Policy, we use two elements to assess whether a population segment under consideration for listing may be recognized as a DPS: (1) The population segment's discreteness from the remainder of the species to which it belongs, and (2) the significance of the population segment to the species to which it belongs. If we determine that a population segment being considered for listing is a DPS, then the population segment's conservation status is evaluated based on the five listing factors established by the Act to determine if listing it as either endangered or threatened is warranted.

The Upper Coosa River (F) representation unit consists of the Conasauga River, Coosawattee River, Etowah River, and their tributaries and watersheds (see figure 1, below). The Coosawattee River joins the Conasauga River to form the Oostanaula River, and the Etowah River joins the Oostanaula River to form the Coosa River. Within this proposed rule, we refer to the Upper Coosa River (F) representation unit as including all rivers and streams in the upper Coosa River basin that join to form the Coosa River; in other words, the entire watershed upstream from the confluence of the Oostanaula and Etowah Rivers. Below, we evaluated the Upper Coosa River representation unit of the frecklebelly madtom's range to determine whether it meets the definition of a DPS under our DPS Policy.

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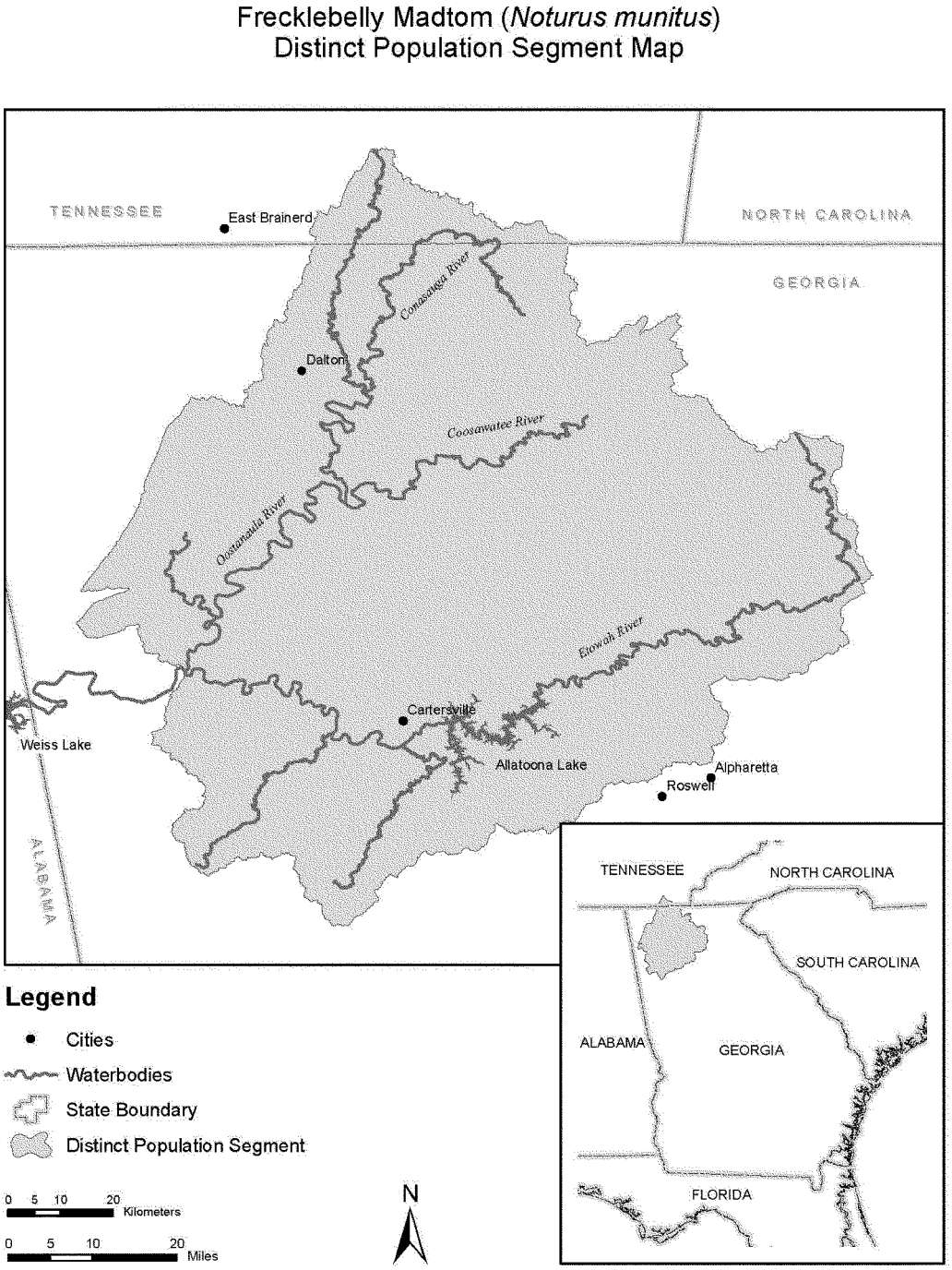

Figure 1. Rivers and streams within the Upper Coosa River DPS of the frecklebelly madtom.

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Discreteness

Under our DPS Policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

The Upper Coosa River (F) representation unit of the frecklebelly madtom is markedly separate from other representation and resilience units of the species both genetically and geographically. In terms of morphology and genetics, the frecklebelly madtom has exhibited some morphological and genetic differences across representation units. Preliminary data suggested there was considerable morphological variation across the species' range, and the populations in the Coosa River drainage were the most distinctive population (Neely 2018, p. 1). Given this information, it was thought that frecklebelly madtoms in the Conasauga and Etowah Rivers may be distinct from frecklebelly madtoms found elsewhere. Through a reanalysis of existing morphological and genetic data, frecklebelly madtoms collected from the Coosa River drainage were found to have shorter snout to barbel midpoint distance measurements than madtoms collected from other drainages, but this difference was not diagnostic of this population as there is overlap in the range of measurements among populations (Neely 2018, p. 7). In terms of genetic variation, considerable genetic differentiation was observed among the Pearl, Tombigbee, Cahaba, and Coosa Rivers populations; however, morphological variation was incongruent with genetic variation (Neely 2018, p. 10). These results ''do not allow clear diagnosis of distinct species within *Noturus munitus*'' (Neely 2018, p. 10). Because the data do not support the description of a distinct subspecies or species, each population of frecklebelly madtom is recommended to be considered as a separate evolutionary significant unit or ESU of the frecklebelly madtom (Neely 2018, p. 10). Therefore, the Upper Coosa River (F) representation unit is considered an ESU of the frecklebelly madtom, which provides key representation for the frecklebelly madtom as a whole.

The Upper Coosa River (F) representation unit also consists of separate and distinct physiographic provinces as compared to the majority of the species' range, as discussed above under *Status Throughout a Significant Portion of Its Range.* In terms of physical or geographic separation, the resilience units in the Upper Coosa River (F) representation unit are disjunct from other units of the frecklebelly madtom across the species' range. The distance of the geographic separation from other frecklebelly madtom representation and resilience units is approximately 418 river miles (673 river kilometers) upstream with seven dams (Weiss, H. Neely Henry, Logan Martin, Lay, Mitchell, Jordan, and R.F. Henry) and impoundments disrupting the connectivity and creating barriers to movement to the rest of the range. Therefore, frecklebelly madtoms in the Upper Coosa River (F) representation unit currently do not, and will likely never, naturally interact with individuals or populations in the remaining part of the range. In addition, if this portion becomes extirpated, frecklebelly madtoms located within the Coastal Plain physiographic province may be unable to recolonize the Upper Coosa River (F) representation unit, not only due to the lack of connectivity, but also because they may lack the needed adaptive traits to survive in these different physical geographies. Based on our review of the available information, we conclude that the Upper Coosa River representation unit of the frecklebelly madtom is markedly separate from other representation and resilience units of the species due to genetic separation and geographic (physical) isolation from frecklebelly madtoms in the remainder of the range. Therefore, we have determined that the Upper Coosa River representation unit of the frecklebelly madtom meets the condition for discreteness under our DPS Policy.

Significance

Under our DPS Policy, once we have determined that a population segment is discrete, we consider its biological and ecological significance to the larger taxon to which it belongs. This consideration may include, but is not limited to: (1) Evidence of the persistence of the discrete population segment in an ecological setting that is unusual or unique for the taxon, (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon, (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range, or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics. Of particular note, as we explained in our draft (76 FR 76987, December 9, 2011, p. 76998) and final (79 FR 37577, July 1, 2014, pp. 79 FR 37579, 37585) Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (SPR Policy), the definition of ''significant'' for the purpose of significant portion of the range analysis differs from the definition of ''significant'' found in our DPS Policy and used for DPS analysis. Although there are similarities in the definition of ''significant'' under the SPR Policy and the definition of ''significance'' in the DPS Policy, there are important differences between the two. The DPS Policy requires that for a vertebrate population to meet the Act's definition of ''species,'' it must be discrete from other populations and must be significant to the taxon as a whole. The significance criterion under the DPS Policy is necessarily broad and could be met under a wider variety of circumstances even if it could not be met under the SPR Policy. In this case, we determine (see below) that the Upper Coosa River (F) representation unit is ''significant'' for the purposes of DPS, and we did not, as discussed above, conclude that it constituted a ''significant'' portion of the frecklebelly madtom's range.

Currently, the Upper Coosa River (F) representation unit is one of four known extant units within the species. We determined that loss of this unit (population segment) would result in a significant gap in the species' range. The Upper Coosa River (F) representation unit in Georgia and Tennessee represents the eastern and northernmost portion of the frecklebelly madtom's range, with the remainder of the range occurring in Louisiana, Mississippi, and Alabama. As discussed previously, this unit also occurs in different physiographic provinces (Ridge and Valley province and Piedmont Upland province) associated with different environmental and physical conditions. Lastly, the Upper Coosa River (F) representation unit is approximately 418 river miles (673 kilometers) from the nearest resilience units in the Coastal Plain province. Therefore, the loss of this unit would result in the species' range shifting south and west approximately 418 miles (673 kilometers).

As with other representation units, the Upper Coosa River (F) representation unit of the frecklebelly madtom differs markedly from other populations of the species in its genetic characteristics. As discussed above, considerable genetic differentiation has been observed among populations of frecklebelly madtom (Neely 2018, p. 10), and these populations are considered evolutionary significant units of frecklebelly madtom. In addition, the Upper Coosa River (F) representation unit of the frecklebelly madtom persists in different physiographic provinces than the remainder of the range. The Upper Coosa River (F) representation unit occurs in the Ridge and Valley

(Conasauga River (F1) and Coosawattee River (F2) resilience units) and Piedmont Upland (Etowah River (F3) resilience unit) physiographic provinces, while the rest of the range occurs in rivers within the Gulf Coastal Plain physiographic province. Having persisted over time in areas with distinctive physical geography, frecklebelly madtoms in the Upper Coosa River (F) representation unit have likely adapted to environmental conditions, such as soils, water chemistry, hydrological regimes, and nutrient cycling, differently, as demonstrated by the divergent genetics described by Neely (2018, entire), and have likely contributed to the adaptive capacity of the species. The adaptations of frecklebelly madtoms are an important and unique component of the species' representation, which is evidence of it differing markedly from other populations of the species in its genetics. Therefore, we have substantial evidence that the Upper Coosa River (F) representation unit of the frecklebelly madtom differs markedly in its genetic characteristics, as it is considered an evolutionary significant unit, and loss of this genetic diversity would likely impact the species' adaptive capacity. However, although the loss of the Upper Coosa River (F) representation unit would likely result in a reduction in species' redundancy, and, therefore, the species' adaptive capacity, it would not notably reduce the viability of the species across the range (see above under *Status Throughout a Significant Portion of Its Range*).

Given the evidence that the Upper Coosa River (F) representation unit of the frecklebelly madtom would result in a significant gap in the range if lost, and that the unit differs markedly from other populations of the species, we consider this unit to be significant to the species as a whole. Thus, the Upper Coosa River (F) representation unit of the frecklebelly madtom meets the criteria for significance under our DPS Policy.

DPS Conclusion for the Upper Coosa River Representation Unit of the Frecklebelly Madtom

Our DPS Policy directs us to evaluate the significance of a discrete population in the context of its biological and ecological significance to the remainder of the species to which it belongs. Based on an analysis of the best available scientific and commercial data, we conclude that the Upper Coosa River (F) representation unit of the frecklebelly madtom is discrete due to genetic separation and geographic (physical) isolation from the remainder of the taxon. Furthermore, we conclude that the Upper Coosa River representation unit of the frecklebelly madtom is significant, as described above. Therefore, we conclude that the Upper Coosa River (F) representation unit of the frecklebelly madtom is both discrete and significant under our DPS Policy and is, therefore, a listable entity under the Act.

Based on our DPS Policy (61 FR 4722; February 7, 1996), if a population segment of a vertebrate species is both discrete and significant relative to the taxon as a whole (*i.e.,* it is a distinct population segment), its evaluation for endangered or threatened status will be based on the Act's definition of those terms and a review of the factors enumerated in section 4(a) of the Act. Having found that the Upper Coosa River (F) representation unit of the frecklebelly madtom meets the definition of a distinct population segment, we now evaluate the status of this DPS to determine whether it meets the definition of an endangered or threatened species under the Act.

Status Throughout All of the DPS's Range

In the analysis above for the frecklebelly madtom as a whole, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Upper Coosa River DPS of the species. We considered whether the Upper Coosa River DPS of the frecklebelly madtom is presently in danger of extinction throughout all of its range. The Upper Coosa River representation unit faces ongoing and future threats from habitat destruction and degradation caused by agriculture and developed land uses resulting in poor water quality. As discussed above under *Status Throughout a Significant Portion of Its Range,* occurrence records in the Etowah River (F3) resilience unit are considered similar to historical occurrence records, whereas there have been declines from historical conditions in frecklebelly madtom occurrences in the Conasauga River (F1) resilience unit. Evidence of the frecklebelly madtom presence was first reported from the Coosawattee River (F2) from eDNA collected in 2018. Until eDNA for the species was recorded from this river, the frecklebelly madtom was not expected occur there, given that the history of physical modification to improve navigation, as well as hydropeaking at Carters Dam, upstream has negatively affected small-bodied, riffle-dwelling fish species (Freeman *et al.* 2011, pp. 10–11). However, given the current resiliency of units within the Upper Coosa River (F) representation unit, it is not likely that the current threats, or the cumulative effects of those threats, will result in the extirpation of the DPS. Therefore, the DPS is not currently in danger of extinction throughout its range.

In the future, projected urbanization and continued agricultural activities will continue to impact the Upper Coosa River DPS and its habitat by negatively affecting water quality (Factor A). Our future scenarios project the Etowah River (F3) and Conasauga River (F1) units in the Upper Coosa River (F) representation unit to have low resiliency or to become extirpated by the year 2050, and this would significantly increase the risk of extirpation of the Upper Coosa River (F) representation unit from the aforementioned threats, as well as a catastrophic or stochastic event, within the foreseeable future. In our consideration of foreseeable future, we evaluated how far into the future we could reliably predict the threats to this unit, as well as the madtom's response to those threats. Based on the modeling and scenarios (agriculture and developed land use projections to 2050) evaluated, we considered our ability to make reliable predictions in the future and the uncertainty in how and to what degree the unit could respond to those risk factors in this timeframe. We determined a foreseeable future of 30 years for the Upper Coosa River representation unit. Based on this information, we find the Upper Coosa River DPS of the frecklebelly madtom is likely to become endangered within the foreseeable future throughout all of its range. Therefore, we consider the Upper Coosa River DPS to be threatened throughout all of its range.

Status Throughout a Significant Portion of the DPS's Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the SPR Policy (79 FR 37577; July 1, 2014) that provided that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species (DPS) is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and

(2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the Upper Coosa River DPS of the frecklebelly madtom, we chose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered. We considered whether the threats acting on the Upper Coosa River DPS are geographically concentrated in any portion of the range at a biologically meaningful scale. We examine the following threats that were considered to be primary factors driving current resiliency of the Upper Coosa River DPS: Habitat destruction and degradation caused by agriculture and developed land uses resulting in poor water quality (Factor A).

Habitat destruction and degradation from agriculture and developed land uses resulting in poor water quality is occurring throughout the range of the Upper Coosa River DPS. In the Conasauga River (F1) resilience unit, current development and agriculture comprises 8.0 percent and 21.3 percent of the watershed, respectively (Service 2020, pp. 66–69). In the Coosawattee River (F2) resilience unit, current development and agriculture comprises 6.6 percent and 27.2 percent of the watershed, respectively (Service 2020, pp. 66–69). Lastly, current development and agriculture comprises 14.8 percent and 10.4 percent of the Etowah River (F3) resilience unit (Service 2020, pp. 66–69). For the three resilience units assessed within the DPS, approximately 25 to 33 percent of each unit is currently impacted by agricultural and developed land uses. Therefore, we found no concentration of threats in any portion of the Upper Coosa River DPS's range at a biologically meaningful scale. However, we identified one portion, the Conasauga River (F1) resilience unit, which currently has low resiliency and where the frecklebelly madtom has not been observed, despite repeated surveys, in at least 20 years. Environmental DNA surveys have detected the frecklebelly madtom in the Conasauga River (F1) resilience unit, leading us to determine the species remains present there. However, the lack of recent occurrence data coupled with projections that this unit will become extirpated within the foreseeable future led us to find there is substantial information that the Conasauga River (F1) resilience unit may be endangered.

We then proceeded to consider whether this portion of the range (*i.e.,* the Conasauga River (F1) resilience unit) is significant. For purposes of this analysis, the Service is examining for significant portions of the range by applying any reasonable definition of ''significant.'' We asked whether any portions of the range may be biologically meaningful in terms of the resiliency, redundancy, or representation of the entity being evaluated. This approach is consistent with the Act, our implementing regulations, our policies, and case law.

The Upper Coosa River (F) representation unit occurs in the Ridge and Valley (Conasauga River (F1) resilience unit) and Piedmont Upland (Etowah River (F3) resilience unit) physiographic provinces. As discussed above under *Status Throughout a Significant Portion of Its Range* for the frecklebelly madtom as a whole, physiographic provinces are geographic areas divided based on physical geography and grouped by similar characteristics (Fenneman 1928, pp. 266–272). The Conasauga River (F1) resilience unit occurs in the Ridge and Valley province, which contains a series of valleys (lowlands) and ridges (mountains) through the Appalachians (Fennemann 1928, p. 296). The Etowah River (F3) resilience unit occurs in the Piedmont province, which contains lowlands (plains) and highlands (plateaus) with isolated mountains (Fennemann 1928, p. 293). These two resilience units may occur in two physiographic provinces; however, the geography in both represents environmental and physical conditions of lowlands and highlands associated with higher elevations than the remainder of the species' range in the Coastal Plain province. Frecklebelly madtoms collected in both the Conasauga River (F1) and Etowah River (F3) resilience units are strongly associated with river weed (*Podostemum* spp.) used for cover and shelter. Neither unit acts as a refugia or an important spawning ground for the DPS. In addition, the Conasauga River (1) resilience unit watershed is experiencing similar impacts from development and agricultural land-use to the Etowah River (F3) resilience unit. Since the Upper Coosa River DPS of the frecklebelly madtom occurs in rivers with similar physical and environmental conditions, and the Conasauga River (F1) resilience unit portion is experiencing similar water quality impacts as the remainder of the DPS's range, there is no unique observable environmental usage or behavioral characteristics attributable to just this portion that would make it a significant portion of the range of the Upper Coosa River DPS.

Overall, there is little evidence to suggest that the Conasauga River (F1) portion of the range has higher quality or higher value habitat or any other special importance to the species' life history in the Upper Coosa River DPS. We considered if the Conasauga River (F1) portion contributes to biological significance in any way listed above and did not find this portion to be prominent or noteworthy in a manner that would suggest it is a significant portion of the DPS's range. Thus, based on the best available information, we find that this portion of the DPS's range is not biologically significant. Therefore, no portion of the Upper Coosa River DPS's range provides a basis for determining that it is in danger of extinction in a significant portion of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

We evaluated threats to the frecklebelly madtom and assessed the cumulative effect of the threats under the Act's section 4(a)(1) factors and conclude the species, viewed across its entire range, experiences a low risk of extinction. Based on the best available scientific and commercial information as presented in the SSA report and this finding, we do not find that the frecklebelly madtom is currently in danger of extinction throughout all or a significant portion of its range, nor is it likely to become so in the foreseeable future. However, we did find the Upper Coosa River representation unit is a valid DPS, and this DPS of the frecklebelly madtom is likely to become endangered within the foreseeable future throughout all of its range. Therefore, we propose to list the Upper Coosa River DPS of the frecklebelly madtom as a threatened species throughout all of its range in accordance

with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

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

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*http://www.fws.gov/endangered*), or from our Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Georgia and Tennessee would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Upper Coosa River DPS of the frecklebelly madtom. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the Upper Coosa River DPS of the frecklebelly madtom is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered, or on private lands seeking funding by Federal agencies, which may include, but are not limited to, the USDA U.S. Forest Service, USDA Farm Service Agency, USDA Natural Resources Conservation Service, and Federal Emergency Disaster Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. The discussion below regarding protective regulations under section 4(d) of the Act complies with our policy.

II. Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act

are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

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

Exercising our authority under section 4(d), we have developed a proposed rule that is designed to address the specific threats and conservation needs for the Upper Coosa River DPS of the frecklebelly madtom. Although the statute does not require us to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the Upper Coosa River DPS of frecklebelly madtom. As discussed above under Summary of Biological Status and Threats, we have concluded that the Upper Coosa River DPS is likely to become in danger of extinction within the foreseeable future primarily due to habitat destruction and degradation from agriculture and developed land uses resulting in poor water quality. The provisions of this proposed 4(d) rule would promote conservation of the Upper Coosa River DPS by encouraging management of the landscape in ways that meet both watershed and riparian management purposes and the conservation needs of the Upper Coosa River DPS. The provisions of this proposed rule are one of many tools that we would use to promote the conservation of the Upper Coosa River DPS. This proposed 4(d) rule would apply only if and when we make final the listing of the Upper Coosa River DPS as a threatened species.

Provisions of the Proposed 4(d) Rule

This proposed 4(d) rule would provide for the conservation of the Upper Coosa River DPS by prohibiting the following activities, except as otherwise authorized or permitted: Import or export (see proposed § 17.44(ee)(1)(i)); take (see proposed § 17.44(ee)(1)(ii)); possession and other acts with unlawfully taken specimens (see proposed § 17.44(ee)(1)(iii)); delivery, receipt, transport, or shipment in interstate or foreign commerce in the course of commercial activity (see proposed § 17.44(ee)(1)(iv)); and sale or offer for sale in interstate or foreign commerce (see proposed § 17.44(ee)(1)(v)). We also include several exceptions to these prohibitions, which along with the prohibitions are set forth under Proposed Regulation Promulgation, below.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally, unintentionally, or incidentally. Protecting the Upper Coosa River DPS of the frecklebelly madtom from direct forms of take, such as physical injury or killing, whether incidental or intentional, will help preserve and recover the remaining populations of the DPS. Therefore, we prohibit intentional take of frecklebelly madtom, including, but not limited to, capturing, handling, trapping, collecting, or other activities (see proposed § 17.44(ee)(1)(ii)). Also, as discussed above under Summary of Biological Status and Threats, habitat destruction and degradation from agriculture and developed land uses are affecting the status of the Upper Coosa River DPS. Across the DPS's range, stream and water quality have been degraded physically by sedimentation, pollution, contaminants, impoundments, channelization, destruction of riparian habitat, and loss of riparian vegetation due to agriculture activities and development within the watershed and riparian areas. Other habitat or hydrological alteration, such as ditching, draining, stream diversion, or diversion or alteration of surface or ground water flow, into or out of the stream will impact the habitat of the DPS. Therefore, we prohibit actions that result in the incidental take of the Upper Coosa River DPS by destroying, altering, or degrading the habitat in the manner described above (see proposed § 17.44(ee)(1)(ii)). Regulating these activities would help preserve the DPS's remaining populations, slow the rate of population decline, and decrease synergistic, negative effects from other stressors.

Exceptions to Prohibitions

In addition to certain statutory exceptions from prohibitions, which are found in sections 9 and 10 of the Act, the proposed 4(d) rule includes the following exceptions to the prohibitions:

Permitted Activities

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances (see proposed § 17.44(ee)(2)(i)). Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Activities Not Requiring a Permit

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Service in implementing all aspects of the Act. In

this regard, section 6 of the Act provides that the Service shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve the Upper Coosa River DPS that may result in otherwise prohibited take without additional authorization (see proposed § 17.44(ee)(2)(iii)).

We may allow take of the individuals of the Upper Coosa River DPS without a permit by any employee or agent of the Service or a State conservation agency designated by his agency for such purposes and when acting in the course of his official duties if such action is necessary to aid a sick, injured or orphaned specimen; dispose of a dead specimen; or salvage a dead specimen which may be useful for scientific study (see proposed § 17.44(ee)(2)(ii)). In addition, Federal and State law enforcement officers may possess, deliver, carry, transport, or ship specimens taken in violation of the Act as necessary (see proposed § 17.44(ee)(2)(v)).

Channel Restoration, Streambank Stabilization, and Other Activities

Channel restoration is used as a technique to restore degraded, physically unstable streams back to natural, physically stable, ecologically functioning streams. When done correctly, these projects reduce, ameliorate, or fix unnatural erosion, head cutting, and/or sedimentation. Thus, channel restoration projects result in geomorphically stable stream channels that maintain the appropriate lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation and include stable riffle-run-pool complexes that consist of silt-free gravel, coarse sand, cobble, boulders, woody structure, and river weed (*Podostemum* spp.). This provision of the proposed 4(d) rule for channel restoration would promote conservation of the Upper Coosa River DPS by excepting incidental take resulting from activities that would improve channel conditions and restore degraded, physically unstable streams or stream segments (see proposed § 17.44(ee)(2)(iv)(A)). We anticipate these activities will advance ecological conditions within a watershed to a more natural state that will benefit the frecklebelly madtom.

Streambank stabilization is used as a habitat restoration technique to restore degraded and eroded streambanks back to natively vegetated, stable streambanks. When done correctly, these projects reduce bank erosion and instream sedimentation, resulting in improved habitat conditions for aquatic species. Therefore, we would allow streambanks to be stabilized using the following bioengineering methods: Live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), planting of bare-root seedlings or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). All methods should use plant species native to the region where the project is being conducted. These methods would not include the sole use of quarried rock (rip-rap) or the use of rock baskets or gabion structures, but could be used in conjunction with the above bioengineering methods. This provision of the proposed 4(d) rule for streambank stabilization would promote conservation of the Upper Coosa River DPS by excepting from the prohibition incidental take resulting from activities that would improve habitat conditions by reducing bank erosion and instream sedimentation (see proposed § 17.44(ee)(2)(iv)(B)).

Improving watershed, riparian, and habitat conditions within the range of the Upper Coosa River DPS would provide for the conservation of the DPS and would likely increase resiliency in the Etowah River and Conasauga River resilience units. Activities carried out under the Working Lands for Wildlife (WLFW) program of the Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture, or similar projects, which may include projects funded by the Service's Partners for Fish and Wildlife Program or the Environmental Protection Agency's 319 grant program, would benefit the DPS if they do not alter habitats known to be used by the DPS beyond its tolerances and are implemented with a primary objective of improving environmental conditions to support the aquatic biodiversity of flowing water habitats. This provision of the proposed 4(d) rule for other activities would promote conservation of the Upper Coosa River DPS by excepting from the prohibition incidental take resulting from activities as described above (see proposed § 17.44(ee)(2)(iv)(C)).

Relation of 4(d) Rule to Available Conservation Measures

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

Since we are proposing a threatened status for the Upper Coosa River DPS of the frecklebelly madtom and this proposed rule outlines the protections in section 9(a)(1) of the Act for the DPS, we are identifying those activities that would or would not constitute a violation of either section 9(a)(1) or this proposed 4(d) rule. Based on the best available information, at this time, activities identified as discussed above under *Exceptions to Prohibitions* would not be considered to result in a violation of section 9 of the Act. On the other hand, based on the best available information, the following actions may potentially result in a violation of section 9 of the Act if we adopt this proposed rule; this list is not comprehensive:

(1) Unauthorized handling, collecting, possessing, selling, delivering, carrying, or transporting of the frecklebelly madtom, including interstate transportation across State lines and import or export across international boundaries.

(2) Destruction/alteration of the species' habitat by discharge of fill material, draining, ditching, tiling, pond construction, stream channelization or diversion, or diversion or alteration of surface or ground water flow into or out of the stream (*i.e.,* due to roads, impoundments, discharge pipes, stormwater detention basins, etc.).

(3) Introduction of nonnative species that compete with or prey upon the frecklebelly madtom.

(4) Discharge of chemicals or fill material into any waters in which the frecklebelly madtom is known to occur.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

III. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for

recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed earlier in this document, there is currently no imminent threat of take attributed to collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA and proposed listing determination for the Upper Coosa River DPS of the frecklebelly madtom, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the Upper Coosa River DPS and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The species occurs wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the Upper Coosa River DPS.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the Upper Coosa River DPS of the frecklebelly madtom is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.'' When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the Upper Coosa River DPS and habitat characteristics where this DPS is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Upper Coosa River DPS.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring;

and habitats that are protected from disturbance.

The Upper Coosa River DPS is a population segment of the frecklebelly madtom and occurs in the upper Coosa River system in the Piedmont Upland physiographic province in Georgia and the Ridge and Valley physiographic province in Georgia and Tennessee. The primary habitat features that influence the resiliency of the Upper Coosa River DPS include flowing water, suitable water quality, substrate, cover, and habitat connectivity. These features are essential to the survival and reproduction of individuals at all life stages.

As stated above, the frecklebelly madtom occurs in small to large, swift-flowing rivers consisting of stable riffle-run pool complexes and with a substrate that consists of silt-free gravel, coarse sand, cobble, and boulders. The species needs unimpounded flowing water to successfully reproduce and maintain populations. In addition, streams must have an adequate flow to maintain instream habitats and connectivity of streams with the floodplain, which is important to allow nutrient and sediment exchange for habitat maintenance. Stream reaches with suitable habitat must be large enough and have connectivity to support enough frecklebelly madtoms to ensure individuals can find a mate and reproduce (Service 2020, p. 17). Cover is an important component of suitable habitat for the frecklebelly madtom and provides shelter from predators, space to forage, and space to nest. The species is often found in or near aquatic vegetation, such as river weed (*Podostemum* spp.), woody structures, and under large, flat rocks. In addition, nesting sites for madtoms are typically cavities under natural material (rocks, logs, empty mussel shells). Thus, small to large flowing rivers with appropriate substrate, cover, and connectivity are important for the growth, reproduction, and survival of the frecklebelly madtom.

The frecklebelly madtom, like other benthic species, is sensitive to poor water quality (Warren *et al.* 1997, p. 125) and needs clean, flowing water to survive. Changes in water chemistry and flow patterns, resulting in a decrease in water quality and quantity, have detrimental effects on madtom ecology, because they can render aquatic habitat unsuitable for occupancy. In addition, the frecklebelly madtom is intolerant of excessive sedimentation (Shepard 2004, p. 221). The minimum and maximum standards of water quality and quantity conditions that are conducive to the presence of frecklebelly madtom is not well known. However, muddy waterways, lentic streams (still water), and poor water quality conditions are not desirable for maintaining suitable habitat for the species. Therefore, appropriate water and sediment quality are necessary to sustain growth, reproduction, and viability of the frecklebelly madtom and are essential to the conservation of the species.

The species is an opportunistic insectivore feeding on a variety of aquatic insects and larvae, including caddisflies, mayflies, blackflies, and midges (Miller 1984, p. 9). Seasonal changes found in diet probably reflect differences in prey availability (Miller 1984, p. 11). Therefore, a diverse and available aquatic macroinvertebrate assemblage is important to the growth and survival of the frecklebelly madtom.

More detail of the habitat and life history needs are summarized above under Background, and a thorough review is available in the SSA report (Service 2020, entire; available on *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058). A summary of the resource needs of the Upper Coosa River DPS is provided below in table 3.

TABLE 3—RESOURCE NEEDS FOR THE UPPER COOSA RIVER DPS OF THE FRECKLEBELLY MADTOM TO COMPLETE EACH LIFE STAGE

Life stage	Resources needed
Fertilized eggs	Flowing water with good water quality; cavities for shelter; parental care.
Larvae	Flowing water with good water quality; low predation, disease, and environmental stress; adequate food availability.
Juveniles	Flowing water with good water quality; low predation, disease, and environmental stress; structure (vegetation, rock, substrate) for shelter and forage; adequate food availability.
Adults	Flowing water with adequate water quality; structure (vegetation, rock, substrate) for shelter, forage, and nesting; cavities for nesting; appropriate male to female demographics; adequate food availability.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of Upper Coosa River DPS of the frecklebelly madtom from studies of the species' habitat, ecology, and life history as described above. Additional information can be found in the SSA report (Service 2020, entire; available on *http://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0058). We have determined that the following physical or biological features are essential to the conservation of Upper Coosa River DPS of the frecklebelly madtom:

(1) Geomorphically stable, medium to large streams with:

(a) Stable stream channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation; and

(b) Banks with intact riparian cover to maintain stream morphology and reduce erosion and sediment inputs.

(2) Connected instream habitats that:

(a) Include stable riffle-run pool complexes;

(b) Consist of silt-free gravel, coarse sand, cobble, boulders, woody structure, and river weed (*Podostemum* spp.); and

(c) Have abundant cobble, boulders, woody structure, or other suitable cover used for nesting.

(3) Adequate flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time), necessary to maintain instream habitats and to maintain connectivity of streams with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the fish's habitat, food availability, and ample oxygenated flow for spawning and nesting habitat.

(4) Appropriate water and sediment quality (including, but not limited to, conductivity; hardness; turbidity; temperature; pH; ammonia; heavy metals; pesticides; animal waste products; and nitrogen, phosphorus, and potassium fertilizers) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(5) Diversity and availability of aquatic macroinvertebrate prey items, which include larval midges, mayflies, caddisflies, dragonflies, and beetles.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Upper Coosa River DPS may require special management considerations or protections to reduce the following threats: (1) Urbanization of the landscape, including (but not limited to) land conversion for urban and commercial use, infrastructure (roads, bridges, utilities), and urban water uses (water supply reservoirs, wastewater treatment); (2) nutrient pollution from agricultural activities that impact water quantity and quality; (3) significant alteration of water quality; (4) culvert and pipe installation that creates barriers to movement; (5) other watershed and floodplain disturbances that release sediments or nutrients into the water or fill suitable spawning habitat; and (6) creation of reservoirs that convert permanently flowing streams and/or streams that hold water into lake or pond-like (lentic) environments.

Management activities that could ameliorate these threats include, but are not limited to, use of best management practices (BMPs) designed to reduce sedimentation, erosion, and bank-side destruction; protection of riparian corridors and suitable spawning habitat; retention of sufficient canopy cover along banks; moderation of surface and ground water withdrawals to maintain natural flow regimes; increased use of stormwater management and reduction of stormwater flows into the stream systems; placement of culverts or bridges that accommodate fish passage; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. To determine and select appropriate occupied areas that contain the physical or biological features essential to the conservation of the species or areas otherwise essential for the conservation of the Upper Coosa River DPS of the frecklebelly madtom, we developed a conservation strategy for the DPS. The goal of the conservation strategy for the Upper Coosa River DPS of the frecklebelly madtom is to recover the DPS to the point where the protections of the Act are no longer necessary. The role of critical habitat in achieving this conservation goal is to identify the specific areas within the Upper Coosa River DPS's range that provide essential physical or biological features, without which range-wide resiliency, redundancy, and representation could not be achieved. We anticipate that recovery will require continued protection of existing resilience units and habitats that contribute to the viability of the DPS, as well as ensuring there are adequate numbers of fish in stable units and that at least one viable unit occurs in each of the physiographic provinces (Piedmont Upland and Ridge and Valley). This will help to ensure that catastrophic events, such as floods, cannot simultaneously affect all known resilience units of the DPS. Recovery considerations, such as maintaining existing genetic diversity and striving for representation of both physiographic provinces in the DPS's current range, were considered in formulating this proposal.

In developing our conservation strategy for determining which areas to include as critical habitat for the Upper Coosa River DPS, we focused on the existing resilience units and habitats that are presently contributing to the viability or historical units in which resiliency can be improved such that they contribute to viability of the species. In summary, we identified streams and rivers that are both: (1) Currently occupied streams and rivers within the known historical range of the Upper Coosa River DPS, and (2) those areas that have retained the physical or biological features identified earlier that will allow for the maintenance and expansion of existing populations. For the purposes of the proposed critical habitat designation, and for areas within the geographic area occupied by the species at the time of listing, we determined a unit to be occupied if it contains a recent (*i.e.,* observed in the past 11 years (since 2009)) observation (collection) or eDNA record that supports the presence of the species. Within those areas, we delineated critical-habitat-unit boundaries using the following process:

We evaluated habitat suitability of stream and river channels within the geographical area occupied at the time of listing, and retained for further consideration those streams that contain one or more of the physical and biological features to support life-history functions essential to conservation of the Upper Coosa River DPS. We determined the end points of river units by evaluating the presence or absence of appropriate physical and biological features. Our upstream cutoff points for each stream are located approximately where the physiographic province that the frecklebelly madtom occupies begins (where the Conasauga River flows out of the Blue Ridge and into the Ridge and Valley physiographic province and where the Etowah River flows out of the Blue Ridge and into the Piedmont Upland physiographic province) and selected downstream cutoff points that omit areas where habitat conditions are less favorable for the species (*i.e.,* do not contain the physical or biological features essential to the conservation of the DPS).

Based on this analysis, the following rivers meet criteria for areas occupied by the species at the time of listing: Conasauga River, Coosawattee River, and Etowah River. These areas include the two rivers, Conasauga River and Etowah River, known to have been occupied by the DPS historically. Environmental DNA of the frecklebelly madtom was detected in the Conasauga River in 2017 and 2018, which meets the criteria for consideration as an area occupied by the species at the time of listing. In the Etowah River, occurrence data and eDNA records from 2018 are available. These two areas meet our conservation strategy for the frecklebelly madtom. Designating critical habitat of streams in these two occupied resilience units of the DPS, which occur in both physiographic provinces and currently contribute to (or are historical units in which resiliency can be improved to contribute to) the species' viability, will sufficiently lead to the protection, and eventual reduction in risk of extirpation, of the DPS. Improving the resiliency of the resilience units in these two currently occupied streams will likely increase viability to the point that the protections of the Act are no longer necessary.

The proposed designation does not include the Coosawattee River, which is not part of the known historical range of the species. Environmental DNA of the frecklebelly madtom was detected in the Coosawattee River in 2018, which meets

the criteria for consideration as an area occupied by the species at the time of listing. However, since the Coosawattee River is not part of the known historical range of the frecklebelly madtom, this area does not meet our conservation strategy for designating critical habitat for the species. The conservation strategy focused on areas within the historical known range of the species. In addition, since the species has never been directly observed in this river despite multiple surveys over time, using the best available information, we determined this area is not a historical unit in which resiliency can be improved to contribute to the species' viability. Lastly, we determined that sufficient areas (Conasauga River and Etowah River) already have been identified within this proposed designation. Should we receive information during the public comment period that supports designating as critical habitat areas not included in the proposed units (see Proposed Critical Habitat Designation, below), we will reevaluate our current proposal.

We are not currently proposing to designate any areas outside the geographical area occupied by the Upper Coosa River DPS, because we have not identified any unoccupied areas that are essential for the conservation of the species. The protection of the Conasauga River and Etowah River would sufficiently reduce the risk of extinction, and improving the resiliency of these currently occupied streams of the DPS would increase viability to the point that the protections of the Act are no longer necessary.

Sources of data for this proposed designation of critical habitat include multiple databases maintained by universities and State agencies in Tennessee and Georgia, as well as numerous survey reports on streams throughout the DPS's range. Other sources of available information on habitat requirements for this species include studies conducted at occupied sites and published in peer-reviewed articles, agency reports, and data collected during monitoring efforts (Shepard *et al.* 1997, entire; Bennet *et al.* 2008, entire; Bennet and Kuhajda 2010, entire; Albanese *et al.* 2018, entire; Service 2020, entire). Observation and eDNA records were compiled and provided to us by State partners during the SSA analysis.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Upper Coosa River DPS. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. Units are proposed for designation based on one or more of the physical or biological features being present to support the Upper Coosa River DPS's life-history processes. Some units contain all of the identified physical or biological features and support multiple life-history processes. Unit 1 contains only some of the physical or biological features necessary to support the Upper Coosa River DPS's particular use of that habitat. Unit 2 contains all of the identified physical or biological features and supports multiple life-history processes.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0058 and on our internet site at *https://www.fws.gov/southeast/.*

Proposed Critical Habitat Designation

We are proposing to designate approximately 134 river miles (mi) (216 river kilometers (km)) in two units as critical habitat for the Upper Coosa River DPS of the frecklebelly madtom. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Upper Coosa River DPS. The two units are: (1) Conasauga River Unit and (2) Etowah River Unit. Table 4, below, shows the proposed critical habitat units, land ownership, and the approximate river miles of each unit. Per State regulations (Tennessee Code Annotated section 69–1–101 and Georgia Code section 52–1–31), navigable waters are considered public rights-of-way. Lands beneath the navigable waters included in this proposed rule are owned by the States of Tennessee or Georgia. Ownership of lands beneath nonnavigable waters included in this rule are determined by riparian land ownership. The riparian land adjacent to the proposed critical habitat is 85 percent private, 6 percent local, 5 percent State, and 4 percent Federal lands.

TABLE 4—PROPOSED CRITICAL HABITAT UNITS FOR THE UPPER COOSA RIVER DPS OF THE FRECKLEBELLY MADTOM

Critical habitat unit	Riparian ownership surrounding units	River miles (kilometers)
1. Conasauga River	Private, State, Federal	51.5 (83)
2. Etowah River	Private, Local, State	82.5 (133)
Total		134 (216)

Note: Lengths may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Upper Coosa River DPS, below.

Unit 1: Conasauga River

Unit 1 consists of approximately 51.5 river mi (83 km) of the Conasauga River beginning at the mouth of Coahulla Creek in Whitfield and Murray Counties, Georgia, and continuing upstream through Bradley County, Tennessee, to the mouth of Graham Branch in Polk County, Tennessee. Unit 1 includes river habitat up to bank full height. Frecklebelly madtom occupies all river reaches in this unit. Unit 1 contains some of the physical or biological features necessary for the conservation of the DPS. Unit 1 possesses those characteristics, as described above under *Summary of Essential Physical or Biological Features,* of essential physical or biological features (1), (2), (3), and (5). Essential physical or biological feature (4) is degraded in this unit, but with appropriate management and restoration actions, this physical or biological feature can be restored.

Special management considerations or protection may be required within Unit 1 to alleviate impacts from stressors that have led to the degradation of the habitat, including sedimentation, pollutant input, excess nutrient input, development, and unstable stream banks. Surrounding land-use practices, including agricultural runoff, agricultural ditching, and erosion have led to high levels of sedimentation, siltation, contamination, and nutrient-loading, as well as destabilized stream banks. Special management considerations related to agricultural and developed areas that will benefit the habitat in this unit include, but are not limited to, riparian buffer restoration, reduced surface and groundwater withdrawals, increased open space in the watershed, and treating wastewater to the highest level practicable.

Unit 2: Etowah River

Unit 2 consists of approximately 82.5 river mi (133 km) of the Etowah River beginning at its confluence with Shoal Creek in Cherokee County, Georgia, and continuing upstream through Forsyth and Dawson Counties to approximately 0.5 miles upstream of the Jay Bridge Road crossing over the Etowah River in Lumpkin County, Georgia. Unit 2 includes river habitat up to bank full height. Frecklebelly madtom occupies all river reaches in this unit. Unit 2 contains all of the physical or biological features necessary for the conservation of the DPS.

Special management considerations or protection may be required within Unit 2 to alleviate impacts from stressors that are anticipated to amplify degradation of the habitat, including sedimentation, pollutant input, excess nutrient input, development, and unstable stream banks. Increased development, including urban development and runoff, dam construction and use, and paved and unpaved roads, in the surrounding watershed and riparian area have led to higher levels of sedimentation, siltation, contamination, and nutrient-loading, as well as destabilized stream banks. Special management considerations related to agricultural and developed areas that will benefit the habitat in this unit include, but are not limited to, riparian buffer restoration, reduced surface and groundwater withdrawals, increased open space in the watershed, and implementing highest levels of treatment of wastewater practicable.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new

species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that the Service may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would alter the minimum flow or existing flow regime. Such activities could include, but are not limited to, impoundment, channelization, water diversion, water withdrawal, hydropower generation, and flood control. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the Upper Coosa River DPS by altering flows to levels that would adversely affect the Upper Coosa River DPS's ability to complete its life cycle.

(2) Actions that would significantly alter water chemistry or quality. Such activities could include, but are not limited to, release of chemicals or biological pollutants into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions to levels that are beyond the tolerances of the Upper Coosa River DPS and result in direct or cumulative adverse effects to individuals and their life cycles.

(3) Actions that would significantly increase sediment deposition within the stream channel. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, channel alteration, and other watershed and floodplain disturbances. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the Upper Coosa River DPS by increasing the sediment deposition to levels that would adversely affect the DPS's ability to complete its life cycle.

(4) Actions that would significantly increase eutrophication (the addition of excessive nutrients that are typically limited in aquatic environments, such as nitrogen and phosphorus that cause phytoplankton to proliferate). Such activities could include, but are not limited to, release of excessive nutrients into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could result in excessive nutrients and algae filling streams and reducing habitat, degrading water quality from excessive nutrients and algae decay, and decreasing oxygen levels below the tolerances of the DPS.

(5) Actions that would significantly alter channel morphology or geometry, or decrease connectivity. Such activities could include, but are not limited to, channelization, impoundment, road and bridge construction, mining, dredging, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate the Upper Coosa River DPS and its habitats. These actions could also lead to increased sedimentation and degradation in water quality to levels beyond the tolerances of the DPS.

(6) Actions that result in the introduction, spread, or augmentation of nonnative aquatic species in occupied stream segments, or in stream segments that are hydrologically connected to occupied stream segments, or introduction of other species that compete with or prey on the Upper Coosa River DPS. Possible actions could include, but are not limited to, stocking of nonnative fishes and crayfishes, or other related actions. These activities could introduce parasites or disease; result in direct predation or direct competition; or affect the growth, reproduction, and survival of the DPS.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no Department of Defense (DoD) lands within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific

critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

For this designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from the proposed designation. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation (IEc 2020, entire). The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the Upper Coosa River DPS. Ultimately, the screening analysis allows us to focus on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. This screening analysis, combined with the information contained in our IEM, comprises our draft economic analysis (DEA) of the proposed critical habitat designation for the Upper Coosa River DPS of the frecklebelly madtom; our DEA is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Upper Coosa River DPS, first we identified, in the IEM dated June 23, 2020, probable incremental economic impacts associated with the following categories of activities: (1) Federal lands management (U.S. Forest Service and U.S. Army Corps of Engineers); (2) agriculture; (3) development; (4) roadway and bridgeway construction; (5) dredging, dams, and diversions; (6) flood control and hydropower; (7) wastewater and chemical discharge; (8) pesticide use; (9) recreation; (10) conservation and restoration; and (11) transportation and utilities. We considered each industry or category individually. Additionally, we considered whether these activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where individuals from the Upper Coosa River DPS are found, Federal agencies already are required to ensure that their actions are not likely to jeopardize the continued existence of the DPS under section 7 consultation procedures. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the Upper Coosa River DPS's critical habitat. Because the designation of critical habitat for the Upper Coosa River DPS was proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the Upper Coosa River DPS would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Upper Coosa River DPS totals approximately 134 river miles (mi) (216 river kilometers (km)) in two occupied units in Georgia and Tennessee. In these areas, any actions that may affect the species would also affect proposed critical habitat because all designated habitat is occupied. Thus, it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Upper Coosa River DPS. Therefore, the only additional costs that are expected in all of the proposed critical habitat designation are administrative costs. These costs are due to additional consultation analysis requiring time and resources by both the Federal action agency and the Service. However, these costs are not expected to

reach the threshold of ''significant'' under E.O. 12866. We anticipate a maximum of 10 section 7 consultations annually at a total incremental cost of less than $11,000 per year.

We are soliciting data and comments from the public on the DEA discussed above, as well as all aspects of this proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts received during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information we obtain during the public comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

Consideration of National Security Impacts

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Upper Coosa River DPS are not owned, managed, or used by the DoD or DHS where a national security or homeland security impact might exist, and, therefore, we anticipate no impact on national security or homeland security. However, during the development of a final designation, we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

Consideration of Other Relevant Impacts

We consider a number of factors, including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs), or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of Tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no draft or final HCPs or other management plans for the Upper Coosa River DPS, and the proposed designation does not include any Tribal lands or trust resources.

As discussed above, we anticipate no impacts on national security, economic, or any other relevant impacts as a result of this designation. Accordingly, at this time, we do not propose to exclude any particular areas from the critical habitat designation. However, during the development of a final designation, we will consider any additional information we receive through the public comment period regarding other relevant impacts to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

Required Determinations

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

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. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500

employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in the light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13771

This proposed rule is not a regulatory action subject to Executive Order (E.O.) 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget (OMB) provides guidance for implementing this Executive Order, outlining nine outcomes (criteria) that may constitute ''a significant adverse effect'' when compared with the regulatory action under consideration. The economic analysis finds that none of these criteria are relevant to this analysis, and therefore, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments, because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments and, as such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Upper Coosa River DPS in a takings

implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for Upper Coosa River DPS, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of designated critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We 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 (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA), need not be prepared in connection with listing a species as an endangered or threatened species under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is also our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have identified no Tribal interests that would be affected by this proposed listing. We have also determined that no Tribal lands fall within the boundaries of the proposed critical habitat for the Upper Coosa River DPS, so no Tribal lands would be affected by the proposed designation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Alabama Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and

recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. Amend § 17.11(h) by adding an entry for ''Madtom, frecklebelly [Upper Coosa River DPS]'' to the List of Endangered and Threatened Wildlife in alphabetical order under FISHES to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
FISHES				
*	*	*	*	*
Madtom, frecklebelly [Upper Coosa River DPS].	*Noturus munitus*	Upper Coosa River Basin (GA, TN).	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.44(ee); [4d] 50 CFR 17.95(e).[CH]
*	*	*	*	*

■ 3. Amend § 17.44 by reserving paragraphs (cc) and (dd), and by adding a paragraph (ee) to read as set forth below:

§ 17.44 Special rules—fishes.

* * * * *

(cc) [Reserved]

(dd) [Reserved]

(ee) Upper Coosa River DPS of the frecklebelly madtom (*Noturus munitus*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the Upper Coosa River DPS. Except as provided under paragraph (ee)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this DPS:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of a commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this DPS, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.

(iii) Take as set forth at § 17.31(b).

(iv) Take incidental to an otherwise lawful activity caused by:

(A) Channel restoration projects that create natural, physically stable, ecologically functioning streams. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with geomorphically stable stream channels that maintain the appropriate lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation and include stable riffle-run-pool complexes that consist of silt-free gravel, coarse sand, cobble, boulders, woody structure, and river weed (*Podostemum* spp.).

(B) Streambank stabilization projects that use bioengineering methods to replace pre-existing, bare, eroding stream banks with natively vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the DPS. Stream banks may be stabilized using live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). Stream banks must not be stabilized solely through the use of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

(C) Projects carried out in the DPS's range under the Working Lands for Wildlife program of the Natural Resources Conservation Service, U.S. Department of Agriculture, or similar projects conducted by the U.S. Fish and Wildlife Service Partners for Fish and Wildlife Program or the Environmental Protection Agency's 319 Grant Program, that are implemented with a primary objective of improving environmental conditions to support the native, aquatic biodiversity of flowing water habitats.

(v) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

* * * * *

■ 4. Amend § 17.95(e) by adding an entry for ''Frecklebelly Madtom [Upper Coosa River DPS] (*Noturus munitus*)'', in the same alphabetical order that it appears in the table at § 17.11(h), to read as set forth below:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Frecklebelly Madtom [Upper Coosa River DPS] (*Noturus munitus*)

(1) Critical habitat units are depicted for Bradley and Polk Counties, Tennessee, and Cherokee, Dawson, Forsyth, Lumpkin, Murray, and Whitfield Counties, Georgia, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Upper Coosa River distinct population segment (DPS) consist of the following components:

(i) Geomorphically stable, medium to large streams with:

(A) Stable stream channels that maintain lateral dimensions, longitudinal profiles, and sinuosity

patterns over time without an aggrading or degrading bed elevation; and

(B) Banks with intact riparian cover to maintain stream morphology and reduce erosion and sediment inputs.

(ii) Connected instream habitats that:

(A) Include stable riffle-run-pool complexes;

(B) Consist of silt-free gravel, coarse sand, cobble, boulders, woody structure, and river weed (*Podostemum* spp.); and

(C) Have abundant cobble, boulders, woody structure, or other suitable cover used for nesting.

(iii) Adequate flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time), necessary to maintain instream habitats and to maintain connectivity of streams with the floodplain, allowing the exchange of nutrients and sediment for maintenance of the fish's habitat, food availability, and ample oxygenated flow for spawning and nesting habitat.

(iv) Appropriate water and sediment quality (including, but not limited to, conductivity; hardness; turbidity; temperature; pH; ammonia; heavy metals; pesticides; animal waste products; and nitrogen, phosphorus, and potassium fertilizers) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(v) Diversity and availability of aquatic macroinvertebrate prey items, which include larval midges, mayflies, caddisflies, dragonflies, and beetles.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of the rule.

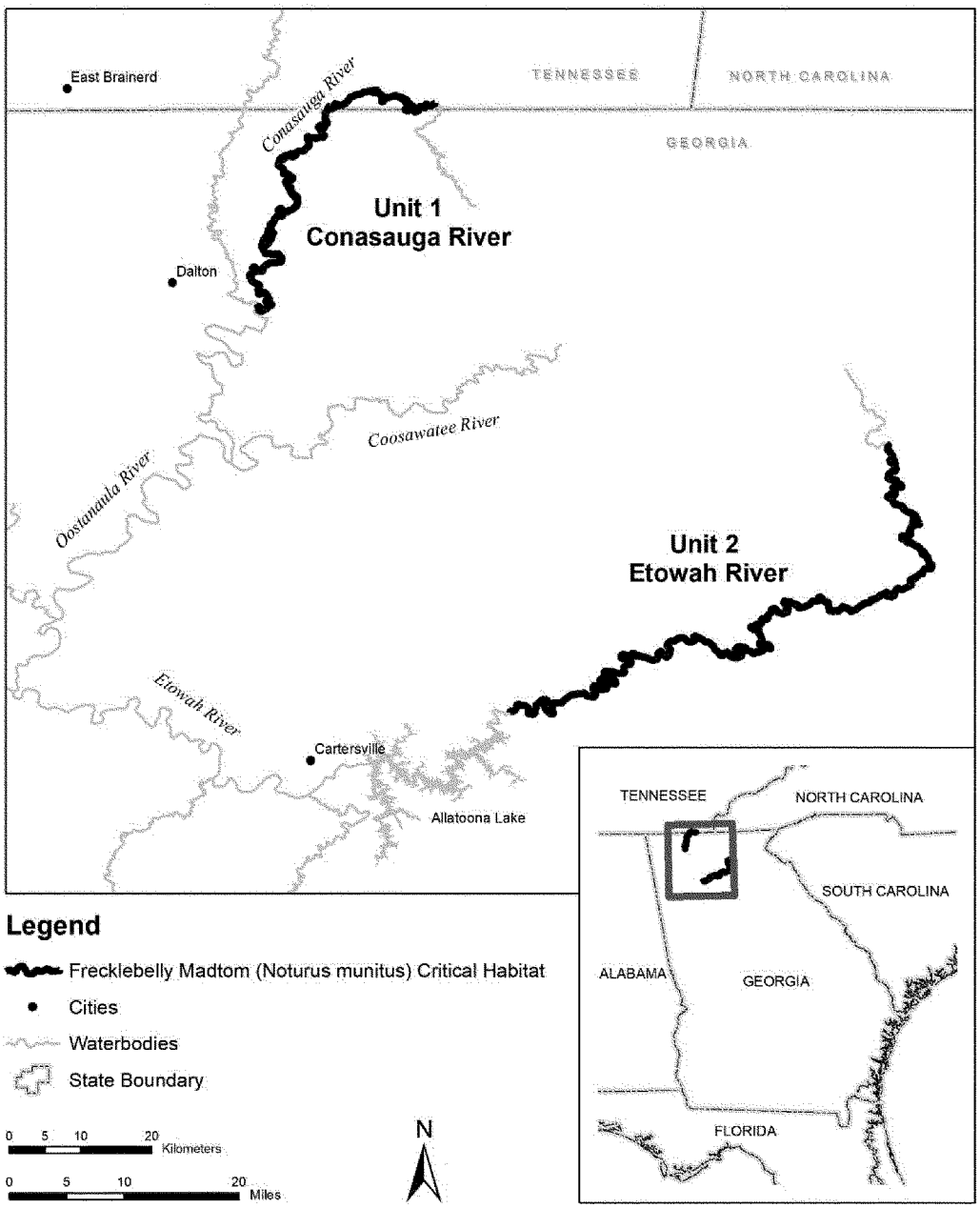
(4) *Critical habitat map units.* Data layers defining map units were selected from the U.S. Geological Survey National Hydrological Dataset—High Resolution (1:24,000 scale; Geographic Coordinate System North American 1983 coordinates) using mapping software. The selected river reaches were informed by species occurrence data. All layers use Universal Transverse Mercator (UTM) Zone 16N coordinates. We also used the mapping software to calculate the length of the units. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points on which each map is based are available to the public at the Service's internet site at *https://www.fws.gov/southeast/,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0058, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

BILLING CODE 4333–15–P

Frecklebelly Madtom (*Noturus munitus*)
Critical Habitat Index Map

Cherokee, Dawson, Forsyth, Lumpkin, Murray, and Whitfield Counties, Georgia; Bradley and Polk Counties, Tennessee

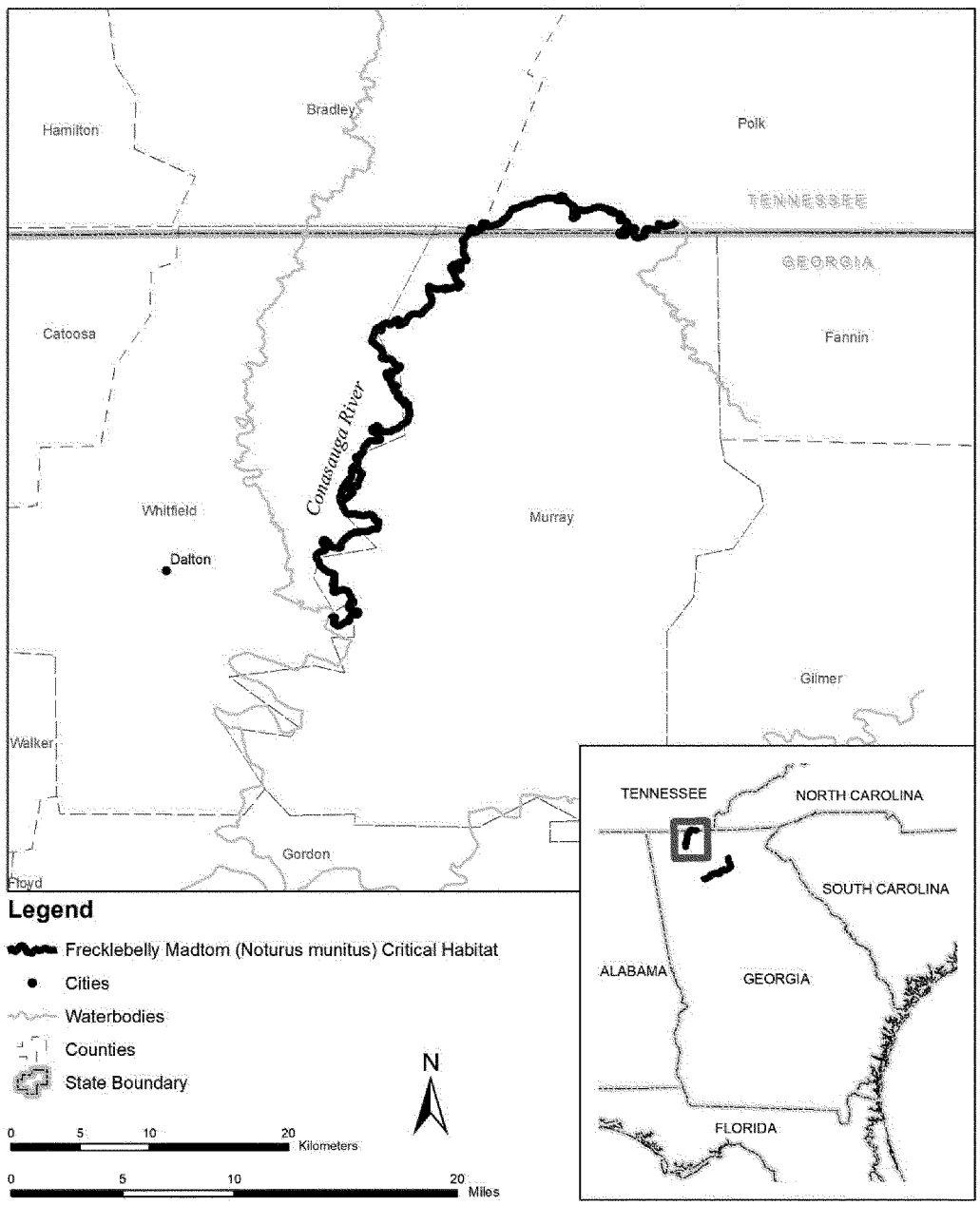


(6) Unit 1: Conasauga River; Bradley and Polk Counties, Tennessee, and Murray and Whitfield Counties, Georgia.

(i) *General description:* Unit 1 consists of 51.5 river miles (83 kilometers) of the Conasauga River beginning at the mouth of Coahulla Creek in Murray and Whitfield Counties, Georgia, and continuing upstream through Bradley County, Tennessee, to the mouth of Graham Branch in Polk County, Tennessee. Unit 1 includes river habitat up to bank full height.

(ii) Map of Unit 1 follows:

Frecklebelly Madtom (*Noturus munitus*)
Critical Habitat Unit 1: Conasauga River
Murray and Whitfield Counties, Georgia; Bradley and Polk Counties, Tennessee

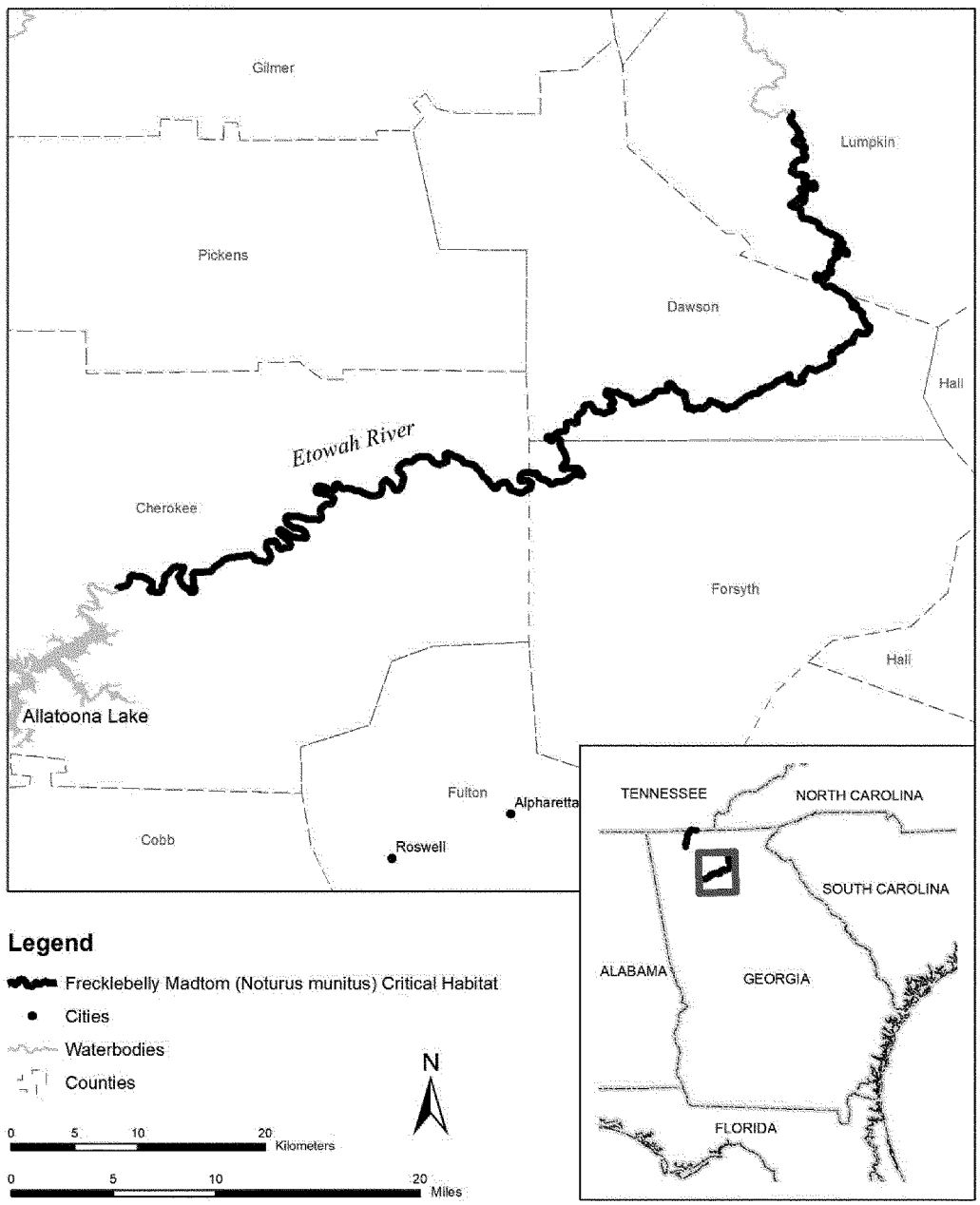


(7) Unit 2: Etowah River, Cherokee, Dawson, Forsyth, and Lumpkin Counties, Georgia.

(i) *General description:* Unit 2 consists of 82.5 river miles (133 kilometers) of the Etowah River beginning at its confluence with Shoal Creek in Cherokee County, Georgia, and continuing upstream through Forsyth and Dawson Counties to approximately 0.5 miles upstream of the Jay Bridge Road crossing over the Etowah River in Lumpkin County, Georgia. Unit 2 includes river habitat up to bank full height.

(ii) Map of Unit 2 follows:

Frecklebelly Madtom (*Noturus munitus*)
Critical Habitat Unit 2: Etowah River
Cherokee, Dawson, Forsyth, and Lumpkin Counties, Georgia



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Aurelia Skipwith

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–24208 Filed 11–18–20; 8:45 am]

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FEDERAL REGISTER

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Part VI

National Credit Union Administration

The NCUA Staff Draft 2021–2022 Budget Justification; Notice

NATIONAL CREDIT UNION ADMINISTRATION

The NCUA Staff Draft 2021–2022 Budget Justification

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice.

SUMMARY: The NCUA's draft, ''detailed business-type budget'' is being made available for public review as required by federal statute. The proposed resources will finance the agency's annual operations and capital projects, both of which are necessary for the agency to accomplish its mission. The briefing schedule and comment instructions are included in the supplementary information section.

DATES: Requests to deliver a statement at the budget briefing must be received on or before November 20, 2020. Written statements and presentations for those scheduled to appear at the budget briefing must be received on or before 5 p.m. Eastern, November 30, 2020.

Written comments without public presentation at the budget briefing may be submitted by December 11, 2020.

ADDRESSES: You may submit comments by any of the following methods (*Please send comments by one method only*):

- *Presentation at public budget briefing:* Submit requests to deliver a statement at the briefing to *BudgetBriefing@ncua.gov* by November 20, 2020. Include your name, title, affiliation, mailing address, email address, and telephone number. Copies of your presentation must be submitted to the same email address by 5 p.m. Eastern, November 30, 2020.
- *Written comments:* Submit comments to *BudgetComments@ncua.gov* by December 11, 2020. Include your name and the following subject line ''Comments on the NCUA Draft 2021–2022 Budget Justification.''

Copies of the NCUA Draft 2021–2022 Budget Justification and associated materials are also available on the NCUA website at *https://www.ncua.gov/About/Pages/budget-strategic-planning/supplementary-materials.aspx.*

FOR FURTHER INFORMATION CONTACT: Eugene H. Schied, Chief Financial Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428 or telephone: (703) 518–6571.

SUPPLEMENTARY INFORMATION: The following itemized list details the documents attached to this notice and made available for public review:

I. The NCUA Budget in Brief
II. Introduction and Strategic Context
III. Forecast and Enterprise Challenges
IV. Key Themes of the 2021–2022 Budget
V. Operating Budget
VI. Capital Budget
VII. Share Insurance Fund Administrative Budget
VIII. Financing The NCUA Programs
IX. Appendix A: Supplemental Budget Information
X. Appendix B: Capital Projects

Section 212 of the Economic Growth, Regulatory Relief, and Consumer Protection Act amended 12 U.S.C. 1789(b)(1)(A) to require the NCUA Board (Board) to ''make publicly available and publish in the **Federal Register** a draft of the detailed business-type budget.'' Although 12 U.S.C. 1789(b)(1)(A) requires publication of a ''business-type budget'' only for the agency operations arising under the Federal Credit Union Act's subchapter on insurance activities, in the interest of transparency the Board is providing the agency's entire staff draft 2021–2022 Budget Justification (budget) in this Notice.

The draft budget details the resources required to support NCUA's mission as outlined in its 2018–2022 Strategic Plan. The draft budget includes personnel and dollar estimates for three major budget components: (1) The Operating Budget; (2) the Capital Budget; and (3) the Share Insurance Fund Administrative Budget. The resources proposed in the draft budget will be used to carry out the agency's annual operations.

The NCUA staff will present its draft budget to the Board at a budget briefing open to the public and scheduled for Wednesday, December 2, 2020 from 10:00 a.m. to 12:00 p.m. Eastern. Due to the COVID–19 Pandemic, the budget briefing will be open to the public via live webcast only. Visit the agency's homepage (*www.ncua.gov*) and access the provided webcast link.

If you wish to participate in the briefing and deliver a statement, you must email a request to *BudgetBriefing@ncua.gov* by November 20, 2020. Your request must include your name, title, affiliation, mailing address, email address, and telephone number. The NCUA will work to accommodate as many public statements as possible at the December 2, 2020 budget briefing. The Board Secretary will inform you if you have been approved to make a presentation and how much time you will be allotted. A written copy of your presentation must be delivered to the Board Secretary via email at *BudgetBriefing@ncua.gov* by 5 p.m. Eastern, November 30, 2020.

Written comments on the draft budget will also be accepted by email at *BudgetComments@ncua.gov* until December 11, 2020. Include your name and the following subject line with your comments: ''Comments on the NCUA Draft 2021–2022 Budget Justification.''

All comments should provide specific, actionable recommendations rather than general remarks. The Board will review and consider any comments from the public prior to approving the budget.

By the National Credit Union Administration Board on November 13, 2020.

Melane Conyers-Ausbrooks,

Secretary of the Board.

I. The NCUA Budget in Brief

Staff Draft 2021 and 2022 Budgets

The National Credit Union Administration's (NCUA) 2018–2022 Strategic Plan sets forth the agency's goals and objectives that form the basis for determining resource needs and allocations. The annual budget provides the resources to execute the strategic plan, to implement important initiatives, and to undertake the NCUA's major programs: Examination and supervision, insurance, credit union development, consumer financial protection, and asset management.

2021–2022 NCUA BUDGET RESOURCES										
Budget	2020 Board Approved Budget	2021 Requested Budget	Change (2020–2021)	Change Percent (2020–2021)	2022 Requested Budget	Change (2021-2022)	Change Percent (2021-2022)	2021 FTE	2022 FTE	FTE Change
Operating Budget	315,883,000	315,567,000	(316,000)	-0.1%	341,766,000	26,199,000	8.3%	1,186	1,186	-
Capital Budget	25,076,000	18,845,000	(6,231,000)	-24.8%	14,572,000	(4,273,000)	-22.7%	-	-	-
Share Insurance Fund Admin. Budget	6,450,000	8,098,000	1,648,000	25.6%	7,880,000	(218,000)	-2.7%	5	5	-
Total	$347,409,000	$342,510,000	$(4,899,000)	-1.4%	$ 364,218,000	$21,708,000	6.3%	1,191	1,191	-

The NCUA's 2021–2022 budget justification consists of three separate budgets: The Operating Budget, the Capital Budget, and the National Credit Union Share Insurance Fund Administrative Budget. Combined, these three budgets total $342.5 million for 2021, which is 4.9 percent less than the 2021 funding level approved by the NCUA Board in December 2019 as part of the two-year 2020–2021 budget, and 1.4 percent less than the comparable level funded by the Board for 2020.

Three significant factors drive the 2021 budget lower than the 2020 level.

1. The NCUA anticipates the continuation of remote/off-site examinations into the first few months of 2021, as the result of on-going concerns about the COVID–19 pandemic, and that examinations-related and other travel will begin to resume as we continue through 2021. Accordingly, travel spending estimates in the 2021 budget are reduced by approximately 25 percent.

2. The NCUA reduced its 2021 budget for travel by an additional 25 percent because it proposes to use surplus funds that resulted from reduced travel in 2020. Combined with the first factor, these reductions account for approximately $12 million in travel-related budget that would otherwise have been included in the 2021 Operating Budget. Had the travel budget for 2021 included this $12 million, the Operating Budget would have increased by approximately 3.7 percent.

3. A final factor driving lower overall spending in 2021 is the reduction in the Capital Budget, largely driven by the completion of the latest phase of the MERIT project.

Staffing levels for 2021 and 2022 reflect the agency's current staffing requirements and proposed staffing enhancements related to high-priority initiatives.

This document is a draft, staff-level budget proposal, made available to the NCUA Board members and the public for their consideration and comment. The contents of this document represent staff-level recommendations for 2021 NCUA funding and have not been endorsed or adopted by the NCUA Board. The NCUA plans to hold a public meeting on December 2, 2020 at 10:00 a.m. to review the budget document and receive comments from members of the public. Final adoption of the budget by the NCUA Board, including any changes to the staff draft that may result from public comments or Board member recommendations, is anticipated at the December Board meeting.

Operating Budget

The proposed 2021 Operating Budget is $315.6 million. Staffing levels are requested to increase by five full-time equivalents (FTE) compared to the 2020 Board-approved budget.[1]

The 2021 Operating Budget, decreases approximately $0.3 million, or 0.1 percent, compared to the 2020 Board-approved budget. The Operating Budget estimate for 2022 is $341.8 million and reflects no change to authorized positions from the 2021 proposed level.

The following chart presents the major categories of spending supported by the 2021 budget, while specific adjustments to the 2020 Board-approved budget are discussed in further detail, below:

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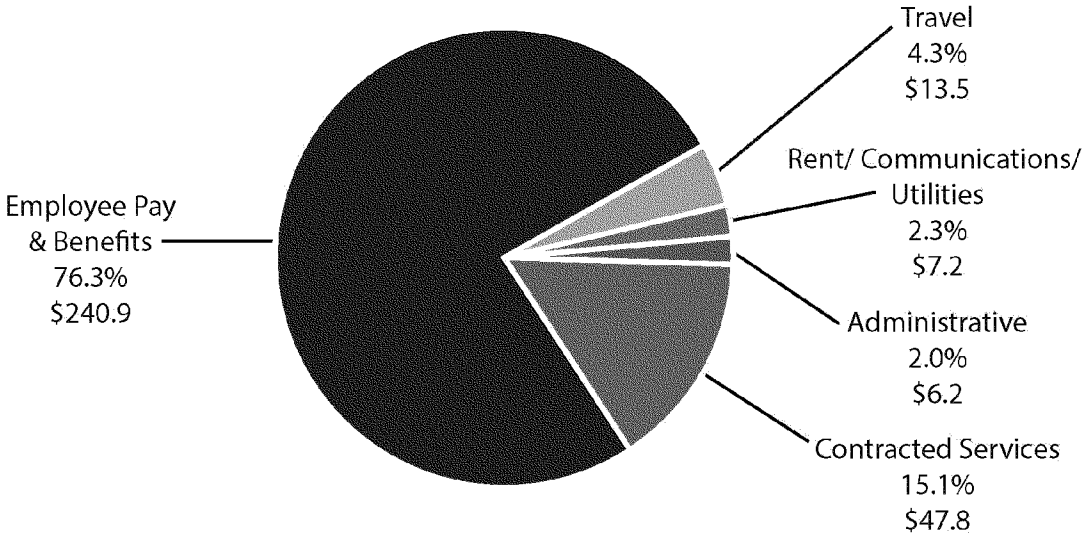
[1] The published 2020 FTE level approved by the Board was 1,180 for the Operating Budget. In March 2020, the NCUA Board approved one additional FTE. The revised 2021 Operating Budget proposes five more FTE, for a total of 1,186.

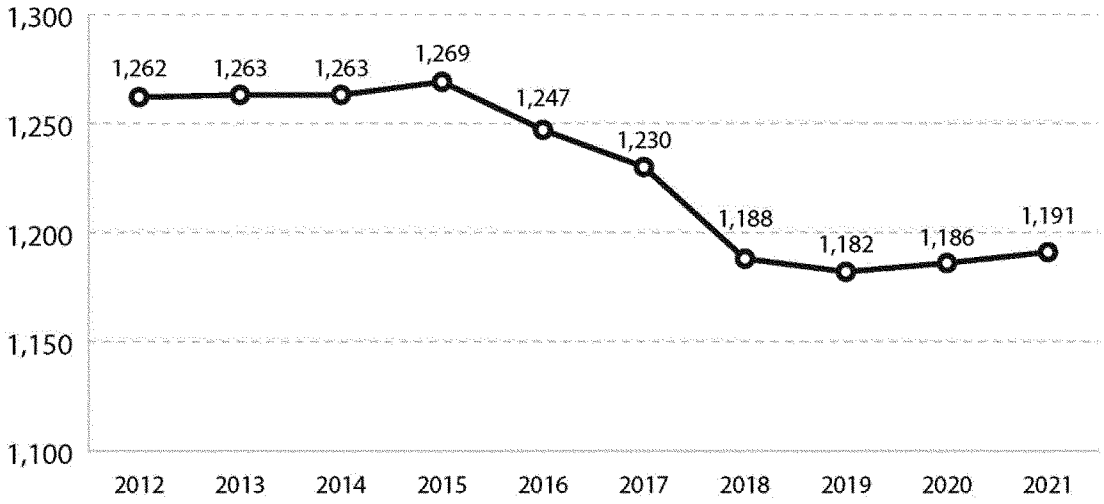
2021 Operating Budget (in Millions of Dollars)



Note: minor rounding differences may occur in totals

Total Staffing. The budget supports 1,191 FTE in total for 2021, of which five are funded by the Share Insurance Fund Administrative Budget. The Operating Budget funds 1,186 FTE in 2021, a net increase of five FTEs from the 2020 levels approved by the Board. Additional staff have been added to several offices as discussed later in this document. Since 2018 and despite significant credit union asset growth, total NCUA staffing has remained within a relatively narrow range, as shown in the chart below.

NCUA Staffing (FTEs)



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Pay and Benefits. Pay and benefits increase by $9.6 million in 2021, or 4.1 percent, for a budget of $240.9 million. A substantial amount of the growth in pay and benefits—nearly $2.3 million—is the result of OPM increasing the mandatory employer contribution for the Federal Employee Retirement System (FERS). Required FERS payments to OPM increase from 16 percent of covered employees' salaries to 17.3 percent, a change of 130 basis points. Nearly all NCUA employees are covered by FERS, which includes a defined pension benefit funded by both employee and employer contributions. Because almost every federal agency is required to participate in FERS, the employer share of contributions increases throughout the government in 2021.

The remaining increase in pay and benefits accounts for the merit and locality pay adjustments required by the NCUA's current collective bargaining agreement, the five new positions proposed for 2021, anticipated staff promotions, position changes, and increased costs for other mandatory employer contributions such as health insurance.

Travel. The travel budget decreases by $13.9 million in 2021, or 50.7 percent, for a budget of $13.5 million. Included in this total and as discussed above, the NCUA reduced the 2021 travel budget by approximately $12 million because the agency expects travel in the first quarter of the year will remain at minimal levels due to the COVID–19 pandemic, and because the agency plans to use surplus 2020 travel funds to pay for a portion of 2021 travel costs. In addition, the cost of training the examiner workforce to use the new MERIT system was already funded in 2020; most training was rescheduled for 2021 but do not require additional resources to carry out.

The NCUA continues working to contain travel costs by expanding offsite examination work and using technology-driven training. In future budgets, the NCUA will determine how such adjustments to its examination approach will help mitigate travel costs.

Rent, Communications, and Utilities. The budget for rent, communications, and utilities decreases by $1,038,000 in 2021, or 12.6 percent, for a budget of $7.2 million. This funding pays for space-related costs, telecommunications services, data capacity contracts, and information technology network support. The decrease in 2021 is primarily due to the termination of a lease for office space in Alexandria VA and the elimination of payments for the NCUA Central Office Building note from the Share Insurance Fund, which would be retired by paying off all principal balances using surplus 2020 travel funds.

Administrative Expenses. Administrative expenses increase $0.6 million in 2021, or 9.8 percent, for a total budget of $6.2 million. The increase to the administrative expenses budget category largely results from including in the 2021 budget the anticipated costs of employee relocations. In 2020, employee relocation costs were paid from surplus salaries and benefits funds available at the end of 2019.

Contracted Services. Contracted services expenses increase by $4.5 million in 2021, an increase of 10.3 percent compared to 2020, for a total budget of $47.8 million. The increase in spending for contract services primarily results from the operating and maintenance costs that will result from deployment of the MERIT system.

Contracted services funding pays for products and services acquired in the commercial marketplace, and includes critical mission support services such as information technology hardware and software support, accounting and auditing services, and specialized subject matter expertise.

Capital Budget

The proposed 2021 Capital Budget is $18.8 million.

The 2021 Capital Budget is $6.4 million less than the 2021 funding level approved by the Board in December 2019, and $6.2 million less than the 2020 Board-approved budget.

The Capital Budget pays for continued investments in critical technology and infrastructure projects. For the past several years, major component of the Capital Budget has been development of the first phases of the Enterprise Solution Modernization (ESM) program, which includes a new technical platform and security infrastructure, a central user interface for stakeholders to transact business with the NCUA, integration of business intelligence tools into the supervision function, and the MERIT examination system, which will replace the agency's antiquated AIRES examination software and will be used by both federal and state examiners in almost all credit union examinations. The MERIT system is scheduled for deployment to all examiners in 2021, and MERIT costs will transition to operating and maintenance budgets. The NCUA's Information Technology Prioritization Council recommended $12 million for IT software development projects that continue to replace the NCUA's decades-old and functionally obsolete information technology systems, and $5.6 million in other IT investments for 2021. The NCUA's facilities require $1.25 million in capital investments.

Share Insurance Fund Administrative Expenses

The proposed 2021 Share Insurance Fund Administrative budget is $8.1 million.

The 2021 Share Insurance Fund (SIF) Administrative Budget is $1.2 million more than the 2021 funding level approved by the Board in December 2019, and $1.6 million more than the 2020 Board-approved budget. The increase in the SIF Administrative Budget is primarily attributed to the costs associated with tools and technology used by the Office of National Examinations and Supervision to oversee credit union-run stress testing for the largest Credit Unions using its own proprietary models. The cost to develop such models was included in past years' capital budgets and the tools and technology were deployed in 2020; the 2021 operating and maintenance costs for ONES tools is now included in the SIF Administrative Budget. Direct charges within this budget include administration of the NCUA Guaranteed Note (NGN) program, state examiner training and laptop leases for state examiners, as well as financial audit and internal control support for the Share Insurance Fund.

2020 Operating Budget—Use of Budget Surplus Resulting From COVID–19 Operating Adjustments

Various public health restrictions instituted in response to the COVID–19 pandemic resulted in much lower-than-planned spending on NCUA employee travel in 2020, as the NCUA pivoted to remote and offsite examinations and work. The NCUA currently estimates that the agency will end 2020 having under-spent the Board-approved budget by approximately $18.3 million, mostly due to a reduction in travel as well as other operating expenses.

The NCUA's response to the coronavirus pandemic has also led to a number of unplanned and unbudgeted expenses, particularly for information technology and operational support activities. As of the publication of this draft budget, the NCUA has reallocated $3.6 million of the projected travel surplus for the liquidation of a portion of NCUA's liabilities associated with disbursements to employees for leave earned in 2020, reducing the anticipated end of year balance for employee leave, as well as increased expenses for items such as remote communications and supply reimbursements due to required off-site work, information technology licensing and equipment costs, cleaning supplies, and facility cleaning and maintenance. These items were discussed as part of the mid-session budget briefing presented at the July 2020 Board meeting. The mid-session estimate was for a $13 million budget surplus from travel, offset by an estimated $5.8 million in increases to other spending categories. The revised surplus estimate is now $18.3 million, and the amount that has been reallocated is $3.6 million.

Deducting the $3.6 million that has been reallocated from the $18.3 million, leaves a balance of $14.7 million, which—subject to approval by the NCUA Board—is being proposed for use in the following way:

- $5.8 million of the budget surplus for 2020 would be made available in 2021, to offset 2021's travel budget. For 2021, the NCUA is currently forecasting a need for about 75% of its annual travel budget, due to the anticipated ongoing travel and on-site work restrictions related to COVID. In addition to the $13.5 million included in this 2021 budget, an additional $5.8 million

would be made available from the 2020 surplus, to fund travel at about 75% of the typical need.

- $2.6 million of the budget surplus would be used to pay for COVID-related expenses in 2020 and 2021, which are largely of a one-time nature and are not anticipated to result in a long-term expense to the agency. This includes:
  - The increase data capacity for computer networks, revised data reporting, conference calling services, and virtual meeting software, all of which spiked due to the remote/off-site work situation.
  - Modifications to facilities operations and maintenance, including improvements to air handling and filtration systems; anticipated increases in facility cleaning and cleaning supplies; and medical consultant support to assess operating status and issues.
  - An assessment of virtual exams in light of the shift to remote and off-site examination and supervision in 2020 as a result of COVID–19, to evaluate opportunities and long-term changes to the supervision program.
- $3.7 million of the surplus would be used to retire the note owed by the Operating Budget to the Share Insurance Fund for the Central Office building at 1775 Duke Street, Alexandria, VA. When the NCUA purchased the building, it was financed by the Share Insurance Fund, and the Operating Fund makes annual principal and interest payments. This action would retire the note three years ahead of schedule, fully repaying the Share Insurance Fund. This will reduce the Operating Budget by about $1.3 million in annual principal payments scheduled for 2021 through 2023, and also avoid additional interest payments for the remaining three years of the loan.
- $2.6 million for the final phase of facilities modernization at the Central Office. This project was originally planned in the original 2021 Capital Budget for $3.0 million. Over the past three years, the NCUA has been modernizing and updating the Central Office, much of which has not been updated in over 20 years. The project also supports security upgrades at the Central and regional offices. Accelerating the funding would enable much of the work to be done while a number of staff continue to work remotely, and will allow NCUA to terminate the lease it has at 1900 Duke Street rather than keep it for 2021, avoiding a cost of approximately $600,000. Therefore, in total, the use of the surplus for this project reduces the overall 2021 budget by $3.6 million.

Budget Trends

As shown in the chart below, the relative size of the NCUA budget (dotted line) continues to decline when compared to balance sheets at federally insured credit unions (solid line). This trend illustrates the greater operating efficiencies the NCUA has attained in the last several years relative to the size of the credit union system. Additionally, the NCUA has improved its operating efficiencies more aggressively than other financial industry regulators (dotted line compared to dashed line).

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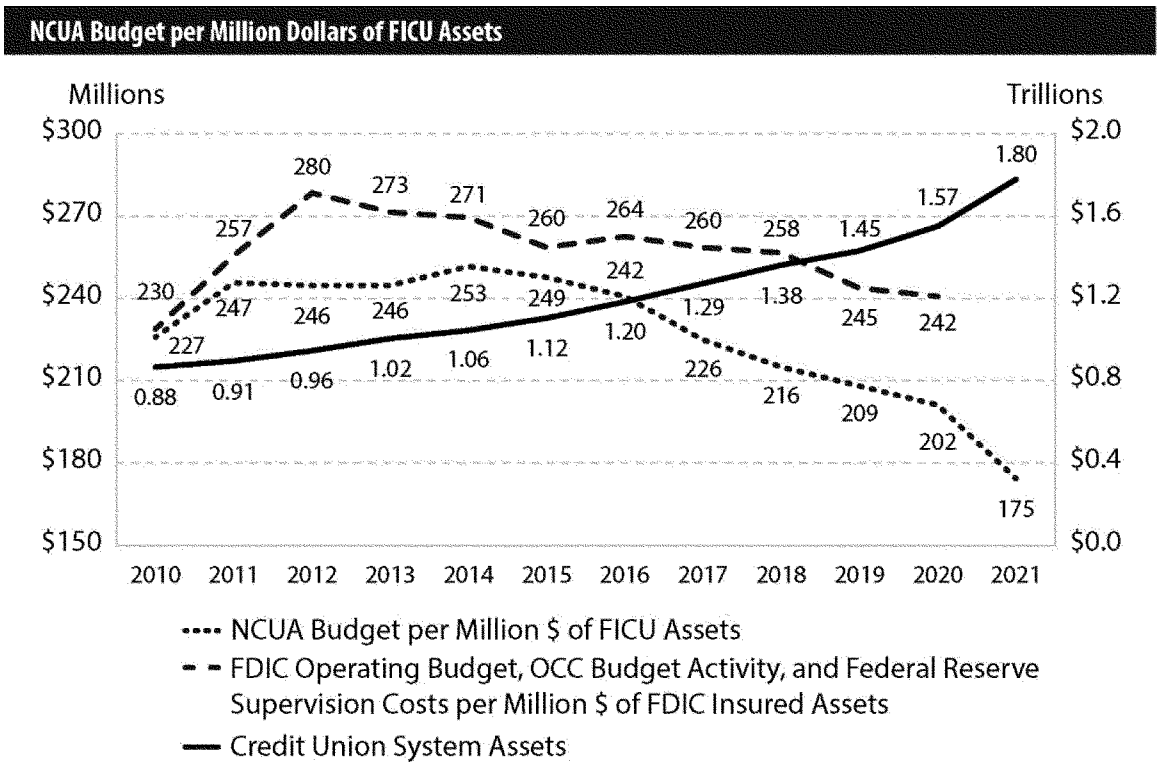

Source: NCUA Annual Budgets, Call Reports, FDIC, OCC, and Federal Reserve financial reports
*Budget per million $ of FICU assets is calculated as the fiscal year's budget divided by the previous year's end-of-year assets (e.g. - FY2021 budget ($315.6M) / projected FICU assets as of 2020Q4 ($1.8T) = $175 of NCUA budget per $1M in FICU assets).

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It is also notable that the NCUA's operations have become more efficient relative to the size of the credit union system because consolidation in the industry has led to growth in the number of large credit unions. This

results in additional complexity in the balance sheets of such credit unions, and a corresponding increase in the supervisory review required to ensure the safety and soundness of such large institutions. The NCUA responded to this increasing complexity through several initiatives: Creation of the specialized Office of National Examination and Supervision, development of in-house capabilities to oversee large credit unions' stress testing, use of specialist examiners with expertise in cybersecurity and capital markets, and improved quality of examination reports through enhanced quality review processes.

Federal Compliance Cost

As a federal agency, the NCUA is required to devote significant resources to numerous compliance activities required by federal law, regulations, or, in some cases, Executive Orders. These requirements dictate how many of the agency's activities are implemented and the associated costs. These compliance activities affect the level of resources needed in areas such as information technology acquisitions and management, human capital processes, financial management processes and reporting, privacy compliance, and physical and cyber security programs. While agency managers are responsible for these activities, required compliance activities can add additional processes and procedures.

Financial Management

Federal law, regulations, and government-wide guidance promulgated by the Office of Management and Budget (OMB), the Government Accountability Office (GAO), and the Department of the Treasury place numerous requirements on federal agencies including the NCUA regarding the management of public funds. Government-wide financial management compliance requirements include: Financial statement audits, improper payments, prompt payments, internal controls, procurement, audits, enterprise risk management, strategic planning, and public reporting of financial and other information.

Information Technology (IT)

There are numerous laws, regulations and required guidance concerning information technology used by the federal government. Many of the requirements cover IT security such as the Federal Information Security Management Act. Other requirements cover records management, paperwork reduction, information technology acquisition, cybersecurity spending, and accessible technology and continuity.

Human Capital and Equal Opportunity

Like other federal agencies, the NCUA is subject to an array of human capital-related laws, regulations, and other mandatory guidance issued by OPM, the Equal Employment Opportunity Commission, and OMB. Human capital compliance requirements include procedures for engagement related to hiring; management engagement with public unions and collective bargaining; employee discipline and removal procedures; required training for supervisors and employees; employee work-life and benefits programs; equal employment opportunity and required diversity and inclusion programs; and storage and retention of human resource records. The NCUA is also required by law to ''maintain comparability with other federal bank regulatory agencies'' when setting employee salaries.

Security

The NCUA's security posture is driven by numerous legal and regulatory requirements covering the full range of security functions. The NCUA is required to comply with mandatory requirements for personnel security; physical security; emergency management and continuity; communications and information security; and insider threat activities. In addition to meeting specific legislative mandates, as a federal agency the NCUA is required to follow guidance from, but not limited to, the Office of the Director of National Intelligence, the Department of Defense, OPM, and the Federal Emergency Management Agency.

General Compliance Activities

The NCUA also has other general compliance activities that cut across numerous offices. For example, the NCUA expends resources complying with the Privacy Act; Government in the Sunshine Act; multiple laws and regulations related to government ethics standards; and various reporting and other requirements set forth by the Federal Credit Union Act and other statutes.

Federal retirement costs are an example of mandatory payments to other federal agencies. As discussed earlier in this document, the cost of mandatory contributions to OPM for most NCUA employees' retirement system will increase from 16.0 to 17.3 percent of their salaries, based on the OPM Board of Actuaries of the Civil Service Retirement System recommendations. The budget impact of these additional retirement costs in 2021 is an increase of approximately $2.3 million over 2020.

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2021 Budget in Brief: Summary Table

(dollars in millions)	Budget	Change from 2020 Budget	% Change	Description
2021 Operating Budget	**$315.6**	**↓ $0.3**	**-0.1%**	The 2021 budget provides the resources required to execute the priorities outlined in the NCUA's Strategic Plan (2018-2022).
Total Staffing (FTE)	**1,191**	**↑ 5**	**+ 0.4%**	The 2021 FTE level increases by five positions from 1,186 authorized by the Board in 2020.
Budget Category				
Pay & Benefits	**$ 240.9**	**↑ $9.6**	**+ 4.1%**	The pay and benefits adjustment covers merit and locality pay changes required by the Collective Bargaining Agreement. The increase also funds $2.3 million in mandatory employer contributions for retirement, as well as health benefits and the compensation costs for new FTEs.
Travel	**$13.5**	**↓ $13.9**	**-50.7%**	The travel budget decreases by slightly more than half in 2021 compared to 2020. The NCUA anticipates minimal travel through the first quarter of 2021 because of the COVID-19 pandemic, and also recommends using approximately $6 million in surplus 2020 travel funds in 2021.
Rent, Communications & Utilities	**$7.2**	**↓ $1.0**	**-12.6%**	Rent, communications, and utilities budgets maintain essential working space, telecommunications, data capacity, and network support. This budget decreases due to the cancellation of an office lease and the payoff of the NCUA's loan that financed construction of the Central Office building.
Administrative	**$6.2**	**↑ $0.6**	**+9.8%**	Administrative expenses primarily support operational requirements, FFIEC fees, relocation expenses, and employee supplies. This budget increases because employee relocation budgets funded in 2020 with prior-year surplus funds were added back to the 2021 budget. .
Contracted Services	**$47.8**	**↑ $4.5**	**+10.3%**	Contracted services reflect costs incurred when products and services are acquired in the commercial marketplace and include critical mission support services such as information technology hardware and software development support, accounting and auditing services, and specialized subject matter expertise.

2022 Budget in Brief: Summary Table

(dollars in millions)	Budget	Change from 2021 Budget	% Change	Description
2022 Operating Budget	**$341.8**	**↑ $26.2**	**+8.3%**	The 2022 budget provides the resources required to execute the priorities outlined in the NCUA's Strategic Plan (2018-2022).
Total Staffing (FTE)	**1,191**	**0**	**0%**	The 2022 budget is unchanged from the 2021 FTE levels.
Budget Category				
Pay & Benefits	**$249.4**	**↑ $8.5**	**+ 3.5%**	The pay and benefits adjustment covers merit and locality pay changes required by the Collective Bargaining Agreement. The increase also funds mandatory employer contributions for health insurance and retirement. Other 2022 cost drivers include full cost for new FTEs added in 2021.
Travel	**$24.3**	**↑ $10.8**	**+80.4%**	Travels costs will increase in 2022 after the COVID-19 pandemic subsides and because surplus 2020 travel funds will be fully spent. The travel budget pays for carrying out the examination and supervision workload and other agency business.
Rent Communications & Utilities	**$8.4**	**↑ $1.2**	**+17.2%**	Rent, communications, and utilities costs will increase in 2022 as the NCUA continues deploying new technology that consumes more data and telecommunications bandwidth. Rent, communications, and utilities expenses include utilities, space rental, software licenses and other recurring costs.
Administrative	**$6.2**	**$0**	**0%**	Administrative expenses support operational requirements, FFIEC fees, relocation expenses, and employee supplies.
Contracted Services	**$53.4**	**↑ $5.6**	**+11.8%**	Contracted services reflect costs incurred for products and services acquired in the commercial marketplace. The increase for 2022 reflects system operations and maintenance support related to implementation of MERIT and other technology acquisitions.

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II. Introduction and Strategic Context

History

For more than 100 years, credit unions have provided financial services to their members in the United States. Credit unions are unique depository institutions created not for profit, but to serve their members as credit cooperatives.

President Franklin Roosevelt signed the Federal Credit Union Act into law in 1934 during the Great Depression, enabling credit unions to be organized throughout the United States under charters approved by the federal government. The law's goal was to make credit available to Americans and promote thrift through a national system of nonprofit, cooperative credit unions. In the years since the passage of the Federal Credit Union Act, credit unions have evolved and are larger and more complex today than those first institutions. But, credit unions continue to provide needed financial services to millions of Americans.

The NCUA is the independent federal agency established in 1970 by the U.S. Congress to regulate, charter, and supervise federal credit unions. With the backing of the full faith and credit of the United States, the NCUA operates and manages the National Credit Union Share Insurance Fund, insuring the deposits of the account holders in all federal credit unions and the vast majority of state-chartered credit unions. No credit union member has ever lost a penny of deposits insured by the Share Insurance Fund.

As of June 2020, the NCUA is responsible for the regulation and supervision of 5,164 federally insured credit unions, which have approximately 122.3 million members and more than $1.75 trillion in assets across all states and U.S. territories.[2]

Authority

Pursuant to the Federal Credit Union Act, authority for management of the NCUA is vested in the NCUA Board. It is the Board's responsibility to determine the resources necessary to carry out the NCUA's responsibilities

[2] Source: The NCUA quarterly call report data, Q2 2020.

under the Act.[3] The Board is authorized to expend such funds and perform such other functions or acts as it deems necessary or appropriate in accordance with the rules, regulations, or policies it establishes.[4]

Upon determination of the budgeted annual expenses for the agency's operations, the Board determines a fee schedule to assess federal credit unions. The Board gives consideration to the ability of federal credit unions to pay such a fee, and the necessity of the expenses the NCUA will incur in carrying out its responsibilities in connection with federal credit unions.[5] In July 2020, the Board approved for publication in the **Federal Register** proposed changes to its regulation and methodology for determining the fees due from federal credit unions, and has invited public comment on the proposals.[6]

Pursuant to the law, fees collected are deposited in the agency's Operating Fund at the Treasury of the United States, and those fees are expended by the Board to defray the cost of carrying out the agency's operations, including the examination and supervision of federal credit unions.[7] In accordance with its authority[8] to use the Share Insurance Fund to carry out a portion of its responsibilities, the Board approved an Overhead Transfer Rate methodology, and authorized the Office of the Chief Financial Officer to transfer resources from the Share Insurance Fund to the Operating Fund to account for insurance-related expenses.

Mission, Goals, and Strategy

The NCUA's 2021–2022 Budget Submission supports the agency's fourth year implementing its *2018–2022 Strategic Plan* to achieve its priorities and improve program performance.

Throughout 2021 and 2022, the NCUA will continue fulfilling its mission to ''*provide, through regulation and supervision, a safe and sound credit union system which promotes confidence in the national system of cooperative credit,*'' and its vision to ensure that the ''*NCUA protects credit unions and consumers who own them through effective supervision, regulation and insurance.*'' This budget commits the resources necessary to implement the NCUA's plans to identify key challenges facing the credit union industry and leverage agency strengths to help credit unions address those challenges.

The budget supports the NCUA's programs, which are focused on achieving the agency's three strategic goals:

- Ensure a safe and sound credit union system;
- Provide a regulatory framework that is transparent, efficient, and improves consumer access; and
- Maximize organizational performance to enable mission success.

Additional information about alignment of the budget to the NCUA's strategic goals is in Appendix A.

In support of its first strategic goal—*ensure a safe and sound credit union system*—the NCUA will continue to supervise federally insured credit unions effectively and maintain a strong Share Insurance Fund.

The NCUA's primary function is to identify credit union system risks, determine the magnitude of those risks, and mitigate unacceptable levels through the examination and supervision program. The agency identifies supervision program priorities each year, aligning budgeted resources to these priorities while addressing emerging issues in order to minimize losses to the Share Insurance Fund. Program priorities in 2021 include ongoing efforts to:

- Ensure compliance with Bank Secrecy Act and Anti-Money Laundering laws and regulations;
- examine credit union operations for compliance with applicable consumer financial protection regulations;
- review credit union policies and the use of loan workout strategies, risk management practices, and new strategies implemented to assist borrowers impacted by the COVID–19 pandemic, including new programs authorized through the CARES Act;
- ensure that credit unions have evaluated and effectively manage the economic impact of COVID–19 on their credit risk, capital position, and overall financial stability;
- evaluating critical security controls for credit union information systems in response to emerging cyber-attacks, which are a persistent threat to the financial sector;
- assess credit unions' exposure and planning related to a transition away from LIBOR; and,
- review liquidity risk management and planning in all credit unions.

The NCUA staff of credit union examiners are the agency's most important assets for identifying and addressing risks before they threaten members' deposits. To do their jobs effectively in this complex and dynamic financial environment, the NCUA staff require the advanced skills, training, and tools supported by the budget. The multi-year Enterprise Solution Modernization (ESM) program will reach a major milestone in 2021 with the deployment of the Modern Examination and Risk Identification Tool (MERIT), the agency's modernized examination tool replacing the Automated Integrated Regulatory Examination System (AIRES), to all credit union examiners and state regulators. As the agency transitions to this new tool, which will result in more efficient and effective supervision, the NCUA must ensure its staff is prepared to use it. Training originally scheduled and paid for in the 2020 budget has been postponed to 2021 because of COVID–19 related travel restrictions.

To fulfill the NCUA's second strategic goal—*provide a regulatory framework that is transparent, efficient, and improves customer access*—the agency continues its efforts to review its regulations in a manner that encourages innovation, provides flexibility, and fulfills its primary mission of protecting safety and soundness. The budget allocates resources to agency programs that keep regulations up to date and consistent with current law, and that assist existing and prospective credit unions with expansion and new chartering activities. The NCUA also seeks to promote financial inclusion through its Advancing Communities through Credit, Education, Stability, and Support (ACCESS) initiative to better serve a changing population and economy while simultaneously ensuring compliance with consumer and financial protections.

Accomplishing the third strategic goal—*maximize organizational performance to enable mission success*—ensures the NCUA employees achieve the agency's mission by supporting them through efficient and effective business processes, modern and secure technology, and suitable tools necessary to perform their duties. The budget makes investments in improved tools and facilities for the NCUA staff, and technological enhancements including new systems that will improve operational effectiveness and efficiency. The budget also allocates resources to developing better human capital planning and processes including a new leadership development strategy and a focus on training for the transition to MERIT.

[3] *See* 12 U.S.C. 1752a(a).

[4] *See* 12 U.S.C. 1766(i)(2).

[5] *See* 12 U.S.C. 1755(a)–(b).

[6] *See https://www.federalregister.gov/d/2020-16981* and *https://www.federalregister.gov/d/2020-17009.*

[7] *See* 12 U.S.C. 1755(d).

[8] *See* 12 U.S.C. 1783(a).

Organization, Major Agency Programs, and Workforce

The NCUA operates its headquarters in Alexandria, Virginia, to administer and oversee its major programs and support functions; its Asset Management and Assistance Center (AMAC) in Austin, Texas, to liquidate credit unions and recover assets; and three regional offices, to carry out the agency's supervision and examination program. Reporting to these regional offices, the NCUA has credit union examiners responsible for a portfolio of credit unions covering all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

The NCUA organizational chart below reflects the agency's current structure, and the map shows each region's geographical alignment:

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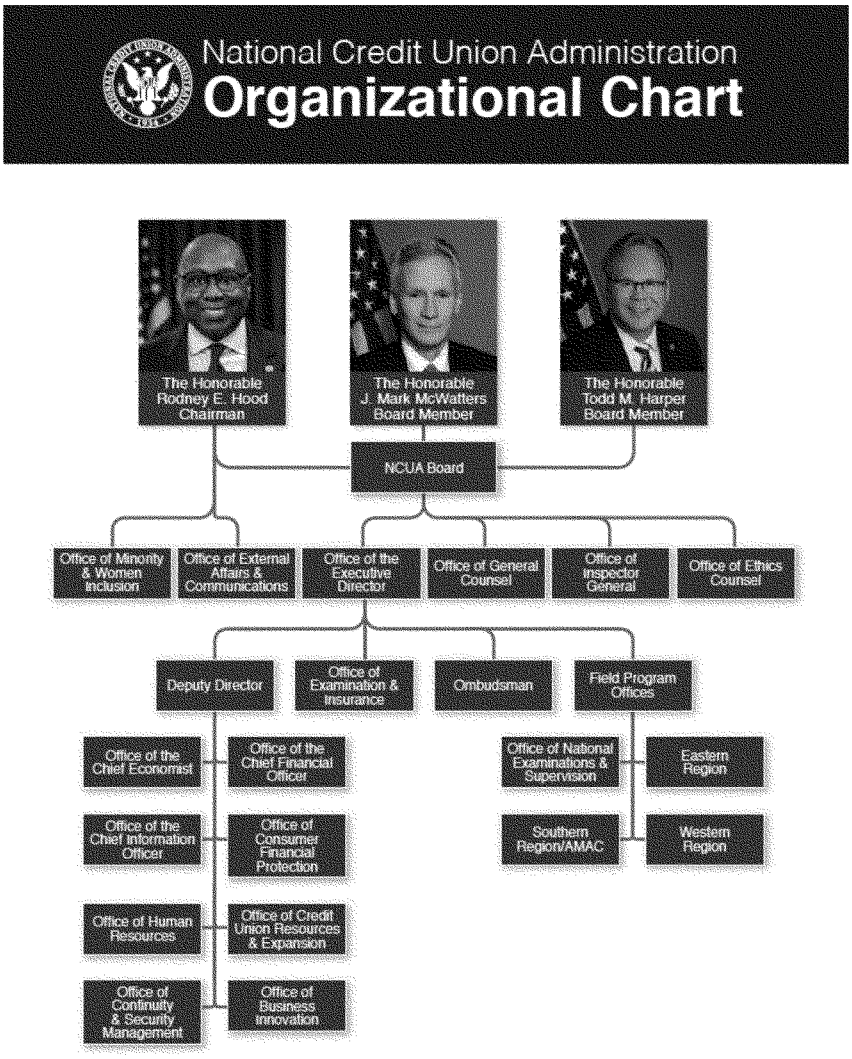

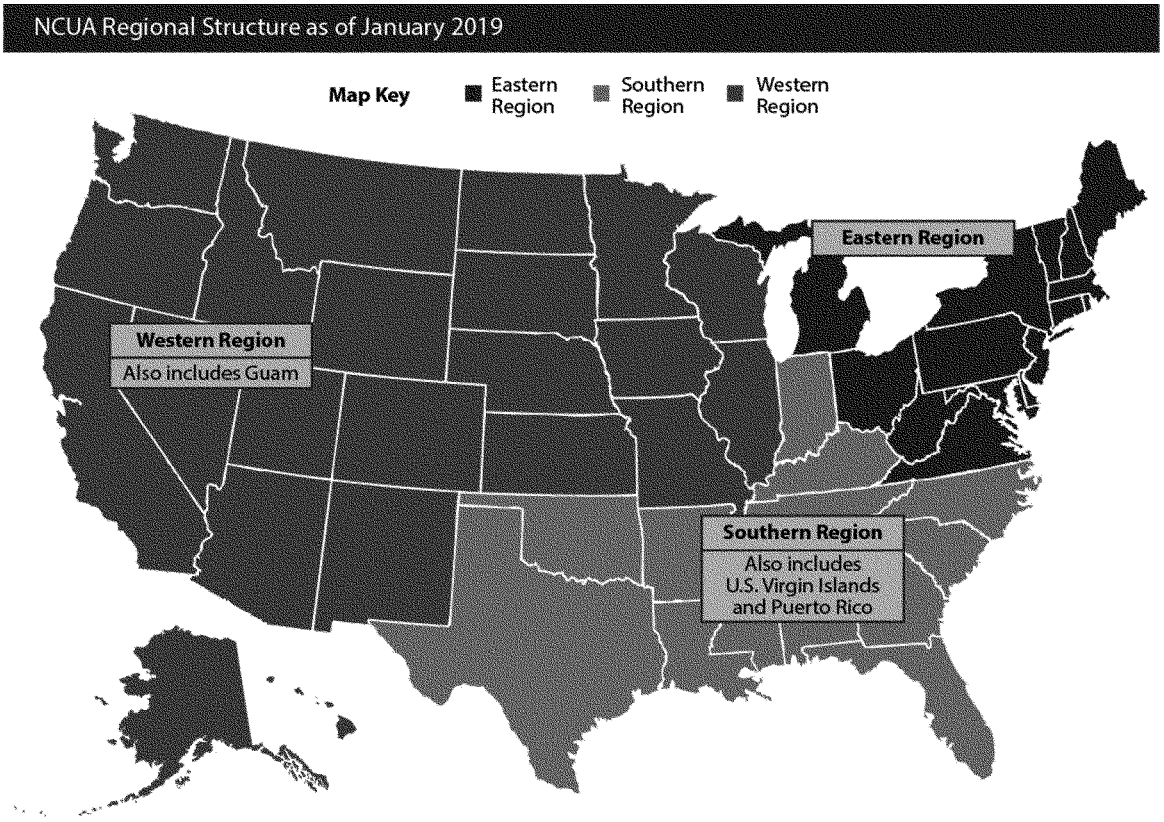

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The NCUA's regional offices will carry out the agency's 2021 examination program. The NCUA uses an extended examination cycle for well-managed, low-risk federal credit unions with assets of less than $1 billion. Additionally, the NCUA's examiners perform streamlined examination procedures for financially and operationally sound credit unions with assets less than $50 million. In addition, the Office of National Examination and Supervision (ONES) will continue to examine corporate credit unions and large consumer credit unions with assets that total over $10 billion. Consumer credit unions fall within ONES' purview based on assets reported on the first quarter call report for the preceding year. Therefore, based on 2020 first quarter call report statistics, in 2021 ONES will examine and supervise 11 consumer credit unions with 21.5 million members, accounting for $324.5 billion in credit union assets. For the 2022 examination cycle, an additional seven credit unions are projected to cross the $10 billion threshold and under existing regulations fall within the supervisory purview of ONES.

In 2021 and 2022, the agency's workforce will undertake tasks in all of the NCUA's major programs:

Supervision: The NCUA supervises federally insured credit unions through examinations and regulatory enforcement including providing guidance through various publications, taking administrative actions and conserving, liquidating, or merging severely troubled institutions as necessary to manage risk.

Insurance: The NCUA manages the $17.7 billion [9] Share Insurance Fund, which provides insurance to at least $250,000 for shares held at federally insured credit unions. The fund is capitalized by credit unions and through retained earnings.

Credit Union Development: Through training, partnerships and resource assistance, the NCUA fosters credit union development, particularly the expansion of services to eligible members provided by small, minority, newly chartered, and low-income designated credit unions. The NCUA also charters new federal credit unions, as well as approves modifications to existing charters and fields of membership.

Consumer Financial Protection: The NCUA protects consumers' rights through effective enforcement of federal consumer financial protection laws, regulations, and requirements. The NCUA also develops and promotes financial education programs for credit unions to assist members in making smarter financial decisions.

Asset Management: The NCUA conducts credit union liquidations and performs management and recovery of assets through AMAC. This office effectively and efficiently manages and disposes assets acquired from liquidations.

The NCUA also performs stakeholder outreach and is involved in numerous cross-agency initiatives. The NCUA conducts stakeholder outreach to clearly understand the needs of the credit union system. The NCUA seeks input from all of its stakeholders, including the Administration, Congress, State Supervisory Authorities, credit union members, credit unions, and their associations.

The NCUA collaborates with the other financial regulatory agencies including through participation in several councils. Significant councils include the Financial Stability Oversight Council (FSOC), the Federal Financial Institutions Examination Council (FFIEC), and the Financial and Banking Information Infrastructure Committee (FBIIC). These councils and relationships help ensure consistent policy and standards within the nation's financial system, where appropriate.

[9] *See https://www.ncua.gov/files/publications/share-insurance-financial-highlights-2020-june.pdf.*

Budget Process—Strategy to Budget

The NCUA's budget process starts with a review of the agency's goals and objectives set forth in the strategic plan. The strategic plan is a framework that sets the agency's direction and guides resource requests, ensuring the agency's resources and workforce are allocated and aligned to agency priorities and initiatives.

Each regional and central office director at the NCUA develops an initial budget request identifying the resources necessary for their office to support the NCUA's mission, strategic goals, and strategic objectives. These budgets are developed to ensure each office's requirements are individually justified and remain consistent with the agency's overall strategic plan.

For regional offices, one of the primary inputs in the development process is a comprehensive workload analysis that estimates the amount of time necessary to conduct examinations and supervise federally insured credit unions in order to carry out the NCUA's dual mission as insurer and regulator. This analysis starts with a field-level review of every federally insured credit union to estimate the number of workload hours needed for the budget year. The workload estimates are then refined by regional managers and submitted to the NCUA central office for the annual budget proposal. The workload analysis accounts for the efforts of nearly seventy percent of the NCUA workforce and is the foundation for budget requests from regional offices and ONES.

In addition to the workload analysis, from which central office budget staff derive related personnel and travel cost estimates, each of the NCUA offices submit estimates for fixed and recurring expenses, such as rental payments for leased property, operations and maintenance for owned facilities or equipment, supplies, telecommunications services, major capital investments, and other administrative and contracted services costs.

Because information technology investments impact all offices within the agency, the NCUA has established an Information Technology Prioritization Council (ITPC). The ITPC meets several times each year to consider, analyze, and prioritize major information technology investments to ensure they are aligned with the NCUA's strategic plan. These focused reviews result in a mutually agreed-upon budget recommendation to support the NCUA's top short-term and long-term information technology needs and investment priorities.

Once compiled for the entire agency, all office budget submissions undergo thorough reviews by the responsible regional and central office directors, the Chief Financial Officer, and the NCUA's executive leadership. Through a series of presentations and briefings by the relevant office executives, the NCUA Executive Director formulates an agency-wide budget recommendation for consideration by the Board.

In recent years, the Board has emphasized the need for increased transparency of the NCUA's finances and its budgeting processes. In response, the Office of the Chief Financial Officer has made draft budgets available for public comment via the NCUA's website, and solicited public comments before presenting final budget recommendations for the Board's approval. Furthermore, the Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law 115–174, enacted May 24, 2018, requires in Section 212 that the NCUA ''make publicly available and publish in the **Federal Register** a draft of the detailed business-type budget.'' To fulfill this requirement, the Board delegated to the Executive Director the authority to publish the draft budget before submitting it for Board review.

This 2021–2022 budget justification document includes comparisons to the Board approved 2020–2021 budget, and includes a summary description of the major spending items in each budget category to provide transparency and understanding of the use of budgeted resources. Estimates are provided by major budget category, office, and cost element.

The NCUA also posts supporting documentation for its budget request on the NCUA website to assist the public in understanding its budget development process. The budget request for 2021 represents the NCUA's projections of operating and capital costs for the year, and is subject to approval by the Board.

Commitment to Financial Stewardship

The NCUA funds its activities through operating fees levied on all federal credit unions and through reimbursements from the Share Insurance Fund, which is funded by both federal credit unions and federally insured state-chartered credit unions. The Overhead Transfer Rate (OTR) calculation determines the annual amount that the Share Insurance Fund reimburses the Operating Fund to pay for the NCUA's insurance-related activities. At the end of each calendar year, the NCUA's financial transactions are subject to audit in accordance with Generally Accepted Government Auditing Standards.[10]

The Board and the agency are committed to providing sound financial stewardship. In recent years, the NCUA Chief Financial Officer, with support and direction from the Executive Director and Board, has worked to improve the NCUA's financial management, financial reporting, and budget processes.

The NCUA revised its financial presentations to conform to federal budgetary concepts and increase transparency of the agency's planned financial activity, starting with the 2018 budget. The 2021–2022 budget continues this presentation. The NCUA is the only Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) agency that publishes a detailed, draft budget and solicits public comments on it at a meeting with its Board and other agency leadership.

The NCUA continues to work diligently to strengthen its internal controls for financial transactions, in accordance with sound financial management policies and practices. Based on the results of the NCUA's assessments conducted through the course of 2019, the agency provided an unmodified Statement of Assurance (signed February 14, 2020) that its management had established and maintained effective controls to achieve the objectives of the Federal Managers Financial Integrity Act (FMFIA) and Office of Management and Budget (OMB) Circular A–123. Specifically, the NCUA supports the internal control objectives of reporting, operations, and compliance, as well as its integration with overarching risk management activities. Within the Office of the Chief Financial Officer, the Internal Controls Assessment Team (ICAT) continues to mature the agency-wide internal control program and continues to strengthen the overall system of internal control, further promote the importance of identifying risk, and ensure the agency has identified appropriate responses to mitigate identified risks, in accordance with the Government Accountability Office's Standards for Internal Controls in the Federal Government (Green Book) requirements.

Enterprise Risk Management

The NCUA uses an Enterprise Risk Management (ERM) program to evaluate various factors arising from its operations and activities (both internal to the agency and external in the

[10] *See* 12 U.S.C. 1783(b) and 1789(b).

industry) that can impact the agency's performance relative to its mission, vision, and performance outcomes. Agency priority risks include both internal considerations such as the agency's control framework, information security posture, and external factors such as credit union diversification risk. All of these risks can materially impact the agency's ability to achieve its mission.

The NCUA's ERM Council provides oversight of the agency's enterprise risk management activities. Through the ERM program, established in 2015, the agency is identifying, analyzing, and managing risks that could affect the achievement of its strategic objectives. In 2020, the NCUA utilized ERM principles to respond to the operational challenges and opportunities created by the COVID–19 pandemic. In 2021, the NCUA plans to continue its efforts to mature its ERM program, analyze high-priority enterprise risks using its assessment framework, and refresh its inventory of enterprise risks.

Overall, the NCUA's ERM program promotes effective awareness and management of risks, which, when combined with robust measurement and communication, are central to cost-effective decision-making and risk optimization within the agency. This holistic evaluation of how the agency pursues its goals and objectives is guided by the agency's appetite for risk and considers resource availability or limitations. The NCUA believes that for many strategic decisions about its programs, ERM offers a better framework for evaluating both the quantitative and qualitative aspects of enterprise-level decisions than the types of cost-benefit analyses used for regulatory development. In addition, the agency's risk appetite helps the NCUA's employees align risks with opportunities when making decisions and allocating resources to achieve the agency's strategic goals and objectives.

The NCUA adopted its enterprise risk appetite statement in the *2018–2022 Strategic Plan,* which is:

> The NCUA is vigilant and has an overall judicious risk appetite. The NCUA's primary goal is to ensure the safety and soundness of the credit union system and the agency recognizes it is not desirable or practical to avoid all risk. Acceptance of some risk is often necessary to foster innovation and agility. This risk appetite will guide the NCUA's actions to achieve its strategic objectives in support of providing, through regulation and supervision, a safe and sound credit union system, which promotes confidence in the national system of cooperative credit.

This enterprise risk appetite statement is part of the NCUA's overall management approach and is supported by detailed appetite statements for individual risk areas.

In practice, this means that the NCUA recognizes that risk is unavoidable and sometimes inherent in carrying out the agency's mandate. The NCUA is positioned to accept greater risks in some areas than in others; however, when consolidated, the risk appetite establishes boundaries for the entire agency and all of its programs. Collaboration across programs and functions is a fundamental part of ensuring the agency stays within its risk appetite boundaries, and the NCUA will identify, assess, prioritize, respond to, and monitor risks to an acceptable level. This budget proposal for 2021–2022 incorporates several programmatic investments that resulted from the NCUA's enterprise risk management reviews, such as acquiring data loss prevention and other network security tools, strengthening analytical focus on emerging financial risks within the credit union system, and assessing process and technology improvements that could improve the NCUA's financial management and reporting functions.

III. Forecast and Enterprise Challenges

Economic Outlook

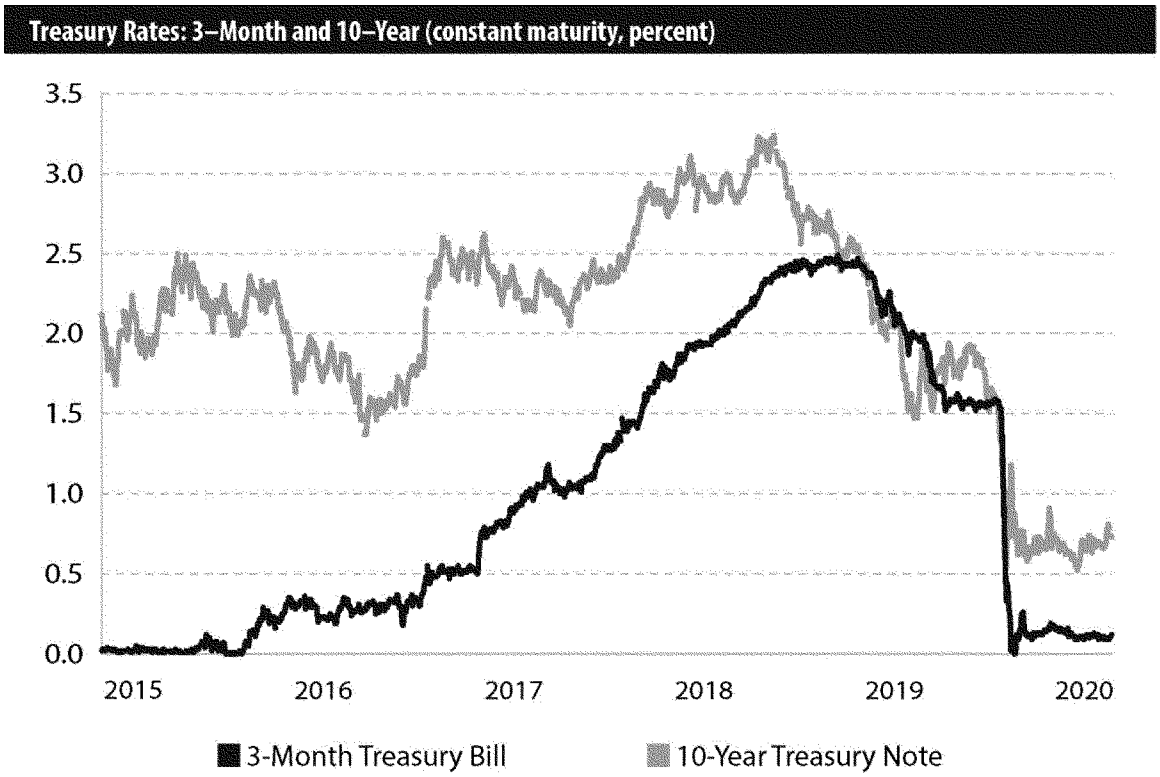
The economic environment is a key determinant of credit union performance. After several years of solid growth, the economy entered a recession at the start of 2020. The significant pull-back in spending that occurred as a result of COVID–19 and government efforts to slow its spread (including business closures and stay-at-home orders) led to an unprecedented drop in real gross domestic product (GDP) and a sharp increase in the unemployment rate from a five-decade low of 3.5 percent in February 2020, to a post-war high of 14.7 percent in April 2020. The Federal Government responded quickly, establishing loan programs for affected businesses and providing financial relief to households as well as enhanced benefit payments to unemployed workers. Federal Reserve policymakers cut short-term interest rates, increased the Federal Reserve's asset holdings, and established a number of lending programs to support financial conditions and the flow of credit to households, businesses, and state and local governments. Interest rates across the maturity spectrum fell to historically low levels.

Despite the severity of the downturn, credit unions in the aggregate turned in a relatively solid performance in the first half of 2020. Federally-insured credit unions added 4.0 million members over the year, boosting credit union membership to 122.3 million in the second quarter of 2020. Credit union assets rose by 15.1 percent to $1.75 trillion. Total loans outstanding at federally insured credit unions increased 6.6 percent to $1.14 trillion, and the system-wide delinquency rate declined 5 basis points to 58 basis points. Credit union shares and deposits increased by 16.5 percent over the year to $1.49 trillion in the second quarter of 2020, reflecting the boost to income from CARES Act payments to individuals and the sharp, economy-wide increase in personal saving.

The credit union system's net worth increased by 6.8 percent over the year to $182.9 billion in the second quarter of 2020. The jump in assets led to a drop in the credit union system's composite net worth ratio but, at 10.46 percent, the credit union system remained well-capitalized. The overall liquidity position of credit unions improved. Cash and short-term investments as a percentage of assets rose from 13 percent in the second quarter of 2019 to 18 percent in the second quarter of 2020, reflecting a 55 percent increase in cash and short-term investments.

By late spring, economic conditions had started to improve. Employment began to rise again in May and by September the unemployment rate had fallen to 7.9 percent. A consensus of forecasters [11] expects the recovery in labor markets and the broader economy to continue. Real GDP is projected to grow 3.9 percent in 2021, following an anticipated 4.0 percent drop in 2020. However, given the depth of the recession—which is on track to be the most severe downturn since the Great Depression—forecasters do not expect the economy to return to its pre-recession, late 2019 peak before the end of 2021. Forecasters expect the labor market recovery will take longer. Although employment is expected to rise and the unemployment rate will continue to decline, the unemployment rate is not forecast to return to pre-recession levels during the 2021–2022 budget window. The unemployment rate is projected to average 6.3% in the fourth quarter of 2021 and 5.5% at the end of 2022.

[11] Estimates and projections in this paragraph are based on forecasts submitted on October 5 and 6, 2020 and published in Blue Chip Economic Indicators, October 10, 2020.



In light of these expectations, Federal Reserve policymakers anticipate that it could be appropriate to hold the federal funds target rate in its current range of 0 to 0.25 percent until at least 2023.[12] Analysts expect other short-term interest rates, which largely determine the interest payments credit unions make, will remain near their current low levels through 2021 and move modestly higher in 2022. Longer-term rates, which largely determine the interest payments credit unions receive, are expected to edge higher later this year and continue to rise as economic conditions improve.

Even if the economy continues to expand as expected, the recent downturn will likely affect credit union performance through the end of the budget period. For example, a sustained, high level of unemployment could reduce loan demand, particularly for non-mortgage consumer loans, and affect credit quality. System-wide delinquency rates, which remained low through the second quarter, could begin to rise as the forbearance programs put in place during the spring come to an end. Credit union shares could remain elevated as consumers eschew riskier investments and opt to keep their funds in insured credit union deposits. A prolonged period of low interest rates also poses risks, particularly to credit unions that rely primarily on investment income for funding their operations.

While the recovery in economic activity and labor markets is widely expected to continue, there is a high risk of a worse-than-expected outcome. Much will depend on the path of the coronavirus in the months ahead. If COVID–19 cases rise to levels that necessitate another wave of temporary business closures and other measures that hinder economic activity, the recovery could falter, leading to more job losses and higher unemployment. Weaker-than-expected economic conditions or another downturn would keep interest rates low or cause them to decline, particularly at the long end of the yield curve, and pose more significant challenges for the credit union system. The NCUA, like credit unions, needs to plan and prepare for a range of economic outcomes that could affect credit union performance and determine resource needs.

Other Risk Factors and Trends

In addition to risks associated with movements and trends in the general economy, the NCUA and credit unions will need to understand their increasing exposure to, and address risks associated with, the technological and structural changes facing the system. Over the longer-term, increased concentration of loan portfolios, development of alternative loan and deposit products, technology-driven changes in the financial landscape, continued industry consolidation, and ongoing demographic changes will continue to shape the environment facing credit unions and will determine the resource needs of the NCUA.

Cybersecurity: Credit unions' increasing dependency on technology is making the credit union system vulnerable to emerging cyber-enabled risks and threats. The prevalence of social engineering, malware/ransomware, distributed denial of service (DDOS) attacks, and other forms of cyber-attacks are creating challenges at credit unions of all sizes, and will require ongoing measures for rapid detection, protection, response and recovery. These trends are likely to continue, and even accelerate, over the foreseeable future.

Lending trends: Increasing concentrations in select loan types and the introduction of new types of lending by credit unions, emphasize the need for long-term risk diversification and effective risk management tools and practices, along with expertise to properly manage increasing concentrations of risk.

Financial Landscape and Technology: New financial products that mimic deposit and loan accounts, such as

[12] Economic projections of Federal Reserve Board members and Federal Reserve Bank presidents, under their individual assumptions of projected appropriate monetary policy, September 16, 2020 available at: *https://www.federalreserve.gov/monetarypolicy/files/fomcprojtabl20200916.pdf.*

Apple Pay and peer-to-peer lending, pose a competitive challenge to credit unions and banks alike. Credit unions also face a range of challenges from financial technology (Fintech) companies in the areas of lending and the provision of other services. For example, underwriting and lending may be automated at a cost below levels associated with more traditional financial institutions, but may not be subject to the same regulations and safeguards that credit unions and other traditional financial institutions face. The emergence and increasing importance of digital currencies may pose both risks and opportunities for credit unions. As these institutions and products gain popularity, credit unions may have to be more active in marketing and rethink their business models.

Technological changes outside the financial sector may also lead to changes in consumer behavior that indirectly affect credit unions. For example, the increase in on-demand use of auto services and pay-as-you-go, on-demand vehicle rental could reduce purchases of consumer-owned vehicles. That could lead to a slowdown or reduction in the demand for vehicle loans, now slightly more than a third of the credit union system loan portfolio.

Membership trends: While overall credit union membership continues to grow, roughly half of federally insured credit unions had fewer members at the end of the second quarter of 2020 than a year earlier. Demographic and field of membership changes are likely to continue leading to declining membership at many credit unions. All credit unions need to consider whether their product mix is consistent with their members' needs and demographic profile.

Smaller credit unions' challenges and industry consolidation: Small credit unions face challenges to their long-term viability for a variety of reasons. If current consolidation trends persist, there will be fewer credit unions in operation in future years and those that remain will be considerably larger and more complex. As of June 30, 2020, there were 627 federally insured credit unions with assets of at least $500 million, 34 percent more than just five years earlier. These 627 credit unions accounted for 76 percent of credit union members and 81 percent of credit union assets. Large credit unions tend to offer more complex products, services and investments. Increasingly complex institutions will pose management challenges for the institutions themselves, as well as the NCUA; consolidation means the risks posed by individual institutions will become more significant to the Share Insurance Fund.

IV. Key Themes of the 2021–2022 Budget

Overview

The budget supports the priorities and goals outlined in the agency's strategic plan and its annual performance plan. The resources and initiatives proposed in the budget support the NCUA's mission to maintain a safe and sound credit union system.

The COVID–19 pandemic, which onset early in 2020, remains a dominant consideration for the 2021–2022 agency priorities and its budget. The spread of COVID–19 has presented a multitude of challenges to the credit union industry and the NCUA, from the economic downturn and its impacts on individuals, business and institutions, to legislation such as the CARES act, to how the NCUA operates, to new cybersecurity concerns. The impacts of COVID–19 are most readily apparent in the 2021–22 budget due to the shift to remote/off-site supervision and work, which reduces travel expenses but also increases certain other expenses such as information technology.

The 2021–2022 budget includes funding for the NCUA to increase permanent staffing in critical areas necessary to operate as an effective federal financial regulator capable of addressing emerging issues. Importantly, the agency has made efforts through 2020 to fill examination-related positions, so that NCUA is best prepared to address the economic impacts from the ongoing COVID–19 situation. The NCUA employees are the agency's most valuable resource for achieving its mission, and the agency is committed to a workplace and a workforce with integrity, accountability, transparency, inclusivity, and proficiency. We will continue investing in the workforce through training and development, helping employees develop the tools they need to do their work effectively.

The 2021–2022 budget also invests in a number of agency priorities, including: The Advancing Communities through Credit, Education, Stability, and Support, or ACCESS, initiative focused on financial inclusion; increased use of off-site examinations work and data analytics through the Virtual Examination project; deployment of the MERIT system to all examiners; ongoing implementation of examination priorities updated in response to the COVID–19 pandemic; regulatory reform initiatives; and efforts to implement organizational efficiencies. The NCUA expects these efforts will result in a more effective organization.

The efficiency and effectiveness of the agency's workforce is dependent upon the resiliency of the NCUA's information technology infrastructure and availability of technological applications. The NCUA is committed to implementing new technology responsibly and delivering secure, reliable and innovative technological solutions to support its mission. This necessitates investments funded in the Capital Budget and additional staff to provide the analytical tools and technology the workforce needs to achieve the NCUA mission.

Financial Inclusion

At its heart, financial inclusion means expanding access to safe and affordable financial services for unbanked and underserved people and communities as well as broadening employment and business opportunities. The financial services industry—of which credit unions are an important part—plays a key role in helping families achieve financial freedom by building generational wealth; helping entrepreneurs to get their small businesses off the ground; and helping to create jobs and strengthen communities. The NCUA has a role to play in making sure that credit unions can support overlooked or underserved areas.

The NCUA recently announced its Advancing Communities through Credit, Education, Stability, and Support, or ACCESS, initiative, which will bring together agency leaders to develop policies and programs that support financial inclusion within the NCUA and more broadly throughout the credit union system.[13] The NCUA has dedicated resources from across the agency offices to ensure an inclusive and open-minded approach to refreshing and modernizing regulations, policies, and processes.

Addressing the various aspects of inclusion, the agency will look at the unique role credit unions can fill by providing access to unbanked and underserved individuals and communities, how credit unions can remain competitive within the financial services industry, and what steps can be taken to modernize the rules and processes for chartering new credit unions to provide consumers with services that meet their needs.

Virtual Examination Project

In 2017, the NCUA Board approved the Virtual Examination project and

[13] *https://www.ncua.gov/access.*

provided funding to research methods to conduct offsite as many aspects of the examination and supervision processes as possible. The Virtual Examination project team is researching ways to harness new and emerging data, advancements in analytical techniques, innovative technology, and improvements in supervisory approaches. Additionally, the COVID–19 pandemic necessitated a switch to an offsite examination posture, and the project team plans to build upon its work to date by integrating lessons learned during the pandemic in planning for enhanced offsite procedures.

By identifying and adopting alternative methods to remotely analyze the financial and operational condition of a credit union, while maintaining or improving effectiveness relative to current examinations, it may be possible to significantly reduce the frequency and scope of onsite examinations. Onsite examination activities could potentially be limited to periodic data quality and governance reviews, interventions for material problems, and meetings or other examination activities that need to be handled in person. To be successful, examination staff will likely need to analyze more information about the credit union being examined and to communicate more frequently with management at the credit union. However, by conducting this analytic work offsite, the NCUA expects to have less impact on credit unions' day-to-day operations.

The NCUA believes that effective Virtual Examinations should lead to greater use of standardized interaction protocols, advanced analytical capabilities, and better-informed subject matter experts. This should result in more consistent and accurate supervisory determinations, provide greater clarity and consistency with respect to how the agency conducts supervisory oversight, and reduce coordination challenges between agency and credit union staff.

The virtual examination team will deliver to the NCUA Board by the end of 2020 an initial report discussing alternative methods identified to remotely analyze aspects of the financial and operational condition of a credit union.

Enterprise Solution Modernization

In 2015, the NCUA conducted an assessment of the information technology (IT) needs across the agency and developed a business case for replacing its antiquated legacy systems. This assessment recognized the full range of industry-leading, cost-effective alternative strategies, services, and products for implementing the agency's next generation of IT information management, examination, supervisory, and data collection solutions.

At that time, the NCUA acknowledged a technology revamp of this magnitude as a high-risk endeavor, both in terms of cost and delivered functionality. The risk stems from the number of systems impacted and the unique nature of the NCUA's applications, many of which require a high degree of customization. However, the agency required a major modernization after many years of under-investment in software and application development. In November 2015, the NCUA Board approved a plan for modernizing the agency's IT systems known as the Enterprise Solution Modernization (ESM) program. The ESM program recognizes the following legacy systems, capabilities and strategies need to be modernized:

To better manage the complexity of the ESM Program, the NCUA established three sub-programs to modernize the NCUA's technology solutions and create an integrated examination and data environment that facilitates a safe and sound credit union system:

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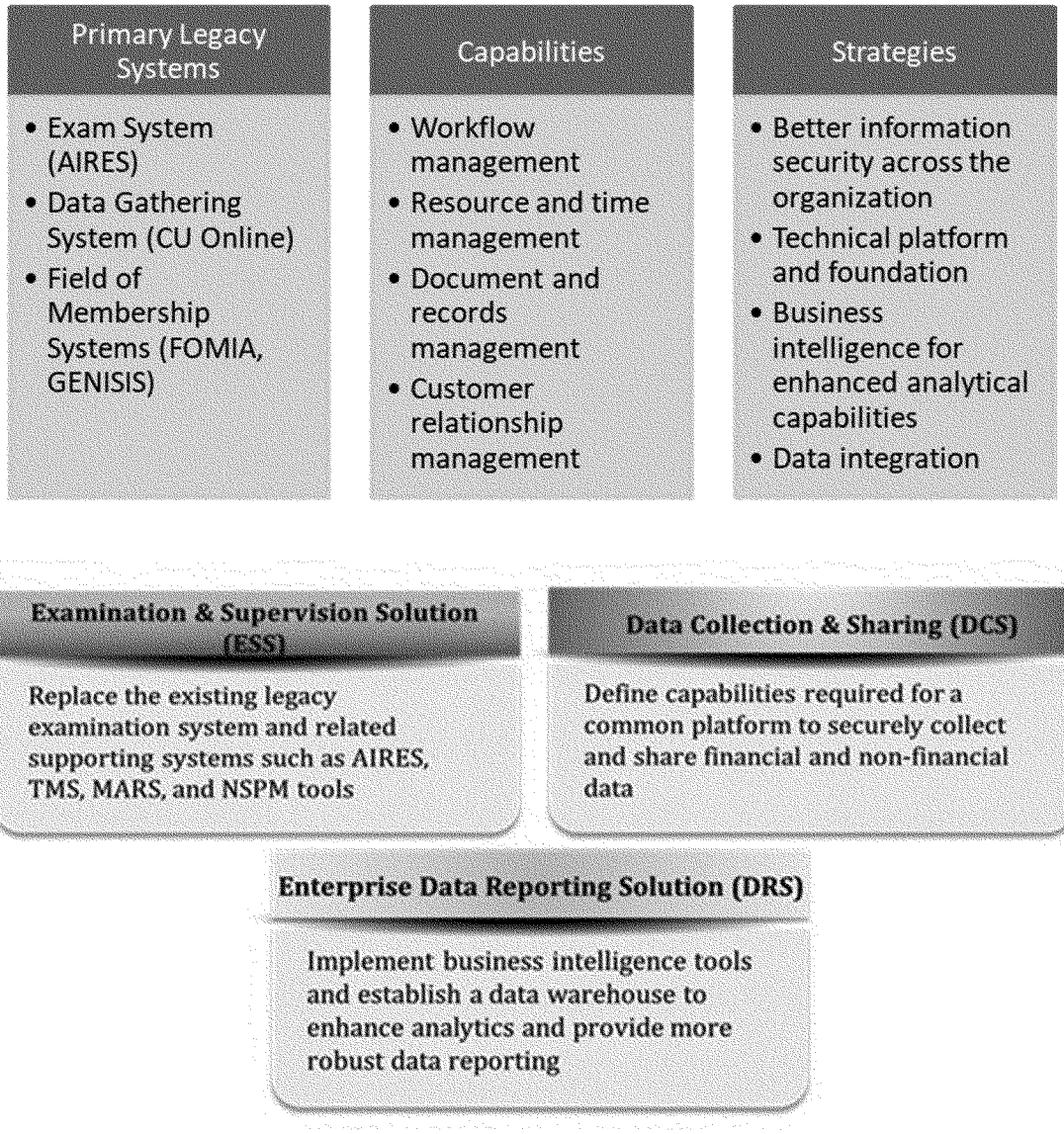

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The NCUA 2021–2022 budget includes funding to complete the roll-out of the first Examination and Supervision Solution project as well as to initiate the first project under the Data Collection and Sharing Solution sub program.

Examination and Supervision Solution

Given the age of the NCUA's legacy examination systems and their importance to the mission of the agency, priority was given to the following parts of the modernization effort in the first phase of ESM development:

○ Better information security across the organization.

○ Technical platform and foundation for new applications.

○ AIRES replacement (Examination and Supervision Solution), including financial analytics.

○ Central user interface for stakeholders to interact with the NCUA.

○ Business Intelligence tools for enhanced analytical capabilities (added later to the initial phase as explained below).

To deploy the Examination and Supervision Solution, it was first necessary to stand up new agency infrastructure that supports the full modernization program: The technology architecture, infrastructure, and security posture required to operate modernized systems. The necessary infrastructure was acquired and put in place in 2019.

The new examination solution, which is named the Modern Examination and Risk Identification Tool (MERIT), was released as a pilot to the Office of National Examinations and Supervision (ONES) and the State Supervisory Authorities (SSA) in North Carolina and Washington in September 2019. The ESS program capabilities were further developed and were on schedule to be released to all users in the summer of 2020. However, the training rollout was delayed because of the coronavirus pandemic. Instead, the agency deployed the second release to current pilot users in July 2020 and began an extended pilot in September 2020 for additional users from the NCUA's three Regional offices, the Wisconsin SSA, select corporate credit unions, and natural person credit unions of various asset sizes. The NCUA now plans to conduct training for its examiner workforce and other users in 2021, with deployment to all remaining system users in the third quarter of 2021.

Enhancing NCUA's analytic capabilities is an important objective of the ESM program. As the MERIT development progressed, the agency identified an opportunity to incorporate a robust business intelligence solution

into the MERIT deployment. Though not originally included as part of the initial MERIT project plan, this addition advances the agency's analytic capabilities and is central to the strategy to shift more exam work offsite.

In addition to better data analytics, MERIT provides numerous improvements over the legacy AIRES examination system, including:

○ Better controlled access to examination data across the organization.

○ Ability to request and submit items for the examination in an organized manner that is easily accessible to members of an exam team.

○ Collaboration and real-time information for examiners, team members, and supervisors, including state supervisory authorities on joint exams.

○ Opportunities for credit union users to manage examination findings and view completed examination reports.

○ Business process improvements to achieve exam efficiencies, including less data redundancy and relational support between scope tasks, questionnaires, and findings.

From 2015 to 2020, the NCUA has spent approximately $40.2 million on the ESM program, which includes the costs for ESS and MERIT. This total includes spending on program planning, a modernized and more secure IT infrastructure, the MERIT central user interface, and multiple releases of MERIT and associated examination systems.

Through September 2020, the NCUA accomplished the following:

○ Established the ESM technical program infrastructure platform, including enhanced IT security.

○ Developed the central user interface known as NCUA Connect, achieving a secure, single entry point into NCUA applications.

○ Deployed the new MERIT examination tool to pilot users to support examination and supervision activities.

○ Deployed the Admin Portal which provides confirmed, delegated credit union and SSA administrative users the ability to add and manage user access to NCUA Connect for their organization.

○ Deployed the Data Exchange Application to ingest credit union member loan and share data requested during the examination and supervision process.

○ Developed financial analytics and new loan and share analytics with dashboards and visualizations designed to assist the examiner in identifying risk.

The NCUA's 2021 budget includes $14.6 million for MERIT, split between the operating, capital and SIF administrative expenses budgets. Of this total, $14.3 million in the operating and capital budgets will support technical and system platform upgrades, surge support for functionality enhancements prior to the broad user rollout, and ongoing operations and maintenance enhancements, fixes, and technological upgrades for the deployed system. An additional $0.3 million for MERIT is in the SIF administrative expenses budget, reflecting the cost of making MERIT available for those state supervisory agencies that use it.

The project is on schedule and met its 2019 performance target for deployment to and use by ONES and State regulators in Washington and North Carolina to carry out examinations and supervision contacts for all relevant federal credit unions with assets greater than $10 billion. Due to the economic, travel, and social disruptions caused by the coronavirus pandemic, the NCUA has delayed the MERIT training rollout for all NCUA examiners originally planned for the third quarter of 2020. The MERIT project's performance goal for 2021 is:

Finalize deployment and training of NCUA and SSA users on MERIT and associated examination systems to begin the transition from AIRES to MERIT by December 31, 2021.

Data Collection and Sharing Solution

With the Examination and Supervision Solution project transitioning to an operations and maintenance state in 2021, the NCUA will next prioritize work on the Data Collection and Sharing (DCS) Solution initiative. The NCUA vision of the DCS project is to replace legacy systems and to streamline workflow processes. Activities to date have included the development and validation of high-level requirements with all NCUA stakeholders.

During the next phase of DCS development, the NCUA will refine the validated requirements for use in an analysis of alternatives (AoA) study. The AoA study will provide a roadmap for acquiring and implementing a solution or set of solutions. The AoA will recommend the best approach for a phased rollout strategy needed to implement DCS capabilities and the replacement of legacy systems. This analysis will also be used to support DCS acquisition planning efforts.

Supervisory Priorities and COVID–19 Response

In July 2020,[14] the NCUA updated its annual supervisory priorities to address economic conditions that had emerged as a result of the COVID–19 pandemic, as well as various statutory and regulatory changes that occurred. Within these revised priorities, the NCUA is focusing its examination activities on areas that pose elevated risk to the credit union industry and the National Credit Union Share Insurance Fund. Additional information about the NCUA's response to the pandemic is available on the agency's COVID–19 web page.[15]

Coronavirus Aid, Relief and Economic Security Act

President Trump signed the Coronavirus Aid, Relief and Economic Security Act (CARES Act) into law on March 27, 2020. The NCUA has added the CARES Act as a supervisory priority to reflect the importance of the provisions outlined in the Act. NCUA examiners will review credit unions' good faith efforts to comply with the CARES Act and will take appropriate action, when necessary, to ensure credit unions meet their obligations under the new law.

Multiple CARES Act provisions directly affect credit unions, including those that:

• Provide greater access to liquidity, and improve the general financial stability of member credit unions through changes to the Central Liquidity Facility;

• Suspend the requirement to categorize certain loan modifications related to the COVID–19 pandemic as troubled debt restructurings (TDRs);

• Authorize the Small Business Administration to create the Paycheck Protection Program, a loan guarantee program to assist eligible businesses;

• Change requirements for reporting loan modifications related to the COVID–19 pandemic to the credit reporting agencies;

• Prohibit foreclosures on all single family, federally backed mortgage loans between March 18, 2020 and May 17, 2020. Fannie Mae, Freddie Mac, FHA, VA and USDA subsequently extended the prohibition to June 30, 2020. The foreclosure moratorium expiration for mortgages purchased by Fannie Mae and Freddie Mac currently extends until August 31, 2020;

[14] *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/update-ncuas-2020-supervisory-priorities.*

[15] *https://www.ncua.gov/coronavirus.*

• Provide up to a 360-day forbearance for borrowers with a single-family, federally backed mortgage loan that experience a financial hardship related to the COVID–19 pandemic; and

• Provide up to a 90-day forbearance for borrowers with a multifamily, federally backed mortgage loan that experience a financial hardship related to the COVID–19 pandemic.

Bank Secrecy Act Compliance/Anti-Money Laundering

The NCUA continues to budget resources to comply with the statutory mandate from Congress to enforce credit union compliance with Bank Secrecy Act (BSA) and Anti-Money Laundering (AML) laws and regulations. Technological advancements may expose even the smallest credit unions to potential illicit finance activities. The NCUA examines federal credit union compliance with BSA during every examination. Additionally, the NCUA assists state regulators as needed by conducting BSA examinations in federally insured, state-chartered credit unions.

The NCUA will continue communicating with credit unions, engaging with law enforcement, and collaborating with the other banking regulators on several initiatives associated with this supervisory priority, including:

• Publishing additional updates to the FFIEC Bank Secrecy Act/Anti-Money Laundering Examination Manual;

• Establishing interagency work-streams to define AML compliance program effectiveness;

• Updating the interagency statement on enforcement of BSA/AML requirements;

• Publishing guidance regarding politically exposed persons; and

• Offering clarification and suggestions to improve Suspicious Activity Report (SAR) and Currency Transaction Report (CTR) filings.

The NCUA will also continue focusing on proper filing of SARs and CTRs, as well as reviews of bi-weekly 314(a) information requests from FinCEN. Law enforcement, intelligence, and counterterrorism officials depend on prompt reporting of any 314(a) matches and the vital information provided through timely and informative SARs and CTRs. Officials use this information regularly to identify and thwart illicit and terrorist financing activities, and to prosecute and convict guilty parties. Credit union efforts in this area help fight crime and keep America safe.

Consumer Financial Protection

The COVID–19 pandemic continues to affect consumers and could result in increased consumer compliance risk in certain areas; consumer financial protection, therefore, remains an NCUA supervisory priority. The NCUA will continue to examine for compliance with applicable consumer financial protection regulations during every examination as established in agency's 2020 Letters to Credit Unions about 2020 Supervisory Priorities,[16] which included:

• *Electronic Fund Transfer Act (Regulation E).* Examiners will evaluate electronic fund transfer policies and procedures and review initial account disclosures as well as Regulation E's error resolution procedures for when consumers assert an error.

• *Fair Credit Reporting Act.* Examiners will review credit reporting policies and procedures and the accuracy of reporting to credit bureaus, particularly the date of first delinquency.

• *Gramm-Leach-Bliley (Privacy Act).* Examiners will continue to evaluate credit union protection of non-public personal information about consumers.

• *Small dollar lending (including payday alternative loans).* Examiners will test for compliance with the NCUA Payday Alternative Lending rules and interest rate cap. Examiners will determine whether a credit union's short-term, small-dollar loan programs that are not NCUA Payday Alternative Lending comply with regulatory requirements.

• *Truth in Lending Act (Regulation Z).* Examiners will evaluate credit union practices concerning annual percentage rates and late charges. This includes evaluating whether finance charges and annual percentage rates are accurately disclosed and late fees are levied appropriately.

• *Military Lending Act (MLA) and Servicemembers Civil Relief Act (SCRA).* The MLA and SCRA have been supervisory priorities for the NCUA since 2017. For credit unions that have not received a recent review, examiners will review credit union compliance with the MLA and SCRA.

The NCUA's consumer compliance reviews will now also emphasize review of the following regulatory changes enacted since the start of the COVID–19 pandemic:

• *Electronic Fund Transfer Act (Regulation E).* Examiners will evaluate credit union practices concerning the Regulation E, Remittance Transfer Rule changes to the safe harbor threshold and disclosures of rates and costs associated with remittance transfers.

• *Truth in Lending Act (Regulation Z).* Examiners will also evaluate credit union practices concerning the changes made in response to the COVID–19 pandemic to the Truth in Lending-Real Estate Settlement Procedures Act (TRID) rule and Regulation Z Rescission rules that permit members to waive the waiting periods under both rules.

Credit Risk Management and Allowance for Loan and Lease Losses

The NCUA's January 2020 Letter to Credit Unions, 20–CU–01, 2020 Supervisory Priorities,[17] prioritized review of a credit union's loan underwriting standards and procedures, and exposure to elevated concentration risks as outlined in NCUA Letter to Credit Unions, 10–CU–03, Concentration Risk.[18] In response to the economic impact of the COVID–19 pandemic and subsequent regulatory and statutory changes, the NCUA is shifting its emphasis to reviewing actions taken by credit unions to assist borrowers facing financial hardship. The NCUA will also review the adequacy of loan and lease losses (ALLL) accounts to address the pro-cyclical effects of economic downturns.

NCUA examiners will review credit union policies and the use of loan workout strategies, risk management practices, and new strategies implemented to assist borrowers impacted by the COVID–19 pandemic, including new programs authorized through the CARES Act. In particular, examiners will evaluate a credit union's controls, reporting, and tracking of these programs. Examiners will also ensure credit unions have evaluated and are effectively managing the impact of COVID–19 on their credit risk, capital position, and overall financial stability.

In addition, credit unions' risk-monitoring practices should be commensurate with the level of complexity and nature of their lending activities, provide for safe and sound lending practices, and ensure compliance with consumer protections and regulatory reporting requirements.

Further, due to the recent developments in economic conditions and the Financial Accounting Standards Board's (FASB) decision to delay its

[16] *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/2020-supervisory-priorities* and *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/update-ncuas-2020-supervisory-priorities.*

[17] *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/2020-supervisory-priorities.*

[18] *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/concentration-risk.*

requirement to comply with the current expected credit losses (CECL) standard until January 2023, NCUA examiners will not be assessing credit unions' efforts to transition to the CECL standard until further notice. The NCUA encourages credit unions to continue to assess their needs and evaluate methodologies for the eventual implementation of the CECL standard.

Credit unions must still maintain an ALLL account in accordance with FASB Accounting Standards Codification (ASC) Subtopic 450–20 (loss contingencies) and/or ASC 310–10 (loan impairment). NCUA examiners will be evaluating the adequacy of credit unions' ALLL accounts by reviewing:

- ALLL policies and procedures;
- Documentation of an ALLL reserving methodology, including modeling assumptions;
- Adherence to generally accepted accounting principles; and
- Independent reviews of credit union reserving methodology and documentation practices by the Supervisory Committee or by an internal or external auditor.

Information Systems and Assurance (Cybersecurity)

Emerging cyber-attacks continue to pose a persistent threat to the financial sector, including credit unions, financial regulators, and the broader financial system. Advances in financial technology, an increased remote workforce, and increased use of mobile technology and cyberspace for financial transactions means more opportunities for cybersecurity threats and other technology-related issues. As a result, cybersecurity is one of the top priorities of the NCUA.

The NCUA has transitioned its priority from performing Automated Cybersecurity Examination Tool (ACET) cybersecurity maturity assessments, to evaluating critical security controls. The NCUA is piloting an Information Technology Risk Examination solution for Credit Unions (InTREx–CU). InTREx–CU harmonizes the IT and Cybersecurity examination procedures shared by the Federal Deposit Insurance Corporation, the Federal Reserve System, and some state financial regulators to ensure consistent approaches are applied to community financial institutions. The InTREx–CU will be deployed to identify gaps in security safeguards, allowing examiners and credit unions to identify and remediate potential high-risk areas through the identification of critical information security program deficiencies as represented by an array of critical security controls and practices.

The NCUA has also published information for credit unions on the increased cybersecurity threats resulting from the COVID–19 pandemic and additional resources for protecting their members. For more information, visit the NCUA's Cybersecurity Resources [19] website and the Cybersecurity, Frauds, and Scams section on the NCUA's Frequently Asked Questions for Federally Insured Credit Unions.[20]

The NCUA also places strong emphasis on ensuring the security of the agency's systems and the controlled, unclassified information it collects. The NCUA's Office of the Chief Information Officer is continually taking steps to enhance the agency's information security posture and ensure the NCUA's systems and information are protected from compromise, including the work done as part of ESM.

LIBOR Transition Planning

In a March 23, 2020, statement, the United Kingdom's Financial Conduct Authority maintained its central assumption that firms cannot rely on LIBOR being published after the end of 2021. This should remain the target date for all credit unions to meet.

Credit unions offer, own, and are counterparties to LIBOR-based products and contracts, including loans, investments, derivatives, deposits, and borrowings. These may be subject to increased legal, financial, and operational risks once the reference rate is no longer available. On July 1, 2020, the FFIEC issued a Joint Statement on Managing the LIBOR Transition [21] that highlights the risks that will result from the transition away from LIBOR and encourages supervised institutions to continue their efforts to transition to alternative reference rates.

Planning for the LIBOR transition is an important operational and safety and soundness consideration for credit unions with material exposures. Examiners will continue assessing credit unions' exposure and planning related to a transition away from LIBOR. For credit unions with exposure to LIBOR, examiners will continue to conduct reviews using the NCUA's LIBOR Assessment Workbook.[22]

Liquidity Risk

The NCUA's January 2020 Letter to Credit Unions, 20–CU–01, 2020 Supervisory Priorities,[23] included assessments of liquidity risk management as a supervisory priority, noting that on average, credit union balance sheets generally exhibit lower levels of on-balance sheet liquidity due to strong loan growth. At that time, the NCUA was focusing liquidity reviews to address the following, in credit unions with low-levels of on-balance sheet liquidity:

- The potential effects of changing interest rates on the market value of assets and borrowing capacity;
- Scenario analysis for liquidity risk modeling, including possible member share migrations (for example, shifts from core deposits into more rate-sensitive accounts). Also, scenario analysis for changes in cash flow projections for an appropriate range of relevant factors (for example, changing prepayment speeds); and
- The appropriateness of contingency funding plans to address any potential liquidity shortfalls.

The economic impact of the COVID–19 pandemic may result in additional stress on credit union balance sheets, potentially requiring robust liquidity management over the course of 2020 and into 2021. As a result, examiners will continue to review liquidity risk management and planning in all credit unions, and will place emphasis on:

- The effects of loan payment forbearance, loan delinquencies, projected credit losses and loan modifications on liquidity and cash flow forecasting;
- Scenario analysis for changes in cash flow projections for an appropriate range of relevant factors (for example, changing prepayment speeds);
- Scenario analysis for liquidity risk modeling, including changes in share compositions and volumes;
- The potential effects of low interest rates and the decline of credit quality on the market value of assets, funding costs and borrowing capacity; and
- The adequacy of contingency funding plans to address any potential liquidity shortfalls.

Impact of COVID–19 on NCUA Operations

Since March 16, 2020, the NCUA has been operating in a remote work posture in response to the COVID–19 pandemic.

[19] *https://www.ncua.gov/regulation-supervision/regulatory-compliance-resources/cybersecurity-resources.*

[20] *https://www.ncua.gov/coronavirus/frequently-asked-questions-regarding-covid-19-ncua-and-credit-union-operations.*

[21] *https://www.ncua.gov/newsroom/press-release/2020/financial-regulators-issue-statement-managing-libor-transition.*

[22] *https://publishedguides.ncua.gov/examiner/Pages/default.htm#ExaminersGuide/IRR/IRRExamProcedures.htm%3FTocPath%3DInterest%2520Rate%2520Risk%7C__9.*

[23] *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/2020-supervisory-priorities.*

The NCUA has drafted a resumption plan to enable a safe and orderly return to onsite work.

The draft NCUA resumption plan is currently designed as a three-phased approach to restoring those on-site activities that have been suspended during the pandemic. Since the NCUA has been successful in maintaining all essential functions and activities under its remote posture, any decision to move to a new phase and resume some or all suspended activity will be made with caution, and supported by metrics and advice from public health professionals.

The NCUA anticipates that as specific phases of the resumption plan are activated, these activations will take place on a county or local level, specific to the on-the-ground conditions reported by government authorities. As such, different portions of the NCUA workforce may operate under different resumption phases based upon local health conditions.

The NCUA has also implemented enhanced cleaning procedures at all of the NCUA's facilities to ensure all NCUA owned or leased worksites are operated in a manner consistent with health guidance from the Centers for Disease Control.

Regulatory Reform

The NCUA established a Regulatory Reform Task Force (Task Force) in March 2017 to oversee implementation of the agency's regulatory reform agenda. This is consistent with the spirit of Executive Order 13777 and the Trump administration's regulatory reform agenda. Although the NCUA, as an independent agency, is not required to comply with Executive Order 13777, the agency chose to review all of the NCUA's regulations, consistent with the spirit of initiative and the public benefit of periodic regulatory review. The NCUA has undertaken a series of regulatory changes as part of this effort, and continues to pursue a regulatory reform agenda.

The NCUA's Regulatory Reform Task Force published its final report in December 2018. Since that time, the NCUA established an annual performance indicator to measure the regulatory reviews it completes on a yearly basis. The NCUA's current performance target for regulatory review is to complete review of one third of the agency's regulations on an annual basis.

V. Operating Budget

Overview

The NCUA Operating Budget is the annual resource plan for the NCUA to conduct activities prescribed by the Federal Credit Union Act of 1934. These activities include: (1) Chartering new federal credit unions; (2) approving field of membership applications of federal credit unions; (3) promulgating regulations and providing guidance; (4) performing regulatory compliance and safety and soundness examinations; (5) implementing and administering enforcement actions, such as prohibition orders, orders to cease and desist, orders of conservatorship and orders of liquidation; and (6) administering the National Credit Union Share Insurance Fund.

Staffing

The staffing levels proposed for 2021 reflect the resource requirements that support the NCUA's continued efforts to modernize the examination process and enhance the efficiency and effectiveness of the supervisory process.

In March 2020, the NCUA Board approved one position to support the agency's new Office of Ethics Counsel to support agency compliance with relevant ethics laws and regulations, to promote accountability and ethical conduct, and ensure the success of the NCUA's ethics programs. The full cost of this new position is included in the 2021 budget.

The 2021 budget supports a total agency staffing level of 1,191 full-time equivalents (FTE), of which 1,186 are funded in the Operating Budget. This is a net increase of five FTE, or 0.4 percent, compared to the Board-approved level for 2020. The new 2021 FTE are described in greater detail below.[24]

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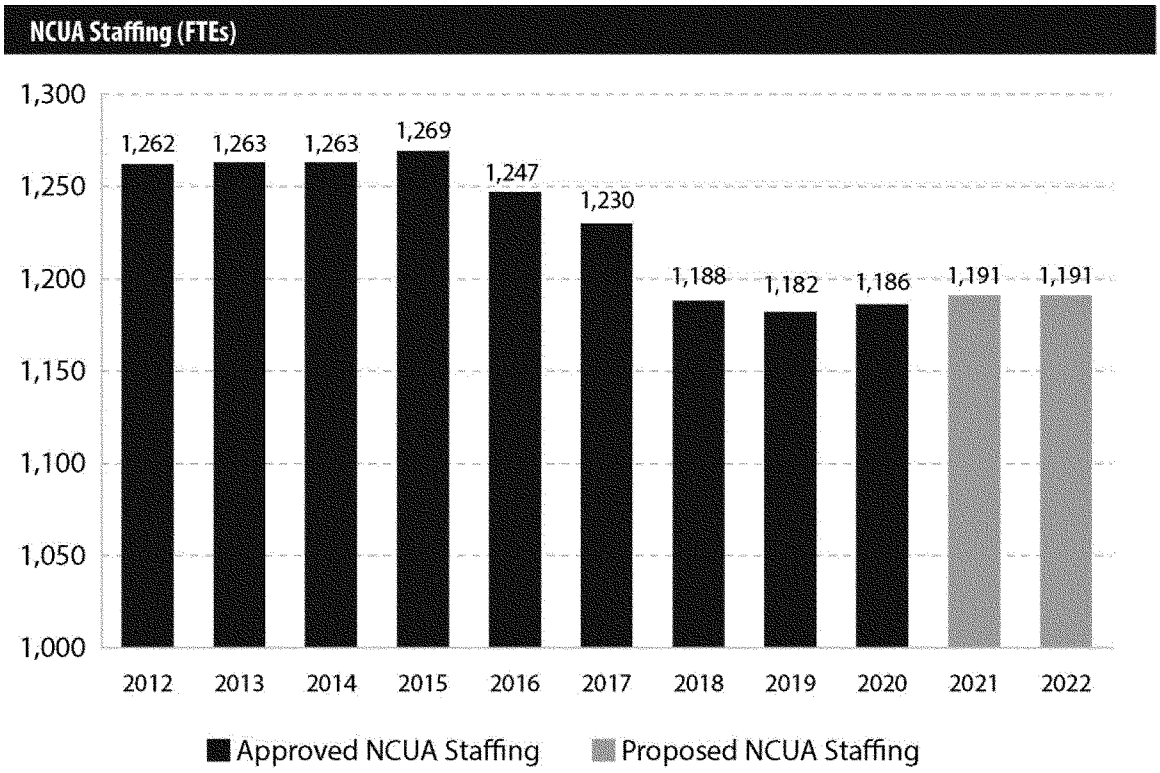
[24] Full-time equivalent (FTE) employment is the total number of regular straight-time hours (*i.e.,* not including comp time or holiday hours) worked by employees divided by the number of compensable hours applicable to the fiscal year, as defined by the Office of Management and Budget, Circular No. A–11. The NCUA uses the number of FTE projected in the budget to build its estimated pay and benefits calculations. The actual number of persons employed will vary at any point in time, based on vacancies, use of part-time employees, etc.



Authorized Regional Examiners and Specialists	2013	2014	2015	2016	2017	2018	2019	2020
Credit Union Examiner	600	566	571	541	517	472	471	470
Regional Capital Market Specialist	12	18	24	24	25	24	25	25
Regional Information System Officer	7	8	13	17	18	18	20	20
Problem Case Officer	41	46	37	31	31	32	32	31
Regional Lending Specialist	21	28	27	31	30	30	30	31
Director of Special Actions	7	10	9	10	10	10	10	10
Supervisory CU Examiner	71	73	68	67	64	50	50	51
Other Regional Staff	117	120	116	117	115	117	118	117
TOTAL	**876**	**869**	**865**	**838**	**810**	**753**	**756**	**755**

In addition to the staff assigned to regional offices, most of the staff in ONES are remote field staff who also travel to credit unions as part of their examination responsibilities.

Request for New Staff in 2021—+5 FTE

The staff draft budget includes funding for an increase or adjustment to NCUA staffing that equates to five FTEs. This funding covers the following 3 specific positions:

Consumer Compliance Program Officer—+1 FTE

This new position, within the Office of Consumer Financial Protection will develop tiered examination procedures up to and including FFIEC-approved examination procedures, lead consumer financial protection compliance reviews conducted at credit unions with higher compliance risk profiles, and assist in developing training materials for examiners and credit unions.

Financial Literacy Specialist—+1 FTE

This new position, within the Office of Consumer Financial Protection, will support and encourage financial inclusion throughout the credit union industry with informative financial literacy outreach activities. The NCUA currently employs one Program Officer in the Office of Consumer Financial Protection to implement the agency's Financial Literacy and Outreach programs. The new position will support this Program Officer and help collaborate and contribute to the National Strategy on Financial Literacy, and the U.S. Department of the Treasury's Financial Literacy and Education Commission (FLEC).

Senior Credit Specialist—+1 FTE

This new position, within the Office of Examination and Insurance, will provide enhanced risk mitigation and program support for the credit risk area. Credit risk, and credit unions' lending functions in particular, represents the largest portion of the credit union system's business and continues to grow increasingly diverse and complex. The NCUA currently has several specialists who analyze the growing complexity of the commercial, residential mortgage,

and consumer lending markets. This additional position will ensure that the Office of Examination and Insurance identifies the increased risks and program needs of the credit union system by focusing on emergent credit risks, developing guidance and program policies needed to effectively implement risk management, and executing increasingly complex analytic portfolios.

The staff draft budget and the related FTE authorization also includes two additional FTEs to account for the potential need for additional support (additional positions and/or changes to position grades) for the Central Liquidity Facility, the Board Secretary function, and financial innovation. Options are still being developed by the NCUA staff related to the resource needs and associated priorities of these functions for the Board to consider.

Additionally, within the overall existing 2020 staffing level of 1,186 FTE, the NCUA is adjusting its staffing plan to accomplish the following in 2021:

• *Office of National Examinations and Supervision (ONES):* To support the additional large consumer credit unions that will come under ONES supervision: One national supervision technician, one national lending specialist, one national supervision analyst, one financial data analyst, and one national information systems officer.

• *Office of the Chief Information Officer:* One data cloud infrastructure specialist and one network specialist to support the increasing demands and complexity of the agency's information technology systems and networks.

• *Office of Examinations and Insurance:* One additional risk officer to support anticipated increase in risk management actions.

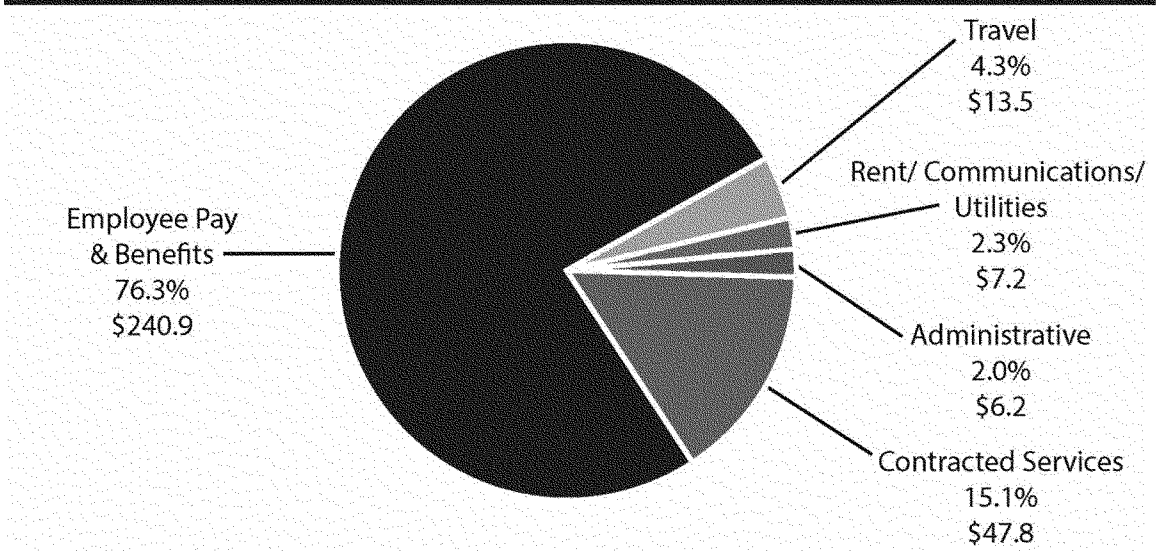
Budget Category Descriptions and Major Changes

There are five major expenditure categories in the NCUA budget. This section explains how these expenditures support the NCUA's operations, and presents a transparent overview of the Operating Budget.

2021–2022 NCUA OPERATING BUDGET SUMMARY

Budget Cost Category	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
Employee compensation	231,311,000	240,894,000	9,583,000	4.1%	249,387,000	8,493,000	3.5%
Salaries	162,513,000	167,978,000	5,465,000	3.4%	174,568,000	6,590,000	3.9%
Benefits	68,798,000	72,916,000	4,118,000	6.0%	74,819,000	1,903,000	2.6%
Travel	27,379,000	13,490,000	(13,889,000)	-50.7%	24,333,000	10,843,000	80.4%
Rent/Comm/Utilities	8,232,000	7,194,000	(1,038,000)	-12.6%	8,434,000	1,240,000	17.2%
Administrative	5,630,000	6,182,000	552,000	9.8%	6,182,000	-	0.0%
Contracted Services	43,331,000	47,807,000	4,476,000	10.3%	53,430,000	5,623,000	11.8%
Total	**$ 315,883,000**	**$ 315,567,000**	**(316,000)**	**-0.1%**	**$ 341,766,000**	**26,199,000**	**8.3%**

2021 Operating Budget (in Millions of Dollars)



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Actual expenses for the Operating Fund are reported monthly in the Operating Fund Financial Highlights posted on the NCUA website. Share Insurance Fund Financial Reports and Statements, which are also posted to the NCUA website, detail reimbursements

made to the Operating Fund for NCUA expenses.

Salaries and Benefits

The budget includes $240.9 million for employee salaries and benefits in 2021. This change is a $9.6 million, or 4.1 percent, increase from the 2020 Board-approved budget.

Salaries and benefits costs make up 76.3 percent of the total budget. There are two primary drivers of increased costs in 2021 for the Salaries and Benefits category:

Merit and locality pay increases for the NCUA's employees are paid in accordance with the agency's current Collective Bargaining Agreement (CBA) and its merit-based pay system. Salaries are estimated to increase 3.4 percent in aggregate compared to 2020.

Contributions for employee retirement to the Federal Employee Retirement System (FERS), which are unilaterally set by the Office of Personnel Management, cannot be negotiated or changed by the NCUA. Driven largely by the mandatory FERS rate adjustment, total NCUA benefits costs increase 6.0 percent in 2021 compared to 2020.

These changes are described in more detail below.

In 2021, the NCUA's compensation levels will continue to ''maintain comparability with other federal bank regulatory agencies,'' as required by the Federal Credit Union Act.[25] The Salaries and Benefits category of the budget includes all employee pay raises for 2021, such as merit and locality increases, and those for promotions, reassignments, and other changes, as described below.

Consistent with other federal pay systems, the NCUA's compensation includes base pay and locality pay components. The NCUA staff will be eligible to receive an average merit-based increase of 3.0 percent, and an additional locality adjustment ranging from 1.3 percent to 1.7 percent, depending on the geographic location.

The first-year cost of the new positions added in 2021 is estimated to be $1.0 million. Specific increases to individual offices' salaries and benefits budgets will vary based on current pay levels, position changes, and promotions.

Personnel compensation at the NCUA varies among every office and region depending on work experience, skills, years of service, supervisory or non-supervisory responsibilities, and geographic locations. In general, more than 85 percent of the NCUA workforce has earned a bachelor's degree or higher, compared to approximately 35 percent of the private-sector workforce. This high level of educational achievement ensures the NCUA workforce is able to fulfill its mission effectively and efficiently, and attracting a well-qualified workforce requires the agency to pay employees competitive salaries.

Individual employee compensation varies, depending on the cost of living in the location where the employee is stationed. The federal government sets locality pay standards, which are managed by the President's Pay Agent—a council established to make recommendations on federal pay. The council uses data from the Occupational Employment Statistics program, collected by the Bureau of Labor Statistics, to compare salaries in over 30 metropolitan areas, and establishes recommendations for equitable adjustments to employee salaries to account for cost-of-living differences between localities.

The OPM economic assumptions for actuarial valuation of the FERS have increased significantly for 2021. All federal agencies are expected to contribute 17.3 percent of FERS employees' salaries to the OPM retirement system, an increase of 130 basis points compared to the 2020 level. This mandatary contribution is prescribed in the OPM Benefits Administration Letter dated May 2020. The estimated impact on the NCUA budget is an increase of approximately $2.3 million in mandatory payments to OPM, or approximately 0.7 percentage points of overall budgetary growth, compared to 2020 levels.

The average health insurance costs for the Federal Employees Health Benefits (FEHBP) program for 2021 are consistent with historical actual expenses and the OPM estimate that the government share of FEHBP premiums will increase 3.0 percent in 2021. The employee salary and benefits category also includes costs associated with other mandatory employer contributions such as Social Security, Medicare, transportation subsidies, unemployment, and workers' compensation.

In past years, the NCUA adjusted its budget downward by an expected vacancy rate for positions that are not filled during the year because of a time lag between employee separations and hiring new staff. Since 2018, the NCUA has lowered its vacancy rate by more than 50 percent, and continues to closely monitor the hiring and attrition trends within its workforce. In anticipation of the need for a full complement of staff in 2021, and because of ongoing acceleration in the agency's hiring cycle time, the proposed 2021 budget does not include a vacancy adjustment.

The 2022 budget request for salaries and benefits is estimated at $249.4 million, a $8.5 million increase from the 2021 level, which accounts for merit and locality increases consistent with the CBA (approximately $5.6 million), the full-year cost impact of new positions (approximately $1.0 million), and associated increases in benefits for all employees (approximately $1.9 million). The assumptions used for compensation-related adjustments are based on the CBA currently in force.

Travel

The 2021 budget includes $13.5 million for Travel. This change is a 50.7 percent decrease to the 2020 Board-approved budget.

There are two reasons for the significant reduction in the 2021 travel budget. First, the NCUA expects that pandemic-related travel restrictions will continue through the first quarter of 2021, and adjusted the budget downward as a result. Second, and subject to approval by the NCUA Board, the agency will use approximately $6 million of unspent 2020 travel funds to offset the 2021 travel budget. Historically, the travel budget comprises approximately nine percent of the overall NCUA budget, however the share of travel in the 2021 budget will be only 4.3 percent.

The travel cost category includes expenses for employees' airfare, lodging, meals, auto rentals, reimbursements for privately owned vehicle usage, and other travel-related expenses. These are necessary expenses for examiners' onsite work in credit unions. Close to two-thirds of the NCUA's workforce is comprised of field staff who spend a significant part of their year traveling to conduct the examination and supervision program.

The NCUA staff also travel for routine and specialized training. In 2020, the NCUA had planned to conduct a series of training events to support the nationwide roll-out of MERIT; however, these training events were postponed to 2021 due to pandemic-related travel restrictions. Amounts budgeted for MERIT training in 2020 will be used to pay for the events' costs in 2021. The NCUA roll-out will be a labor intensive effort requiring travel for many of the NCUA's staff, and will provide hands-on training for this new system, which

[25] The Federal Credit Union Act states that, ''In setting and adjusting the total amount of compensation and benefits for employees of the Board, the Board shall seek to maintain comparability with other [F]ederal bank regulatory agencies.'' *See* 12 U.S.C. 1766(j)(2).

will be officially deployed in the fourth quarter of 2021.

During the COVID–19 pandemic, the agency and its employees successfully transitioned to an offsite examination posture, developing new procedures and processes to continue examination and supervisory work. In 2021, the NCUA will continue evaluating how it can conduct examinations remotely and offsite, which should result in future cost avoidance for travel. In addition, agency personnel will continue to utilize more virtual training options, where appropriate, to help minimize travel expenses.

The 2022 budget request for travel is estimated to be $24.3 million, or an 80.4 percent increase over the 2021 level. This increase results from returning to a full year of scheduled travel and from using up the unspent 2020 travel balances in 2021.

Rent, Communications, and Utilities

The 2021 budget includes $7.2 million for Rent, Communications, and Utilities. This is a $1.0 million, decrease, or 12.6 percent less than the 2020 Board-approved budget. The Rent, Communications, and Utilities budget funds the agency's telecommunications and information technology network expenses, and facility rental costs.

The NCUA used approximately $3.7 million of unspent 2020 travel funds to pay the balance of a loan taken from the Share Insurance Fund for construction of the NCUA's Central Office building. This reduces the Rent, Communications, and Utilities budget by approximately $1.3 million per year through 2023.

The telecommunication charges include leased lines, domestic and international voice (including mobile), and other network charges. Telecommunication costs include the circuits and any associated usage fees for providing voice or data telecommunications service between data centers, office locations, the internet and any customer, supplier or partner.

The 2021 budget includes costs to support the NCUA's bandwidth at the NCUA disaster recovery sites, procurement of additional circuits and express routes for Microsoft365 implementation, and transition to the GSA-managed Enterprise Infrastructure Solutions (EIS). EIS is the federal government's contract for enterprise telecommunications and networking solutions. By transitioning to EIS, the NCUA will benefit from the comprehensive solution EIS provides to address all aspects of federal agency IT telecommunications, and infrastructure requirements.

Office building leases, meeting rentals, office utilities, and postage expenses are also included in this budget category. Facility costs are approximately $700,000 in 2021 for office space rental for the Western Region, insurance, and ancillary costs for the NCUA Central Office. The annual utility costs for the Central Office and regional offices are estimated at $383,000.

The 2021 budget also includes $627,000 for event rental costs for examiner meetings and other training events. This is a decrease of approximately $500,000 compared to 2020 since the costs of MERIT-related training were already incurred in 2020 but the classes were rescheduled to 2021 because of the COVID–19 pandemic.

The 2022 budget request for the Rent, Communications, and Utilities category is estimated to be $8.4 million, an increase of $1.2 million over the 2021 level, which includes an additional $740,000 for telecommunications transitions and $500,000 for space rentals for a national conference.

Administrative Expenses

The 2021 budget includes $6.2 million for Administrative Expenses. This is an increase of $552,000, or 9.8 percent, compared to the 2020 Board-approved budget. Recurring costs in the Administrative Expenses category include the annual reimbursement to the Federal Financial Institutions Examination Council (FFIEC), employee relocation expenses, recruitment and advertising, shipping, printing, subscriptions, examiner training and meeting supplies, office furniture, and employee supplies and materials.

As part of the FFIEC, the NCUA shares in costs for joint actions and services that affect the financial services industry. The FFIEC costs increased by almost $200,000 from 2020 to 2021.

The 2020 budget did not include funds for employee relocation but instead used approximately $1,000,000 of unspent balances from prior years to pay for 2020 employee relocation costs. The 2021 budget includes an increase of $750,000 for employee relocations compared to the 2020 budget. Relocation costs are paid by the NCUA to employees who are competitively selected for a promotion or new job within the agency in a different geographic area than where they live.

The 2022 budget request for Administrative Services is projected to be the same as the 2021 recommended level.

Contracted Services

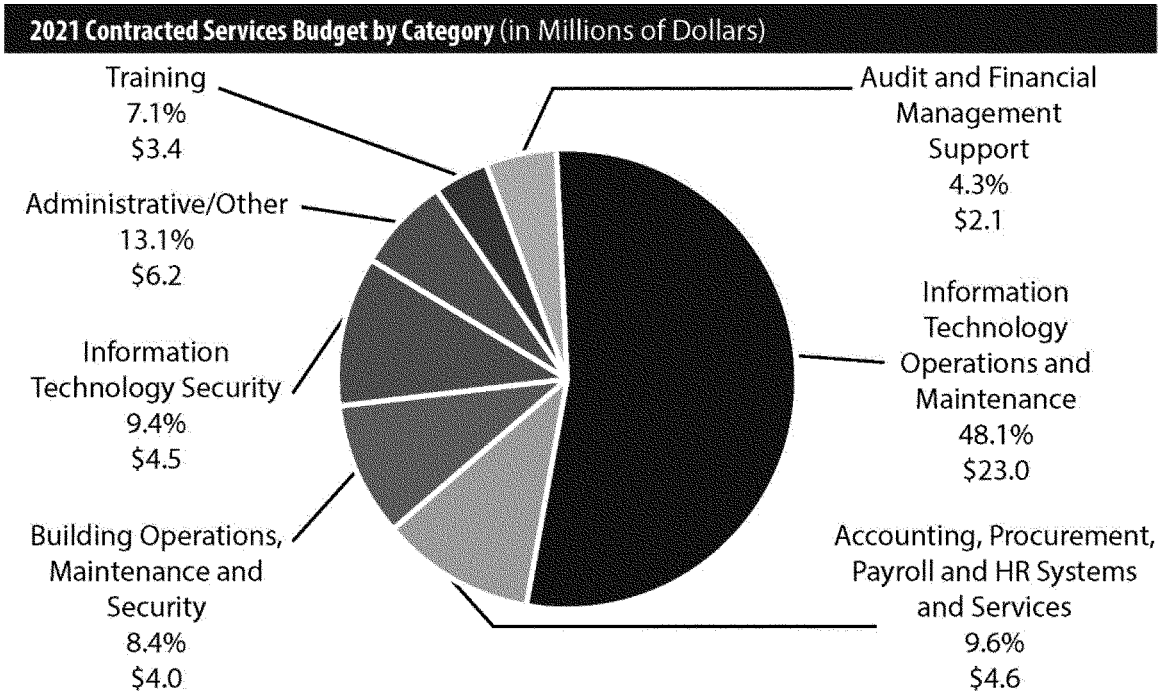
The 2021 budget includes $47.8 million for Contracted Services. This is a $4.5 million, or 10.3 percent, increase compared to the 2020 Board-approved budget. The Contracted Services budget category includes costs incurred when products and services are acquired in the commercial marketplace. Acquiring specific expertise or services from contract providers is often the most cost-effective approach to fulfill the NCUA's mission. Such services include critical mission support such as information technology equipment and software development, accounting and auditing services, and specialized subject matter expertise that enable staff to focus on core mission execution.

The majority of funding in the Contracted Services category supports the NCUA's robust supervision framework, and includes funding for tools used to identify and resolve traditional risk concerns such as interest rate risk, credit risk, and industry concentration risk, as well as by addressing new and evolving operational risks such as cybersecurity threats. Growth in the contracted services budget category results primarily from new operations and maintenance costs associated with capital investments, such as the Examinations and Supervision Solution, or MERIT system. Other costs include core agency business operation systems such as accounting and payroll processing, and various recurring costs, as described in the seven major categories, below:

- Information Technology Operations and Maintenance (48 percent of contracted services)
  - IT network support services and help desk support
  - Contractor program and web support and network and equipment maintenance services
  - Administration of software products such as Microsoft Office, Share Point and audio visual services
- Administrative Support and Other Services (13 percent of contracted services)
  - Examination and Supervision program support
  - Technical support for examination and cybersecurity training programs
  - Equipment maintenance services
  - Legal services and other expert consulting support
  - Other administrative mission support services for the NCUA central office
- Accounting, Procurement, Payroll and Human Resources Systems (10 percent of contracted services)
  - Accounting and procurement systems and support

- Human resources, payroll, and employee services
- Equal employment opportunity and diversity programs
- Building Operations, Maintenance, and Security (8 percent of contracted services)
  - Central office facility operations and maintenance
  - Building security and continuity programs
  - Personnel security and administrative programs
- Information Technology Security (9 percent of contracted services)
  - Enhanced secure data storage and operations
  - Information security programs
  - Security system assessment services
- Training (7 percent of contracted services)
  - Examiner staff, technical and specialized training and development
  - Senior executive and mission support staff professional development
- Audit and Financial Management Support (4 percent of contracted services)
  - Annual audit support services
  - Material loss reviews
  - Investigation support services
  - Financial management support services

The following pie chart illustrates the breakout of the seven categories for the total 2021 contracted services budget of $47.8 million.



Note: minor rounding differences may occur in totals

Major programs within the contracted services category include:

- Training requirements for the examiner workforce. The NCUA's most important resource is its highly educated, experienced, and skilled workforce. It is important that staff have the proper knowledge, skills, and abilities to perform assigned duties and meet emerging needs. Each year, Credit Union Examiners complete a variety of training classes to ensure their skills and industry knowledge are kept up to date, including in core areas such as capital markets, consumer compliance, and specialized lending. Major training deliverables for 2021 include the rescheduled MERIT training sessions discussed elsewhere in this document, classes offered by the Federal Financial Institutions Examination Council, updated examiner classes, and subject matter expert training sessions for the NCUA examiners. Contracted service providers, in partnership with the NCUA subject matter experts, will develop and design training classes for examiners and continue work on the triennial review of the NCUA's Subject Matter Examiner (SME) course curriculum. The NCUA plans to implement a new Talent Management System in 2021, and will simultaneously update some of the current online course content. Additionally, contracted service providers and central office staff will continue conducting organizational development, leadership and teambuilding training.

- The NCUA's information security program supports ongoing efforts to strengthen the agency's cybersecurity and ensure its compliance with the Federal Information System Management Act.

- Agency financial management services, human resources technology support, and payroll services. The NCUA contracts for these back-office support services with the U.S. Department of Transportation's Enterprise Service Center (DOT/ESC) and the General Services Administration. The NCUA's human resource system, HR Links, also adopted by other federal agencies, is a shared solution that automates routine human resource tasks and improves time and attendance functionality.

- Audit. The NCUA Office of Inspector General contracts with an accounting firm to conduct the annual audit of the agency's four permanent funds. The results of these audits are posted annually on the NCUA website

and also included as part of the agency's Annual Report.

A significant share of the budget for the Contracted Services category finances on-going infrastructure support for the agency. The 2021 budget includes the first year of funding for that annual Operation and Maintenance costs for the MERIT system, which will replace the legacy AIRES examination system. Several other of the NCUA's core information technology systems and processes also require additional contract support in 2021, which result in increased budgets in the Contracted Services category, as described below.

Within the budget for the Office of Chief Information Officer (OCIO), an additional $3.8 million is required primarily for the operations and maintenance costs of capital projects, including the MERIT system.

Funding for the contract services that support the NCUA's website—approximately $1.5 million—has been moved from the Office of the Chief Information Officer to the Office of External Affairs and Communications in the 2021 budget. With the rollout of MERIT and new digital training courses for employees, website-related Americans with Disabilities Act compliance requests are expected to increase in 2021.

Within the Office of Examination and Insurance, contract reductions of $500,000 are associated with technical accounting and security consultant support purchased in 2020 but not required in 2021.

The 2021 contracted serviced budget includes $250,000 for the NCUA's ACCESS initiative, which will bring together agency leaders to develop policies and programs that support financial inclusion within the NCUA and more broadly throughout the credit union system. By building on our successes, ACCESS will expand existing efforts to address the financial services and financial literacy needs of underserved and diverse communities, as well as expand opportunities for employment.

The 2022 budget for Contracted Services is estimated to increase by $5.6 million, or 11.8 percent, compared to 2021, largely due to the operations and maintenance costs resulting from the delivery of capital projects funded in prior years.

VI. Capital Budget

Overview

Annually, the NCUA carries out a rigorous investment review process to identify the agency's needs for information technology (IT), facility improvements and repairs, and other multi-year capital investments. The NCUA staff review the agency's inventory of owned facilities, equipment, IT systems, and IT hardware to determine what requires repair, major renovation, or replacement. The staff then make recommendations for prioritized investments to the NCUA Board.

IT systems and hardware are another significant capital expenditure for modern organizations. The 2021 budget continues the NCUA's multi-year investment in current and replacement IT systems. The budget fully supports the NCUA's effort to modernize its IT infrastructure and applications, including the full rollout of MERIT, the NCUA's Examination and Supervision Solution (ESS) project, which will replace the legacy Automated Integrated Regulatory Examination System (AIRES) system. Other IT investments include ongoing enhancements and upgrades to enhance decades-old legacy systems, network servers, systems to ensure the agency's cybersecurity posture, and various hardware investments to refresh agency networks and ensure staff have the tools necessary to maintain and increase their productivity.

Routine repairs and lifecycle-driven property renovations are also necessary to properly maintain investments in the NCUA's central office building in Alexandria, Virginia and the agency's owned office building in Austin, Texas. The NCUA facility manager assesses the agency's properties to determine the need for essential repairs, replacement of building systems that have reached the end of their engineered lives, or renovations required to support changes in the agency's organizational structure or to address revisions to building standards and codes.

The NCUA's 2021 capital budget is $18.8 million. The capital budget funds the NCUA's long-term investments. The Information Technology Prioritization Council recommended $12.0 million for IT software development projects and $5.6 million in other IT investments for 2021. The NCUA facilities require $1.3 million in capital investments.

2021 – 2022 NCUA CAPITAL BUDGET

	2020 Board Approved Budget	2021 Requested Budget	Change (2020–2021)	Change Percent (2020–2021)	2022 Requested Budget	Change (2021–2022)	Change Percent (2021–2022)
IT software development investments	20,902,000	11,968,000	(8,934,000)	-42.7%	11,047,000	(921,000)	-7.7%
Other Information technology investments	2,650,000	5,627,000	2,977,000	112.3%	3,275,000	(2,352,000)	-41.8%
Capital building improvements and repairs	1,524,000	1,250,000	(274,000)	-18.0%	250,000	(1,000,000)	-80.0%
Total	**$ 25,076,000**	**$ 18,845,000**	**$ (6,231,000)**	**-24.8%**	**$ 14,572,000**	**$ (4,273,000)**	**-22.7%**

Detailed descriptions of all 2021 capital projects, including a discussion of how each project helps the agency achieve its strategic goals and objectives, are provided in Appendix B.

Summary of Capital Projects

Examination and Supervision Solution and Infrastructure Hosting ($7.4 Million)

The purpose of the Examination and Supervision Solution and Infrastructure Hosting (ESS&IH) project is to implement a new, flexible, technical foundation to enable current and future NCUA business process modernization initiatives, and replace the NCUA's legacy exam system, AIRES, with a new, customized Commercial-Off-The-Shelf (COTS) solution that will allow the NCUA's examiners and supervisors to be more efficient, consistent, and

effective. In 2021, all NCUA examiners will be trained to use the new MERIT system, with full implementation expected by the end of the year. After the MERIT system is fully deployed to the examiner workforce, the NCUA expects to include the system's on-going operating and maintenance costs in the operating budget.

Enterprise Central Data Repository ($1.6 Million)

The Enterprise Central Data Repository (ECDR) project will implement a central data repository that will serve as the data integration point for ESS, ONES's analytic tools, the NCUA's legacy applications and the Data Collection Solution (DCS). The ECDR will become an enterprise solution for the NCUA allowing the agency to transition in a phased approach from the existing legacy databases to a cloud-based data repository serving the agency's needs.

Enterprise Data Program ($0.4 Million)

The purpose of this project is the centralization, organization and storage of the NCUA data. The primary goal is to enable the NCUA to manage enterprise data as a strategic asset through its full lifecycle (create/collect, manage/move, consume, dispose). The Enterprise Data Program (EDP) will also facilitate the centralization and organization of the NCUA's data with an authoritative source so analysis is more accurate, simple and easily distributed across the agency.

NCUA Website Development ($0.1 Million)

The purpose of the website Development project is to serve the web-related needs of the internal NCUA stakeholders and the public. The project provides on-going improvements to the website, such as an improved user experience, and provides support for design, development, and maintenance of the agency's public websites: *NCUA.gov* and *MyCreditUnion.gov.*

Performance Management System Replacement ($0.2 Million)

A replacement system is needed to enable employees to complete all phases of NCUA's performance management program. The system will standardize the workflows and management of employees' performance plans, facilitating employee performance plan issuance, plan acknowledgement, progress review acknowledgment, and the issuance of a final year-end evaluation for all NCUA employees.

Continuous Diagnostic Mitigation ($0.9 Million)

The objective of the Continuous Diagnostics and Mitigation (CDM) project is to enhance the overall security posture of NCUA with capabilities to monitor vulnerabilities and threats in near real-time. This is achieved by implementing capabilities and technical controls to identify what is on the network, who is on the network, what is happening on the network, and to protect data in use, transit, and at rest. This increased situational awareness will allow NCUA to prioritize actions to mitigate or accept cybersecurity risks based on the potential impact to the NCUA mission.

Microsoft Office M365 Implementation ($1.5 Million)

The goal of the M365 Implementation project is to empower the NCUA's employees by delivering the most advanced innovations in management, collaboration, enterprise security, and business analytics through cloud services. Once implemented, M365 will reduce security risks as well as reduce the cost and effort to maintain and manage software nearing the end of its service life.

Enterprise Laptop Lease ($0.8 Million)

The purpose of the Enterprise Laptop Lease project is to ensure the NCUA workforce has an efficient, mobile friendly, and secure computer that helps employees better perform their jobs at a reasonable cost. Because of the priority deployment of the MERIT system in 2021, the NCUA plans to purchase its current fleet of laptops at the end of the current lease in 2021. The NCUA now plans to replace its laptops in 2022.

Information Technology Infrastructure, Platform and Security Refresh ($3.9 Million)

The purpose of the Information Technology (IT) Infrastructure, Platform and Security Refresh project is to refresh and/or replace routers, switches, virtual servers, wireless infrastructure, virtual private network, infrastructure appliances, end of life and end of service components in order to ensure that the NCUA data is secure and operations are stable.

Refresh VoIP Phone System ($1.0 Million)

The purpose of the Refresh Voice over internet Protocol (VoIP) Phone System project is to fully replace NCUA's telephone system (infrastructure, platform, and endpoints) to ensure voice communications capabilities in order to ensure that business continuity and operations are stable. NCUA VoIP voice components include Session Initiation Protocol (SIP), call control, external and internal call routing, local and long-distance call plans, international calling plans and VoIP desk/soft phone. In addition, NCUA plans to integrate the VoIP infrastructure with the M365 project to optimize the workforce's collaboration experience.

Central Office Heating, Ventilation, and Air Conditioning (HVAC) System Replacement ($0.5 Million)

The NCUA central office HVAC system replacement project will recapitalize the HVAC system in the agency's central office building, including all cooling towers, air handlers, boilers and HVAC components. The current HVAC system is original to the facility, 27 years old, at the end of its useful life, not working efficiently, and obsolete. The 2021 budget provides funding to complete the multi-year HVAC replacement project.

Austin, Texas Office Building Modernization ($0.8 Million)

In 2021, the NCUA will continue its multi-year improvement project at the Austin, Texas office building. These capital improvements are required for the facility to continue routine and safe operations, and align with the lifecycle replacement required for critical infrastructure.

VII. Share Insurance Fund Administrative Budget

Overview

The Share Insurance Fund Administrative budget funds direct costs associated with authorized Share Insurance Fund activities. The direct charges to the Share Insurance Fund include costs associated with the NCUA Guaranteed Note (NGN) program and other administrative costs, and represent the total estimated direct costs to the Share Insurance Fund.[26] The Share Insurance Fund Administrative budget funds five positions that were formerly part of the Temporary Corporate Credit Union Stabilization Fund (Stabilization Fund) budget.

The cost of the NGN program and the Corporate System Resolution Program, including costs associated with the

[26] Note these direct costs are exclusive of any costs that are shared with the Operating Fund through the Overhead Transfer Rate, and with payments available upon requisition by the Board, without fiscal year limitation, for insurance under section 1787 of this title, and for providing assistance and making expenditures under section 1788 of this title in connection with the liquidation or threatened liquidation of insured credit unions as it may determine to be proper.

administration of those programs, are funded from the Share Insurance Fund Administrative budget. These costs have no impact on the NCUA's current and future Operating Fund budgets. The budget for the Share Insurance Fund also includes funding for expenditures previously authorized as direct expenses of the Share Insurance Fund for items such as state examiner computer leases, training and financial audit support.

The 2021 Share Insurance Fund Administrative budget is estimated to be $8.1 million, $1.6 million, or 26 percent, more than 2020.

The 2021 budget increase is primarily driven by the addition of operations and maintenance costs for technology systems and data used by the NCUA to validate stress testing at large credit unions, and the addition of the costs of making MERIT, the new examination solution and replacement to AIRES, available to those state supervisory agencies that use it.

The 2022 requested budget supports similar workload and resources, but is projected to decrease by $218,000 or, or 2.7 percent, compared to the 2021 funding level because the one-time nature of the cost of providing the MERIT system to state supervisory authorities.

Budget Category Descriptions and Major Changes

Salaries and Benefits

The employee pay and benefits expense category for the Share Insurance Fund Administrative budget is estimated to be $1.5 million, which represents an increase of $30,000 compared to 2020. This increase is due to aligning the budget to actual payroll costs for staff on board, as well as an increase to mandatory agency contribution rates to the FERS retirement program. Personnel compensation is 18 percent of the total budget. The financial analysts on the NGN team have specialized technical expertise to manage the remaining $5 billion of legacy assets the NCUA will control in 2021. Personnel costs are estimated in a manner similar to the operating budget.

Travel

The estimated travel cost of $52,000 is less than one percent of the overall 2021 budget and remains the same as the 2020 budget estimate. These costs cover all of the travel expenses for the five staff that manage and support the NGN program. Two of the five staff are remote employees and are expected to travel periodically to the NCUA's central office.

Administrative: Training

Training expenses, which represent less than one percent of the overall 2021 budget, are estimated to remain at $27,000, identical to the 2020 level, based on projections of employee professional development plans and specialized training requirements.

Support for the NGN Program (Contract Support)

Contract costs to support the NGN program, which represent 31 percent of the overall 2021 budget, are estimated to be $2.5 million, a decrease of $0.2 million from the 2020 level. Funding is needed to fulfill Corporate System Resolution Program requirements and includes outside professional services such as external valuation experts, financial specialists, and accountants.

These experts assist the NCUA with the following services:

Consulting Services in the amount of $0.9 million to support two NCUA offices: Examination and Insurance and the Chief Financial Officer. Services include quarterly management reviews of asset valuations, as well as analyses of emerging issues. Contractors also provide support for the annual financial audit process and improvements in internal controls. Tasks include: Supporting complex accounting and financial requirements for settlements, sale of legacy assets, parity payments, changing valuation model assumptions, and other asset disposition activities. Additionally, professional services are used to assist with accounting, tax, financial reporting, and systems support for the corporate Asset Management Estates.

Valuation Services in the amount of $1.0 million funds valuation support for the NGN legacy assets. As supported by the NGN Oversight Committee, resources are also needed to conduct special analyses, including valuations for determining reasonable market prices for securities to be sold by auction.

Software and Data Subscription Services in the amount of $0.6 million supports technical tools used to provide waterfall models, calculations, and metrics for the structured investment products underlying the NGN portfolio. The service provides coverage of all relevant asset classes, waterfall models that are seasoned and tested throughout the industry, and a broad array of calculations and metrics. Financial data analytics play a critical role in the surveillance, modeling, and pricing of the legacy assets that securitize the NGN Trusts, as well as supporting the management reviews that the NCUA performs on the cash flow projections. Now that the NGNs are maturing, the NCUA requires data subscription services to provide additional valuation as well as support for the legacy asset disposition process.

Other annual subscriptions provide important services related to surveillance of the portfolio of corporate bonds and mortgage-related bonds. Independent credit research services include fundamental capital structure research, credit analyses for surveillance of corporate bond portfolio and mono-line insurer exposure, and direct access to various industry experts for discussion on specific credits.

Other Direct Expenses

Other direct expenses of the Share Insurance Fund are estimated to be $4.0 million in 2021, an increase of $1.8 million, or 82 percent, compared to the 2020 budget level.

The NCUA is required to validate annual stress testing conducted by certain large credit unions to help ensure these credit unions can remain financially sound through challenging economic cycles. Over a multi-year endeavor, the NCUA has developed and implemented its Assets and Liabilities Management (ALM) system, which in part allows the NCUA to build internal analytical capabilities and run supervisory stress testing analyses. The NCUA also uses the ALM system and associated data to conduct regular quantitative risk assessments. Development of the ALM system was funded from the NCUA capital budget in 2020 and prior years, but now that the system is in use, $1.4 million for operations and maintenance costs will be funded from the SIF budget in 2021 and future budgets.

The 2021 budget also includes $0.3 million that will be spent to make the MERIT examination and supervision system available to State Supervisory Authorities that oversee state-chartered credit unions. This is expected to be a one-time cost for specific technology development.

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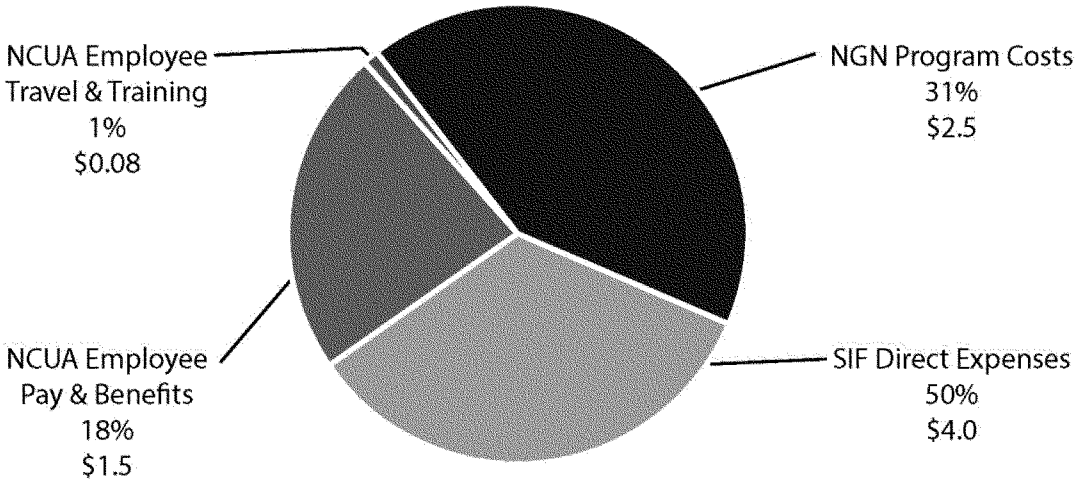
2021 Share Insurance Fund Administrative Budget (in Millions of Dollars)



2021–2022 SHARE INSURANCE FUND ADMINISTRATIVE BUDGET

By Cost Category	2020 Board Approved Budget	2021 Requested Budget	Change (2020-21)	Change Percent (2020-21)	2022 Requested Budget	2021 FTE	2022 FTE
Employee Pay and Benefits	**$ 1,470,000**	**$ 1,500,000**	**30,000**	**2.0%**	**$ 1,500,000**	5	5
Travel	**52,000**	**52,000**	**-**	**0.0%**	**52,000**		
Administrative (NGN Staff Training)	**27,000**	**27,000**	**-**	**0.0%**	**27,000**		
Support for NCUA Guaranteed Note (NGN) Program:	**2,689,000**	**2,484,000**	**(205,000)**	**-7.6%**	**2,484,000**		
Consulting	1,015,000	920,000	(95,000)	-9.4%	920,000		
Valuation Services	875,000	1,000,000	125,000	14.3%	1,000,000		
Software/Data Subscriptions	799,000	564,000	(235,000)	-29.4%	564,000		
Share Insurance Fund Direct Expenses:	**2,212,000**	**4,035,000**	**1,823,000**	**82.4%**	**3,817,000**		
State Examination computer leases	62,000	62,000	-	0.0%	62,000		
State Examiner Training	1,670,000	1,754,000	84,000	5.0%	1,754,000		
State Supervisory Agencies: MERIT costs	-	277,000	277,000	n/a	-		
Analytic tools for large credit union stress tests	-	1,441,000	1,441,000	n/a	1,500,000		
Financial Audit Support	450,000	471,000	21,000	4.7%	471,000		
Bank Charges	30,000	30,000	-	0.0%	30,000		
Total	**$ 6,450,000**	**$ 8,098,000**	**$ 1,648,000**	**25.6%**	**$ 7,880,000**	**5**	**5**

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VII. Financing the NCUA Programs

Overview

When formulating the annual budget, the NCUA is mindful that its operating funding comes directly from federal and state chartered credit unions. The agency strives to ensure that any use or allocation of these funds follows a thorough review that evaluates the necessity of the expenditures and whether programs are operating in an efficient, effective, transparent, and fully accountable manner.

To achieve its statutory mission, the NCUA incurs various expenses, including those involved in examining and supervising federally insured credit unions. The NCUA Board adopts an Operating Budget, which includes the Capital Budget, in the fall of each year to fund the vast majority of the costs of operating the agency.[27] The Federal Credit Union Act authorizes two primary sources to fund the Operating Budget:

(1) Requisitions from the Share Insurance Fund ''for such administrative and other expenses incurred in carrying out the purposes of

[27] Some costs are directly charged to the Share Insurance Fund when appropriate to do so. For example, costs for training and equipment provided to State Supervisory Authorities are directly charged to the Share Insurance Fund.

[Title II of the Act] as [the Board] may determine to be proper''; [28] and

(2) ''fees and assessments (including income earned on insurance deposits) levied on insured credit unions under [the Act].'' [29]

Among the fees levied under the Act are annual Operating Fees, which are required for federal credit unions under 12 U.S.C. 1755 ''and may be expended by the Board to defray the expenses incurred in carrying out the provisions of [the Act,] including the examination and supervision of [federal credit unions].''

Taken together, these authorities effectively require the Board to determine which expenses are appropriately paid from each source while giving the Board broad discretion in allocating expenses.

In 1972, the Government Accountability Office recommended the NCUA adopt a method for properly allocating Operating Budget costs—that is, the portion of the NCUA's budget funded by requisitions from the Share Insurance Fund and the portion covered by Operating Fees paid by federal credit unions.[30] The NCUA has since used an allocation methodology, known as the Overhead Transfer Rate (OTR), to determine how much of the Operating Budget to fund with a requisition from the Share Insurance Fund.

The NCUA uses the OTR methodology to allocate agency expenses between these two primary funding sources. Specifically, the OTR is the formula the NCUA uses to allocate insurance-related expenses to the Share Insurance Fund under Title II. Almost all other operating expenses are funded through collecting annual Operating Fees paid by federal credit unions.[31]

Two statutory provisions directly limit the Board's discretion with respect to Share Insurance Fund requisitions for the NCUA's Operating Budget and, hence, the OTR. First, expenses funded from the Share Insurance Fund must carry out the purposes of Title II of the Act, which relate to share insurance.[32] Second, the NCUA may not fund its entire Operating Budget through charges to the Share Insurance Fund.[33] The NCUA has not imposed additional policy or regulatory limitations on its discretion for determining the OTR.

Overhead Transfer Rate (OTR)

The NCUA conducts a comprehensive workload analysis annually. This analysis estimates the amount of time necessary to conduct examinations and supervise federally insured credit unions in order to carry out the NCUA's dual mission as insurer and regulator. This analysis starts with a field-level review of every federally insured credit union to estimate the number of workload hours needed for the current year. These estimates are informed by the overall parameters of the NCUA's examination program, as most recently updated by the Exam Flexibility Initiative approved by the Board.[34] The workload estimates are then refined by regional managers and submitted to the NCUA central office for the annual budget proposal. The OTR methodology accounts for the costs of the NCUA, not the costs of state regulators. Therefore, there are no calculations made for state examiner hours.

There have not been any major changes to the parameters of the examination program since the current OTR methodology went into effect.[35] The minor variations in the OTR since 2018 are the result of routine, small fluctuations in the variables that affect the OTR, including normal fluctuations in the workload budget from one calendar year to the next.

The NCUA Board approved the current methodology for calculating the OTR at its November 2017 open meeting.[36] In 2020, the Board published [37] in the **Federal Register** a request for comment regarding the OTR methodology, but did not propose any changes to the current methodology. The OTR is designed to cover the NCUA's costs of examining and supervising the risk to the Share Insurance Fund posed by all federally insured credit unions, as well as the costs of administering the fund. The OTR represents the percentage of the agency's operating budget paid for by a transfer from the Share Insurance Fund. Federally insured credit unions are not billed for and do not have to remit the OTR amount; instead, it is transferred directly to the Operating Fund from the Share Insurance Fund. This transfer, therefore, represents a cost to all federally insured credit unions.

The OTR formula uses the following underlying principles to allocate agency operating costs:

1. Time spent examining and supervising federal credit unions is allocated as 50 percent insurance related.[38]

2. All time and costs the NCUA spends supervising or evaluating the risks posed by federally insured, state-chartered credit unions or other entities that the NCUA does not charter or regulate (for example, third-party vendors and CUSOs) are allocated as 100 percent insurance related.[39]

3. Time and costs related to the NCUA's role as charterer and enforcer of consumer protection and other non-insurance based laws governing the operation of credit unions (like field of membership requirements) are allocated as 0 percent insurance related.[40]

4. Time and costs related to the NCUA's role in administering federal share insurance and the Share Insurance

[28] 12 U.S.C. 1783(a).

[29] 12 U.S.C. 1766(j)(3). Other sources of income for the Operating Budget have included interest income, funds from publication sales, parking fee income, and rental income.

[30] *http://www.gao.gov/assets/210/203181.pdf.*

[31] Annual Operating Fees must ''be determined according to a schedule, or schedules, or other method determined by the NCUA Board to be appropriate, which gives due consideration to the expenses of the [NCUA] in carrying out its responsibilities under the [Act] and to the ability of [FCUs] to pay the fee.'' 12 U.S.C. 1755(b).

[32] 12 U.S.C. 1783(a).

[33] The Act in 12 U.S.C. 1755(a) states, ''[i]n accordance with rules prescribed by the Board, each [federal credit union] shall pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.'' See also 12 U.S.C. 1766(j)(3).

[34] The Exam Flexibility Initiative started with the January 1, 2017 examination cycle and it allows for extended examination cycles for eligible credit unions. Letters to Credit Unions 16–CU–12, December 2016.

[35] On November 16, 2017, the NCUA Board adopted a new methodology for calculating the OTR starting with the 2018 OTR. 82 FR 55644, November 22, 2017.

[36] 82 FR 55644 (Nov. 22, 2017).

[37] *https://www.federalregister.gov/documents/2020/08/31/2020-17009/request-for-comment-regarding-national-credit-union-administration-overhead-transfer-rate.*

[38] The 50 percent allocation mathematically emulates an examination and supervision program design where the NCUA would alternate examinations, and/or conduct joint examinations, between its insurance function and its prudential regulator function if they were separate units within the NCUA. It reflects an equal sharing of supervisory responsibilities between the NCUA's dual roles as charterer/prudential regulator and insurer given both roles have a vested interest in the safety and soundness of federal credit unions. It is consistent with the alternating examinations the FDIC and state regulators conduct for insured state-chartered banks as mandated by Congress. Further, it reflects that the NCUA is responsible for managing risk to the Share Insurance Fund and therefore should not rely solely on examinations and supervision conducted by the prudential regulator.

[39] The NCUA does not charter state-chartered credit unions nor serve as their prudential regulator. The NCUA's role with respect to federally insured state-chartered credit unions is as insurer. Therefore, all examination and supervision work and other agency costs attributable to insured state-chartered credit unions is allocated as 100 percent insurance related.

[40] As the federal agency with the responsibility to charter federal credit unions and enforce non-insurance related laws governing how credit unions operate in the marketplace, the NCUA resources allocated to these functions are properly assigned to its role as charterer/prudential regulator.

Fund are allocated as 100 percent insurance related.[41]

These four principles are applied to the activities and costs of the agency to determine the portion of the agency's budget that is funded by the Share Insurance Fund. Based on the Board-approved methodology, the OTR for 2021 is one percentage point higher than 2020, and estimated to be 62.3 percent. Thus, 62.3 percent of the total Operating Budget is estimated to be paid out of the Share Insurance Fund. The remaining 37.7 percent of the Operating Budget is estimated be paid for by Operating Fees collected from federal credit unions. The explicit and implicit distribution of total Operating Budget costs for federal credit unions and federally insured, state-chartered credit unions is outlined in the table below:

2021 Estimated Distribution: OTR and Operating Fee		
Est. Share of the Operating Budget covered by:	Federal Credit Unions	Federally Insured, State-Chartered Credit Unions
Federal Credit Union Operating Fee	37.7%	0.0%
OTR x Percent of Insured Shares	31.3% (62.3% x 50.3%)	31.0% (62.3% x 49.7%)
Total	**69.0%**	**31.0%**

Concurrent with its request for comment regarding the OTR methodology, the Board also published proposed changes to the methodology used to compute the NCUA's Operating Fee[42]. Included as part of the proposed changes, the Board proposed applying the OTR to the NCUA's Capital Budget in the same manner as it applies the OTR to the Operating Budget. The Board is reviewing public comments received about this proposal before making a final decision about the applicability of the OTR to the Capital Budget.

By applying the four principles in a manner that incorporates all Operating and Capital Budget activities, the OTR for 2021 is estimated to be 62.3 percent, the same result as applying the four principles to the Operating Budget alone.

To determine the funds transferred from the Share Insurance Fund to the Operating Fund, the OTR is applied to actual expenses incurred each month. Therefore, the rate calculated by the OTR formula is multiplied by each month's actual operating expenditures and the product of that calculation is transferred from the Share Insurance Fund to the Operating Fund. This monthly reconciliation to actual operating expenditures captures the variance between actual and budgeted amounts, so when the NCUA's expenditures are less than budgeted, the amount charged to the Share Insurance Fund is also less—and those lower expenditures benefit both federally chartered and state chartered credit unions.

The use of insured shares in calculating the OTR was eliminated from the OTR methodology adopted by the Board in 2017. However, insured shares are used for informational purposes to reflect the fundamental economics with respect to how the implicit costs of the OTR are borne by federal and state-chartered credit unions. Use of insured shares is consistent with the mutual nature of the Share Insurance Fund and part of the statutory scheme related to Share Insurance Fund deposits, premiums and dividends.[43] The number, size, and health of federal and state credit unions affects the NCUA's workload budget, which in turn is one of the variables in the OTR methodology.

The primary driver of the increase in the estimated 2021 OTR is the increase in examination and supervision time for federally insured state-chartered credit unions. Calendar year 2021 marks the end of the first, five-year cycle associated with the Exam Flexibility Initiative that extended the NCUA exam time for eligible institutions. The increase in budgeted time for FISCU examination and supervision for 2021 is due to program obligations associated with examination scheduling and scope requirements. Normal fluctuations in the workload budget from one calendar year to the next are also variables that tend to influence the change in the calculated OTR compared to previous years. Workload budget variables include, but are not limited to, changes in CAMEL ratings, the number and size of credit unions that meet the annual exam and extended exam eligibility criteria, credit unions with emerging risk indicators, variations in individual state regulator programs, and fluctuations in the timing of examinations related to a particular calendar year.

CUSOs are at times subject to review during the examination of a federally insured credit union. The OTR methodology captures CUSO-related time within the scope of the examination and supervision of federally insured credit unions under Principle 1 for federal credit unions and Principle 2 for federally insured state-chartered credit unions.

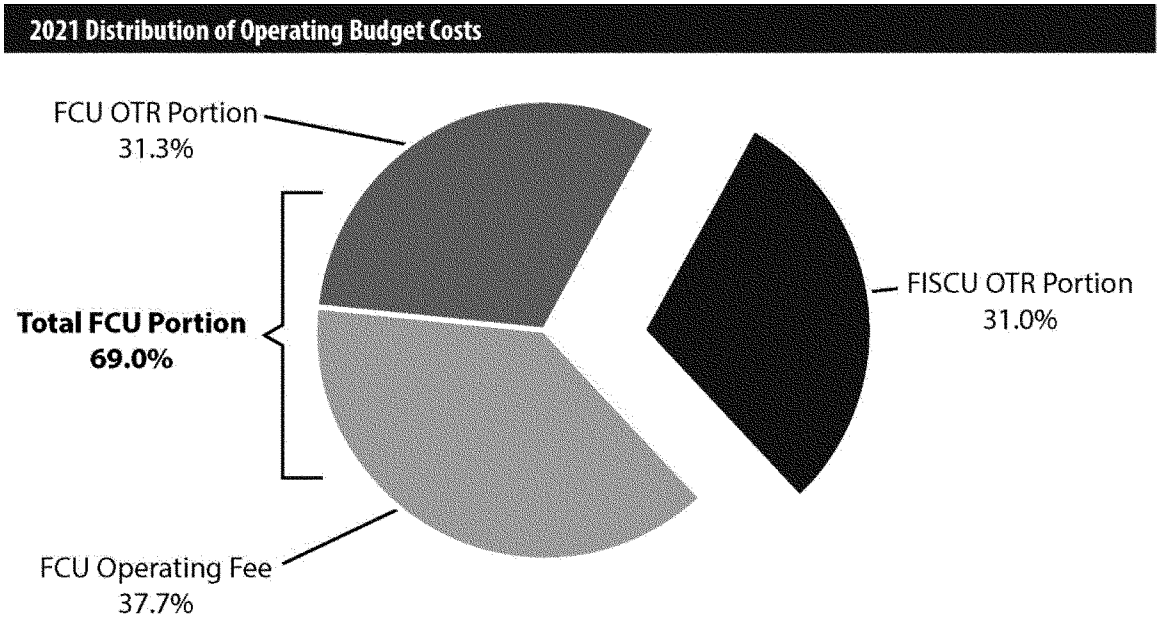
The time designated for separate, stand-alone reviews of CUSOs and third-party vendors is accounted for separately in the NCUA's workload budget and is covered by Principle 2 only. The Board has no direct regulatory authority with respect to CUSOs and there is no support to allocate time specifically designated for CUSO and third-party vendor reviews as anything other than the NCUA's role as insurer. The stand-alone review of CUSOs and third-party vendors is to identify and address risk to federally insured credit unions. These reviews are not intended to identify whether credit unions are complying with the lending and investment limitations with CUSOs. That is determined as part of the examination of the credit union.

The following chart illustrates the share of the Operating Budget paid by federal credit unions (FCUs, 69%) and federally insured, state-chartered credit unions (FISCUs, 31%).

[41] The NCUA conducts liquidations of credit unions, insured share payouts, and other resolution activities in its role as insurer. Also, activities related to share insurance, such as answering consumer inquiries about insurance coverage, are a function of the NCUA's role as insurer.

[42] *https://www.federalregister.gov/documents/2020/08/31/2020-17009/request-for-comment-regarding-national-credit-union-administration-overhead-transfer-rate*

[43] 12 U.S.C. 1782(c)(2) and (3).



Operating Fee

The Board delegated authority to the Chief Financial Officer to administer the methodology approved by the Board for calculating the Operating Fee, and to set the fee schedule as calculated per the approved methodology. In 2020, the Board published [44] in the **Federal Register** several proposed changes to the Operating Fee methodology, and requested public comments about those changes. This section illustrates how the Operating Fee is calculated using the current, Board-approved Operating Fee methodology and also shows how the Operating Fee would be calculated if the Board adopts all of the changes it has proposed to the methodology.

Current Board-Approved Methodology

Based on the estimated 2021 OTR and the current methodology for computing the Operating Fee, the share of the 2021 budget funded by the Operating Fee is $136.8 million. This equates to 0.0149 percent of projected federal credit union assets for December 2020. The overall decrease for the Operating Fee is estimated at 17.7 percent below the 2020 level under the current methodology, as shown on the table on page 64.

The Operating Fee is assessed on federal credit unions based on projected year-end assets under the current methodology. Credit unions with assets less than $1 million are not assessed an Operating Fee. To set the assessment scale for 2021, federal credit union asset growth is projected through December 31, 2020. Based on the June 30, 2020 Call Report data, annual growth is projected to be 14.3 percent at year end. The asset level dividing points would be increased by this same projected growth rate. Under the current methodology, assets are indexed annually by the projected annual growth in total federal credit union assets, which preserves the same relative relationship of the scale to the applicable asset base.

Proposed Changes to Operating Fee Methodology

In 2020, the NCUA Board proposed changes to the methodology it uses to determine how it apportions the Operating Fees and requested public comment about the changes. Specifically, the Board proposed: (1) Clarifying the treatment of capital project budgets when calculating the operating fees; (2) clarifying the treatment of miscellaneous revenues when calculating the operating fees; and (3) modifying the approach for calculating the annual inflationary adjustments to the thresholds for the operating fee rate tiers.

In a separate notice,[45] the Board also proposed amending its rule for determining total assets used as the basis for calculating the Operating Fee by (1) excluding Paycheck Protection Program (PPP) loans from the computation of a credit union's total assets and (2) using the average of the four quarters' call report data available at the time the Board approves the annual budget to compute total assets instead of using the projected fourth quarter total assets.

Based on the proposed changes to the Operating Fee methodology and the proposed changes for determining credit unions' total assets, the share of the 2021 budget funded by the Operating Fee would be $125.3 million. This equates to 0.0147 percent of the estimated average of federal credit union assets for the quarters ending on September 30, 2020. The overall decrease for the Operating Fee would be 19.4 percent less than 2020, as shown on the table on page 64. The Board is reviewing comments from the public about the proposals, as well as responses to questions the Board asked of the public about the Operating Fee rate scale, and may revise the Operating Fee rule, methodology, or rate scale based on these comments.

Under the proposed changes to the determination of total assets, the Operating Fee would be assessed on federal credit unions based on the average of total assets reported in the fourth quarter 2019 and the first three quarters of 2020, net of any reported PPP loans. Credit unions with assets less than $1 million would not be assessed an Operating Fee.

To set the assessment scale for 2021, total growth in federal credit union assets would be calculated as the change between the average of the four most-current quarters (*i.e.,* the fourth quarter of 2019 and the first three quarters of 2020 in the case of the 2021 budget) and the previous four quarters (*i.e.,* the fourth quarter of 2018 and the first three quarters of 2019), which is estimated to

[44] *https://www.federalregister.gov/documents/2020/08/31/2020-17009/request-for-comment-regarding-national-credit-union-administration-overhead-transfer-rate.*

[45] *https://www.federalregister.gov/documents/2020/08/31/2020-16981/fees-paid-by-federal-credit-unions.*

be 11.9 percent.[46] Under the proposed methodology, asset level dividing points would be increased by this same growth rate in order to preserve the same relative relationship of the scale to the applicable asset base.

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OPERATING FEE CALCULATION FOR DRAFT 2021 BUDGET COMPARED TO PROPOSED OPERATING FEE REVISIONS

($ millions)

			Current Methodology	Proposed Methodology
1	Operating Budget recommendation - staff draft		$ 315.567	$ 315.567
	Capital Budget		$ -	$ 18.845
	Miscellaneous Revenue (rent and publication fees)		$ -	$ (0.469)
2	Remove King Street Station Note from Calculation		$ -	$ -
3	Operating Budget (current methodology) or Operating and Capital Budgets (proposed methodology) to apply OTR		**$ 315.567**	**$ 333.943**
4	2021 est. Overhead Transfer Rate	**62.3%**	$ (196.598)	$ (208.046)
5	Interest Income		$ (0.355)	$ (0.355)
6	Miscellaneous Revenue (rent and publication fees)		$ (0.469)	$ -
7	**Net** (sum lines 3 - 6)		**$ 118.145**	**$ 125.542**
8	Operating Fund adjustment		$ -	$ -
9	Capital Budget		$ 18.845	$ -
10	Payment of King Street Note Payable (scheduled principal payments)		$ -	$ -
11	**Budgeted Operating Fee/Capital Requirements** (sum lines 5 -10)		**$ 136.990**	**$ 125.542**
12	Corporate Federal CU Operating Fees		$ (0.200)	$ (0.200)
13	**Natural Person FCU Operating Fees Required** (sum lines 11 -12)		**$ 136.790**	**$ 125.342**
14	Fees projected with Annual Q4 Asset Growth of	**14.3%**	$ (166.216)	
	Fees projected with 4Q Average Asset Growth of	**11.9%**		$ (155.538)
15	**Difference** (lines 13 & 14)		**$ (29.426)**	**$ (30.197)**
16	**Average Rate Adjustment Indicated** (line 15 divided by line 14)		**-17.70%**	**-19.41%**

Operating Fee Scale

To illustrate the rate for each asset tier for which Operating Fees are charged, the tables below show the effect of the average 17.7 percent decrease in the Operating Fee for natural person federal credit unions under the current Board-approved methodology and the 19.4 percent decrease in the Operating Fee for natural person credit unions under the proposed changes to the methodology. The corporate federal credit union rate scale remains unchanged from prior years.

[46] Total assets are determined using the most-current call report data, however 2020 third-quarter data were not available at time of publication. The NCUA estimate for 2020 third-quarter assets is based on projected growth, and will be revised with actual call report data once available.

PROPOSED 2021 OPERATING FEE SCALE

2020 Natural Person Federal Credit Union Scale

Asset Level			Operating Fee Assessment				
$0	TO	$1,000,000	$0.00				
$1,000,000	TO	$1,599,193,665	$0.00	+	0.00027245	X total assets over	$0.00
$1,599,193,665	TO	$4,839,136,005	$435,700	+	0.00007941	X total assets over	$1,599,193,665
$4,839,136,005	AND	Over	$692,984	+	0.00002652	X total assets over	$4,839,136,005

2021 Estimated Natural Person Federal Credit Union Scale: Current Methodology

Projected FCU asset growth rate	14.27%	Change in asset level dividing points
Operating fee rate change	-17.70%	Change in assessment rate percentages

Asset Level			Operating Fee Assessment				
$0	TO	$1,000,000	$0.00				
$1,000,000	TO	$1,827,468,579	$0.00	+	0.00022422	X total assets over	$0.00
$1,827,468,579	TO	$5,529,892,465	$409,755	+	0.00006535	X total assets over	$1,827,468,579
$5,529,892,465	AND	Over	$651,708	+	0.00002183	X total assets over	$5,529,892,465

2021 Estimated Natural Person Federal Credit Union Scale: Proposed Methodology

Projected FCU asset growth rate	11.93%	Change in asset level dividing points
Operating fee rate change	-19.41%	Change in assessment rate percentages

Asset Level			Operating Fee Assessment				
$0	TO	$1,000,000	$0.00				
$1,000,000	TO	$1,790,004,113	$0.00	+	0.00021956	X total assets over	$0.00
$1,790,004,113	TO	$5,416,525,554	$393,013	+	0.00006399	X total assets over	$1,790,004,113
$5,416,525,554	AND	Over	$625,074	+	0.00002137	X total assets over	$5,416,525,554

FY2021 Estimated Corporate Federal Credit Union Scale

Asset Level			Operating Fee Assessment				
$50,000,000	TO	$100,000,000	$10,836	+	0.00019870	X total assets over	$50,000,000
$100,000,000	AND	Over	$20,771	+	0.00001230	X total assets over	$100,000,000

Operating Fee Scale explanation:	
Projected federal credit union asset growth = change in asset level dividing points. Every year, the asset level scale is adjusted by the same percentage as the estimated growth rate.	Percent growth noted on Page 64, line 14
Operating fee rate change = Change in assessment rate percentage	Same as Page 64, line 16
The **Corporate Credit Union scale** remains unchanged from year to year. The number of CCUs is small and stable. Collections from CCUs do not vary significantly between years.	

IX. Appendix A: Supplemental Budget Information

2021 Budget by Strategic Goal

Strategic Goal	2021 Proposed Budget	
	Dollars (in Millions)	Full-Time Equivalents*
Goal 1: Ensure a safe and sound credit union system	$200.80	932.9
Goal 2: Provide a regulatory framework that is transparent, efficient, and improves consumer access	$30.09	117.6
Goal 3: Maximize organizational performance to enable mission success	$80.66	130.5
Office of Inspector General	$4.02	10.0
Total	**$315.57**	**1,191.0**

Expenses for the Offices of the Board, Executive Director, Inspector General, External Affairs and Communications, and Chief Financial Officer are allocated across all strategic goals.
*NCUA's 2021 positions are funded by three different sources: the Central Liquidity Facility funds 3 full-time equivalents, and the Share Insurance Fund funds 5 full-time equivalents. NCUA's Operating Fund funds the remaining 1,183 full-time equivalents.

Note: minor rounding differences may occur in totals.

Office Budget Summary

2021–2022 NCUA OPERATING BUDGET										
Office	2020 Board Approved Budget	2021 Requested Budget	2020–2021 Change		2022 Requested Budget	2021–2022 Change		Authorized Positions		
								2020**	2021***	2022***
Eastern Region	59,229,654	56,143,219	(3,086,435)	-5.2%	60,035,060	3,891,841	6.9%	285	285	285
Southern Region	47,083,762	44,547,608	(2,536,154)	-5.4%	47,673,532	3,125,925	7.0%	233	233	233
Western Region	50,911,527	47,212,838	(3,698,690)	-7.3%	50,550,806	3,337,968	7.1%	237	237	237
Office of National Examinations and Supervision	12,877,247	12,416,885	(460,362)	-3.6%	13,262,286	845,401	6.8%	45	45	45
Supervision and Examination	**170,102,190**	**160,320,549**	**(9,781,641)**	**-5.8%**	**171,521,684**	**11,201,135**	**7.0%**	**800**	**800**	**800**
Office of the Board	3,025,411	3,009,779	(15,632)	-0.5%	3,135,112	125,333	4.2%	12	12	12
Office of the Executive Director	2,044,060	2,277,867	233,807	11.4%	2,346,944	69,078	3.0%	6	8	8
Federal Financial Institutions Examination Council	1,344,185	1,342,000	(2,185)	-0.2%	1,342,000	-	0.0%	-	-	-
Office of Ethics Counsel	-	908,471	908,471	0.0%	943,074	34,603	3.8%	3	3	3
Office of Business Innovation	3,325,535	3,245,552	(79,983)	-2.4%	3,362,506	116,953	3.6%	12	12	12
Office of Continuity and Security Management	5,080,583	5,000,557	(80,026)	-1.6%	4,979,724	(20,833)	-0.4%	12	12	12
Office of Minority and Women Inclusion	3,503,191	3,511,845	8,653	0.2%	3,646,719	134,875	3.8%	10	10	10
Office of the Chief Economist	2,357,494	2,469,812	112,318	4.8%	2,547,693	77,881	3.2%	8	8	8
Office of Consumer Financial Protection	5,526,606	5,507,225	(19,381)	-0.4%	6,969,007	1,461,782	26.5%	24	26	26
Office of the Chief Financial Officer	20,980,522	21,312,605	332,084	1.6%	21,690,555	377,950	1.8%	54	54	54
King Street Station Note	1,340,000	-	(1,340,000)	-100.0%	-	-	0.0%	-	-	-
Cross-cutting agency expenses	(2,666,081)	2,388,949	5,055,030	-189.6%	2,565,000	176,051	7.4%	-	-	-
Office of the Chief Information Officer	39,270,622	44,029,200	4,758,578	12.1%	50,751,869	6,722,669	15.3%	44	44	44
Credit Union Resources and Expansion	8,795,066	8,687,705	(107,361)	-1.2%	9,969,691	1,281,986	14.8%	36	36	36
Office of Examination & Insurance*	15,614,627	14,887,689	(726,937)	-4.7%	15,697,980	810,291	5.4%	56	57	57
Office of General Counsel	12,379,765	12,426,302	46,537	0.4%	12,522,139	95,837	0.8%	45	45	45
Office of Inspector General	3,906,512	4,022,421	115,909	3.0%	4,086,975	64,554	1.6%	10	10	10
Office of Human Resources	17,303,833	15,579,947	(1,723,886)	-10.0%	18,952,098	3,372,151	21.6%	43	43	43
Office of External Affairs and Communication	2,648,879	4,638,541	1,989,662	75.1%	4,735,468	96,927	2.1%	11	11	11
Mission Support	**145,780,809**	**155,246,467**	**9,465,658**	**6.5%**	**170,244,554**	**14,998,087**	**9.7%**	**386**	**391**	**391**
Total*	**$315,883,000**	**$315,567,016**	**$ (315,983)**	**-0.1%**	**$341,766,238**	**$26,199,221**	**8.3%**	**1,186**	**1,191**	**1,191**

*Budget includes 8 FTE related to other NCUA funds; 3 FTE are paid for by the Central Liquidity Facility and 5 FTE are paid for by the Share Insurance Fund.
**2020 Budget adjusted with one additional position for the new Office of Ethics Counsel and the overall positions increased from 1,185 to 1,186.
***2021 and 2022 OED FTE levels include 2 unallocated FTE

Board Budgets

OFFICE OF THE CHAIRMAN: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**4.0**	**4.0**	**-**	**0.0%**	**4.0**	**-**	**-**
Employee Compensation	901,043	933,861	32,818	3.6%	955,181	21,320	2.3%
Salaries	656,680	664,178	7,498	1.1%	680,678	16,500	2.5%
Benefits	244,363	269,684	25,321	10.4%	274,503	4,819	1.8%
Travel	75,000	39,000	(36,000)	-48.0%	66,000	27,000	69.2%
Rent /Comm/Util	250	250	-	0.0%	250	-	0.0%
Administrative	10,000	10,000	-	0.0%	10,000	-	0.0%
Contracted Services	12,000	12,000	-	0.0%	12,000	-	0.0%
Total	**$ 998,293**	**$ 995,111**	**$ (3,182)**	**-0.3%**	**$ 1,043,431**	**$ 48,320**	**4.9%**

BOARD MEMBER McWatters: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**3.0**	**3.0**	**-**	**0.0%**	**3.0**	**-**	**-**
Employee Compensation	744,311	754,210	9,899	1.3%	770,672	16,462	2.2%
Salaries	534,043	538,649	4,606	0.9%	551,301	12,652	2.3%
Benefits	210,268	215,561	5,293	2.5%	219,371	3,810	1.8%
Travel	40,000	21,000	(19,000)	-47.5%	35,000	14,000	66.7%
Rent /Comm/Util	500	250	(250)	-50.0%	250	-	0.0%
Administrative	9,000	9,000	-	0.0%	9,000	-	0.0%
Contracted Services	8,000	8,000	-	0.0%	8,000	-	0.0%
Total	**$ 801,811**	**$ 792,460**	**$ (9,351)**	**-1.2%**	**$ 822,922**	**$ 30,462**	**3.8%**

BOARD MEMBER Harper: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**3.0**	**3.0**	**-**	**-**	**3.0**	**-**	**-**
Employee Compensation	688,079	700,457	12,378	1.8%	715,130	14,673	2.1%
Salaries	497,395	496,929	(466)	-0.1%	508,192	11,263	2.3%
Benefits	190,685	203,529	12,844	6.7%	206,938	3,409	1.7%
Travel	50,000	26,000	(24,000)	-48.0%	44,000	18,000	69.2%
Rent /Comm/Util	500	500	-	0.0%	500	-	0.0%
Administrative	9,000	9,000	-	0.0%	9,000	-	0.0%
Contracted Services	18,000	18,000	-	0.0%	18,000	-	0.0%
Total	**$ 765,579**	**$ 753,957**	**$ (11,622)**	**-1.5%**	**$ 786,630**	**$ 32,673**	**4.3%**

Note: minor rounding differences may occur in totals.

Office Budgets

OFFICE OF THE BOARD: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**12.0**	**12.0**	**-**	**0.0%**	**12.0**	**-**	**-**
Employee Compensation	2,777,661	2,839,779	62,118	2.2%	2,906,112	66,333	2.3%
Salaries	2,010,424	2,021,515	11,091	0.6%	2,072,639	51,125	2.5%
Benefits	767,237	818,264	51,027	6.7%	833,472	15,208	1.9%
Travel	167,000	88,000	(79,000)	-47.3%	147,000	59,000	67.0%
Rent /Comm/Util	1,250	2,000	750	60.0%	2,000	-	0.0%
Administrative	28,000	28,500	500	1.8%	28,500	-	0.0%
Contracted Services	51,500	51,500	-	0.0%	51,500	-	0.0%
Total	**$ 3,025,411**	**$ 3,009,779**	**$ (15,632)**	**-0.5%**	**$ 3,135,112**	**$ 125,333**	**4.2%**

OFFICE OF THE EXECUTIVE DIRECTOR: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE*	**6.0**	**8.0**	**2.0**	**0.3**	**8.0**	**-**	**-**
Employee Compensation	1,730,310	1,737,867	7,557	0.4%	1,790,944	53,078	3.1%
Salaries	1,250,843	1,236,391	(14,452)	-1.2%	1,277,541	41,149	3.3%
Benefits	479,467	501,475	22,008	4.6%	513,404	11,928	2.4%
Travel	45,000	24,000	(21,000)	0.0%	40,000	16,000	66.7%
Rent /Comm/Util	20,250	20,250	-	0.0%	20,250	-	0.0%
Administrative	1,369,185	1,367,250	(1,935)	-0.1%	1,367,250	-	0.0%
ED Core	25,000	25,250	250	1.0%	25,250	-	0.0%
FFIEC	1,344,185	1,342,000	(2,185)	-0.2%	1,342,000	-	0.0%
Contracted Services	223,500	470,500	247,000	110.5%	470,500	-	0.0%
Total	**$ 3,388,245**	**$ 3,619,867**	**$ 231,622**	**6.8%**	**$ 3,688,944**	**$ 69,078**	**1.9%**

* 2021 and 2022 OED FTE levels include 2 unallocated FTE

OFFICE OF ETHICS COUNSEL: 2021-2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**3.0**	**3.0**	**-**	**-**	**3.0**	**-**	**-**
Employee Compensation	-	892,471	892,471	0.0%	920,074	27,603	3.1%
Salaries		648,212	648,212	0.0%	669,786	21,574	3.3%
Benefits		244,259	244,259	0.0%	250,288	6,030	2.5%
Travel		11,000	11,000	0.0%	18,000	7,000	63.6%
Rent /Comm/Util		2,000	2,000	0.0%	2,000	-	0.0%
Administrative		3,000	3,000	0.0%	3,000	-	0.0%
Contracted Services		-	-	0.0%	-	-	0.0%
Total	**$ -**	**$ 908,471**	**$ 908,471**	**0.0%**	**$ 943,074**	**$ 34,603**	**3.8%**

Note: minor rounding differences may occur in totals.

OFFICE OF BUSINESS INNOVATION: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**12.0**	**12.0**	-	-	**12.0**	-	-
Employee Compensation	3,049,685	3,115,002	65,317	2.1%	3,210,956	95,953	3.1%
Salaries	2,228,475	2,234,028	5,553	0.2%	2,308,381	74,352	3.3%
Benefits	821,210	880,974	59,764	7.3%	902,575	21,601	2.5%
Travel	224,000	79,000	(145,000)	-64.7%	100,000	21,000	26.6%
Rent /Comm/Util	3,600	4,650	1,050	29.2%	4,650	-	0.0%
Administrative	10,000	8,100	(1,900)	-19.0%	8,100	-	0.0%
Contracted Services	38,250	38,800	550	1.4%	38,800	-	0.0%
Total	**$ 3,325,535**	**$ 3,245,552**	**$ (79,983)**	**-2.4%**	**$ 3,362,506**	**$ 116,953**	**3.6%**

OFFICE OF CONTINUITY AND SECURITY MANAGEMENT: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**12.0**	**12.0**	-	-	**12.0**	-	-
Employee Compensation	2,782,988	3,011,617	228,629	8.2%	2,983,784	(27,833)	-0.9%
Salaries	2,020,314	2,157,167	136,853	6.8%	2,135,572	(21,596)	-1.0%
Benefits	762,674	854,450	91,776	12.0%	848,213	(6,237)	-0.7%
Travel	30,000	11,000	(19,000)	-63.3%	18,000	7,000	63.6%
Rent /Comm/Util	35,000	35,000	-	0.0%	35,000	-	0.0%
Administrative	36,000	36,000	-	0.0%	36,000	-	0.0%
Contracted Services	2,196,595	1,906,940	(289,655)	-13.2%	1,906,940	-	0.0%
Total	**$ 5,080,583**	**$ 5,000,557**	**$ (80,026)**	**-1.6%**	**$ 4,979,724**	**$ (20,833)**	**-0.4%**

OFFICE OF MINORITY AND WOMEN INCLUSION: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**10.0**	**10.0**	-	-	**10.0**	-	-
Employee Compensation	2,271,894	2,545,846	273,951	12.1%	2,623,720.4	77,875	3.1%
Salaries	1,653,089	1,824,521	171,432	10.4%	1,885,244	60,723	3.3%
Benefits	618,805	721,325	102,519	16.6%	738,476	17,152	2.4%
Travel	157,349	85,169	(72,180)	-45.9%	142,169	57,000	66.9%
Rent /Comm/Util	19,750	18,700	(1,050)	-5.3%	18,700	-	0.0%
Administrative	211,067	207,091	(3,976)	-1.9%	207,091	-	0.0%
Contracted Services	843,131	655,039	(188,092)	-22.3%	655,039	-	0.0%
Total	**$ 3,503,191**	**$ 3,511,845**	**$ 8,653**	**0.2%**	**$ 3,646,719**	**$ 134,875**	**3.8%**

Note: minor rounding differences may occur in totals.

OFFICE OF THE CHIEF ECONOMIST: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**8.0**	**8.0**	-	-	**8.0**	-	-
Employee Compensation	2,117,041	2,241,359	124,318	5.9%	2,310,240	68,881	3.1%
Salaries	1,552,568	1,617,535	64,967	4.2%	1,671,370	53,834	3.3%
Benefits	564,473	623,824	59,351	10.5%	638,870	15,047	2.4%
Travel	25,000	13,000	(12,000)	-48.0%	22,000	9,000	69.2%
Rent /Comm/Util	300	4,200	3,900	1300.0%	4,200	-	0.0%
Administrative	210,839	206,939	(3,900)	-1.8%	206,939	-	0.0%
Contracted Services	4,314	4,314	(0)	0.0%	4,314	-	0.0%
Total	**$ 2,357,494**	**$ 2,469,812**	**$ 112,318**	**4.8%**	**$ 2,547,693**	**$ 77,881**	**3.2%**

OFFICE OF CONSUMER FINANCIAL PROTECTION: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**24.0**	**26.0**	**2.0**	**0.1%**	**26.0**	-	-
Employee Compensation	5,051,759	5,217,891	166,132	3.3%	6,548,673	1,330,782	25.5%
Salaries	3,623,066	3,687,530	64,465	1.8%	4,725,328	1,037,798	28.1%
Benefits	1,428,694	1,530,361	101,667	7.1%	1,823,345	292,984	19.1%
Travel	384,423	195,596	(188,827)	-49.1%	326,596	131,000	67.0%
Rent /Comm/Util	39,950	37,200	(2,750)	-6.9%	37,200	-	0.0%
Administrative	20,815	26,430	5,615	27.0%	26,430	-	0.0%
Contracted Services	29,659	30,108	449	1.5%	30,108	-	0.0%
Total	**$ 5,526,606**	**$ 5,507,225**	**$ (19,381)**	**-0.4%**	**$ 6,969,007**	**$ 1,461,782**	**26.5%**

Note: minor rounding differences may occur in totals.

OFFICE OF THE CHIEF FINANCIAL OFFICER: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**54.0**	**54.0**	**-**	**0.0%**	**54.0**	**-**	**-**
Employee Compensation	7,907,346	12,985,554	5,078,209	64.2%	13,511,555	526,001	4.1%
Salaries	4,458,749	9,314,122	4,855,373	108.9%	9,759,428	445,306	5.5%
OCFO	8,016,797	8,090,173	73,376	0.9%	8,359,428	269,255	
Crosscutting	(3,558,048)	1,223,949	4,781,997	-134.4%	1,400,000	176,051	
Benefits	3,448,597	3,671,432	222,836	6.5%	3,752,127	80,695	2.2%
OCFO	3,127,597	3,356,432	228,836	7.3%	3,437,127	80,695	
Crosscutting	321,000	315,000	(6,000)	-1.9%	315,000	-	
Travel	90,000	42,000	(48,000)	-53.3%	70,000	28,000	66.7%
OCFO	90,000	42,000	(48,000)	-53.3%	70,000	28,000	
Crosscutting	-		-			-	
Rent /Comm/Util	2,095,500	618,000	(1,477,500)	-70.5%	618,000	-	0.0%
OCFO	755,500	618,000	(137,500)	-18.2%	618,000	-	
King Station Note	1,340,000	-	(1,340,000)	-100.0%		-	
Administrative	1,040,000	1,794,000	754,000	72.5%	1,794,000	-	0.0%
OCFO	940,000	944,000	4,000	0.4%	944,000	-	
Crosscutting	100,000	850,000	750,000	750.0%	850,000	-	
Contracted Services	8,521,595	8,262,000	(259,595)	-3.0%	8,262,000	-	0.0%
OCFO	8,050,628	8,262,000	211,372	2.6%	8,262,000	-	
Crosscutting	470,967		(470,967)			-	
Total	**$ 19,654,441**	**$ 23,701,554**	**$ 4,047,114**	**20.6%**	**$ 24,255,555**	**$ 554,001**	**2.3%**
OCFO Total	22,320,522	21,312,605	(1,007,916)	-4.5%	21,690,555	377,950	1.8%
Crosscutting	(2,666,081)	2,388,949	5,055,030	-189.6%	2,565,000	176,051	7.4%

OFFICE OF THE CHIEF INFORMATION OFFICER: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**44.0**	**44.0**	**-**	**-**	**44.0**	**-**	**-**
Employee Compensation	10,850,291	10,996,943	146,652	1.4%	11,333,612	336,669	3.1%
Salaries	7,910,059	7,879,267	(30,792)	-0.4%	8,141,503	262,236	3.3%
Benefits	2,940,232	3,117,676	177,444	6.0%	3,192,109	74,434	2.4%
Travel	50,000	34,000	(16,000)	-32.0%	57,000	23,000	67.6%
Rent /Comm/Util	4,553,060	5,337,135	784,075	17.2%	6,077,135	740,000	13.9%
Administrative	4,500	30,000	25,500	566.7%	30,000	-	0.0%
Contracted Services	23,812,771	27,631,122	3,818,351	16.0%	33,254,122	5,623,000	20.4%
Total	**$ 39,270,622**	**$ 44,029,200**	**$ 4,758,578**	**12.1%**	**$ 50,751,869**	**$ 6,722,669**	**15.3%**

Note: minor rounding differences may occur in totals.

OFFICE OF NATIONAL EXAMINATIONS AND SUPERVISION: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**45.0**	**45.0**	**-**	**-**	**45.0**	**-**	**-**
Employee Compensation	10,852,318	11,305,615	453,297	4.2%	11,649,016	343,401	3.0%
Salaries	7,798,101	8,030,194	232,093	3.0%	8,297,453	267,259	3.3%
Benefits	3,054,216	3,275,420	221,204	7.2%	3,351,562	76,142	2.3%
Travel	1,455,000	752,000	(703,000)	-48.3%	1,254,000	502,000	66.8%
Rent /Comm/Util	14,500	21,600	7,100	49.0%	21,600	-	0.0%
Administrative	36,429	45,070	8,641	23.7%	45,070	-	0.0%
Contracted Services	519,000	292,600	(226,400)	-43.6%	292,600	-	0.0%
Total	**$ 12,877,247**	**$ 12,416,885**	**$ (460,362)**	**-3.6%**	**$ 13,262,286**	**$ 845,401**	**6.8%**

OFFICE OF CREDIT UNION RESOURCE AND EXPANSION: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**36.0**	**36.0**	**-**	**-**	**36.0**	**-**	**-**
Employee Compensation	7,882,689	7,956,705	74,016	0.9%	9,033,691	1,076,986	13.5%
Salaries	5,674,658	5,625,467	(49,191)	-0.9%	6,464,360	838,892	14.9%
Benefits	2,208,031	2,331,238	123,207	5.6%	2,569,331	238,093	10.2%
Travel	580,000	307,000	(273,000)	-47.1%	512,000	205,000	66.8%
Rent /Comm/Util	24,750	33,000	8,250	33.3%	33,000	-	0.0%
Administrative	30,000	38,000	8,000	26.7%	38,000	-	0.0%
Contracted Services	277,627	353,000	75,373	27.1%	353,000	-	0.0%
Total	**$ 8,795,066**	**$ 8,687,705**	**$ (107,361)**	**-1.2%**	**$ 9,969,691**	**$ 1,281,986**	**14.8%**

OFFICE OF EXAMINATION AND INSURANCE: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**56.0**	**57.0**	**1.0**	**1.8%**	**57.0**	**-**	**-**
Employee Compensation	12,028,189	12,388,794	360,605	3.0%	12,857,085	468,291	3.8%
Salaries	8,753,933	8,855,876	101,942	1.2%	9,219,244	363,368	4.1%
Benefits	3,274,255	3,532,918	258,663	7.9%	3,637,841	104,923	3.0%
Travel	1,008,244	513,180	(495,064)	-49.1%	855,180	342,000	66.6%
Rent /Comm/Util	20,877	23,100	2,223	10.6%	23,100	-	0.0%
Administrative	805,317	708,615	(96,702)	-12.0%	708,615	-	0.0%
Contracted Services	1,752,000	1,254,000	(498,000)	-28.4%	1,254,000	-	0.0%
Total	**$ 15,614,627**	**$ 14,887,689**	**$ (726,937)**	**-4.7%**	**$ 15,697,980**	**$ 810,291**	**5.4%**

Note: minor rounding differences may occur in totals.

OFFICE OF GENERAL COUNSEL: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**47.0**	**47.0**	**-**	**0.0%**	**47.0**	**-**	**-**
Employee Compensation	12,025,265	12,053,302	28,037	0.2%	12,114,139	60,837	0.5%
Salaries	8,815,622	8,688,862	(126,760)	-1.4%	8,735,222	46,360	0.5%
Benefits	3,209,643	3,364,441	154,797	4.8%	3,378,917	14,477	0.4%
Travel	150,000	53,000	(97,000)	-64.7	88,000	35,000	66.0%
Rent /Comm/Util	500	5,000	4,500	900.0%	5,000	-	0.0%
Administrative	1,500	5,000	3,500	233.3%	5,000	-	0.0%
Contracted Services	202,500	310,000	107,500	53.1%	310,000	-	0.0%
Total	**$ 12,379,765**	**$ 12,426,302**	**$ 46,537**	**0.4%**	**$ 12,522,139**	**$ 95,837**	**0.8%**

OFFICE OF HUMAN RESOURCES: 2021–2022 BUDGET SUMMARYY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**43.0**	**43.0**	**-**	**-**	**43.0**	**-**	**-**
Employee Compensation	10,082,718	10,609,324	526,606	5.2%	10,901,375	292,051	2.8%
Salaries	6,556,141	6,800,495	244,354	3.7%	7,025,995	225,500	3.3%
Benefits	3,526,577	3,808,829	282,252	8.0%	3,875,380	66,551	1.7%
Travel	3,086,815	1,058,600	(2,028,215)	-65.7%	3,638,600	2,580,000	243.7%
Rent /Comm/Util	482,085	40,400	(441,685)	-91.6%	540,500	500,100	1237.9%
Administrative	982,500	970,540	(11,960)	-1.2%	970,540	-	0.0%
Contracted Services	2,669,714	2,901,083	231,369	8.7%	2,901,083	-	0.0%
Total	**$17,303,833**	**$15,579,947**	**$(1,723,886)**	**-10.0%**	**$18,952,098**	**$3,372,151**	**21.6%**

OFFICE OF EXTERNAL AFFAIRS AND COMMUNICATION: 2021–2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**11.0**	**11.0**	**-**	**0.0%**	**11.0**	**-**	**-**
Employee Compensation	2,263,316	2,746,796	483,480	21.4%	2,830,723	83,927	3.1%
Salaries	1,627,003	1,941,846	314,843	19.4%	2,006,474	64,628	3.3%
Benefits	636,313	804,950	168,637	26.5%	824,249	19,299	2.4%
Travel	36,000	19,000	(17,000)	-47.2%	32,000	13,000	68.4%
Rent /Comm/Util	-	500	500	-	500	-	0.0%
Administrative	51,888	66,938	15,050	29.0%	66,938	-	0.0%
Contracted Services	297,675	1,805,307	1,507,632	506.5%	1,805,307	-	0.0%
Total	**$2,648,879**	**$4,638,541**	**$1,989,662**	**75.1%**	**$4,735,468**	**$96,927**	**2.1%**

Note: minor rounding differences may occur in totals.

EASTERN REGION: 2021-2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**285.0**	**285.0**	**0.00**	**0.0%**	**285.0**	**-**	**-**
Employee Compensation	52,021,801	52,147,653	125,852	0.2%	53,690,494	1,542,841	3.0%
Salaries	36,570,573	36,046,234	(524,339)	-1.4%	37,220,625	1,174,391	3.3%
Benefits	15,451,228	16,101,419	650,191	4.2%	16,469,869	368,450	2.3%
Travel	6,654,236	3,521,000	(3,133,236)	-47.1%	5,870,000	2,349,000	66.7%
Rent /Comm/Util	148,300	102,622	(45,678)	-30.8%	102,622	-	0.0%
Administrative	203,819	170,896	(32,923)	-16.2%	170,896	-	0.0%
Contracted Services	201,498	201,048	(450)	-0.2%	201,048	-	0.0%
Total	**$ 59,229,654**	**$ 56,143,219**	**$ (3,086,435)**	**-5.2%**	**$ 60,035,060**	**$ 3,891,841**	**6.9%**

SOUTHERN REGION: 2021-2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**233.0**	**233.0**	**0.0**	**0.0%**	**233.0**	**-**	**-**
Employee Compensation	40,347,162	40,882,543	535,381	1.3%	42,039,467	1,156,925	2.8%
Salaries	28,366,086	28,278,961	(87,125)	-0.3%	29,161,850	882,889	3.1%
Benefits	11,981,076	12,603,581	622,506	5.2%	12,877,617	274,036	2.2%
Travel	6,100,000	2,951,000	(3,149,000)	-51.6%	4,920,000	1,969,000	66.7%
Rent /Comm/Util	200,500	318,488	117,988	58.8%	318,488	-	0.0%
Administrative	233,100	186,544	(46,556)	-20.0%	186,544	-	0.0%
Contracted Services	203,000	209,033	6,033	3.0%	209,033	-	0.0%
Total	**$ 47,083,762**	**$ 44,547,608**	**$ (2,536,154)**	**-5.4%**	**$ 47,673,532**	**$ 3,125,925**	**7.0%**

WESTERN REGION: 2021-2022 BUDGET SUMMARY							
	2020 Board Approved Budget	2021 Requested Budget	2020-2021 Change	Change Percent	2022 Requested Budget	2021-2022 Change	Change Percent
FTE	**237.0**	**237.0**	**-**	**-**	**237.0**	**-**	**-**
Employee Compensation	42,647,527	42,434,238	(213,290)	-0.5%	43,291,206	856,968	2.0%
Salaries	29,741,955	29,104,594	(637,361)	-2.1%	29,761,879	657,286	2.3%
Benefits	12,905,572	13,329,644	424,072	3.3%	13,529,326	199,683	1.5%
Travel	7,110,000	3,718,200	(3,391,800)	-47.7%	6,199,200	2,481,000	66.7%
Rent /Comm/Util	570,000	570,500	500	0.1%	570,500	-	0.0%
Administrative	334,300	258,900	(75,400)	-22.6%	258,900	-	0.0%
Contracted Services	249,700	231,000	(18,700)	-7.5%	231,000	-	0.0%
Total	**$ 50,911,527**	**$ 47,212,838**	**$ (3,698,690)**	**-7.3%**	**$ 50,550,806**	**$ 3,337,968**	**7.1%**

Note: minor rounding differences may occur in totals.

X. Appendix B: Capital Projects

NATIONAL CREDIT UNION ADMINISTRATION: CAPITAL INVESTMENT PROJECTS				
Description	**2020 Board Approved**	**2021 Board Approved**	**2021 Requested**	**2022 Requested**
IT software development investments				
Examination and Supervision Solution and Infrastructure Hosting	15,782,000	4,000,000	7,388,000	597,000
Data Collection and Sharing Solution	-	5,000,000	-	-
Enterprise Central Data Repository	1,096,000	2,000,000	1,626,000	-
Enterprise Data Program	450,000	-	350,000	350,000
Asset and Liabilities Management Application	2,074,000	-	-	-
Enterprise Learning Management System Replacement	1,000,000	-	-	-
NCUA Website Development	100,000	100,000	100,000	100,000
Performance Management System Replacement	-	-	154,000	-
Continuous Diagnostic Mitigation (CDM)	-	-	900,000	-
Integrated Financial Management System Analysis	400,000	400,000	-	-
Microsoft Office M365 Implementation	-	-	1,450,000	-
Anticipated New Software Development Investments	-	5,500,000	-	10,000,000
Total, IT software development investments	**$ 20,902,000**	**$ 17,000,000**	**$ 11,968,000**	**$ 11,047,000**
Other Information technology investments				
Enterprise Laptop Lease	650,000	2,475,000	807,000	2,075,000
Information Technology Infrastructure, Platform and Security Refresh	2,000,000	2,000,000	3,870,000	1,200,000
Refresh VoIP Phone System	-	-	950,000	-
Total, Other Information technology investments	**$ 2,650,000**	**$ 4,475,000**	**$ 5,627,000**	**$ 3,275,000**
Capital building improvements and repairs				
Central Office Rennovations	500,000	3,000,000	-	-
Central Office HVAC System Replacement	750,000	500,000	500,000	-
Austin, TX Office Building Improvements	274,000	230,000	750,000	250,000
Total, Capital building improvements and repairs	**$ 1,524,000**	**$ 3,730,000**	**$ 1,250,000**	**$ 250,000**
Grand Total, Capital Projects	**$ 25,076,000**	**$ 25,205,000**	**$ 18,845,000**	**$ 14,572,000**

Project name	**Examination and Supervision Solution and Infrastructure Hosting (ESS&IH)/MERIT**					
Project sponsor	Office of Business Innovation and Office of the Chief Information Officer					
Customers/ beneficiaries	Internal: E&I, ONES, All Field Program Offices, OCIO, CURE, OHR, and OCFP External: Credit Unions, State Supervisory Authorities (SSAs)					
Budget	**$ in thousands**	**2020**	**2021***	**2022**	**2023**	**2024**
	Acquisition	$15,782	$7,388	$597	$1,277	TBD
	Operations and Maintenance	$0	$6,952	$10,169	$10,470	TBD
	*Note: $276k will be funded from the 2021 Share and Insurance Fund Administrative Expenses Budget to make the system available to State Examiners.					
Link to NCUA strategic goals	Goal 1: Ensure a Safe and Sound Credit Union System. ESS will enable credit union examiners to fulfill NCUA strategic objective 1.2, "provide high-quality and efficient supervision," by providing a more effective and secure examination tool. Goal 3: Maximize organizational performance to enable mission success. ESS will enable credit union examiners to perform their work more efficiently, helping the NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation."					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Conduct ONES examinations and supervision contacts for all federal credit unions with assets greater than $10 billion and joint exams with state regulators in federally insured state-chartered credit unions with assets greater than $10 billion in Washington and North Carolina using the Modern Examination and Risk Identification Tool (MERIT), commencing October 7, 2019.	100% of contacts identified for Release 2**				
	Expand the MERIT Pilot to include additional states, corporate credit unions, regional natural person		Minimum 15 credit unions, 50 examiners, and one			

	credit union examiners, and other contact types to gather additional feedback for enhancing MERIT and the ESS applications while supporting user adoption.		state will be on-boarded			
	Finalize deployment and training of NCUA and SSA users on MERIT and associated examination systems to begin the transition from AIRES to MERIT by December 31, 2021		100% staff and SSA partners trained.			
	All FCU and FISCU contacts created and completed in MERIT.			75% of contacts	95% of contacts	
	Development Sprint completion: Estimate versus Actual	Within +/- 20%				
	Testing Pass Rate: % of User Stories that Pass User Acceptance Testing on First attempt	90% 75% (Actual)				
	Production System Availability	99.9% (Planned) 99.9% (Actual)	99.9%	99.9%	99.9%	99.9%
	* Release 1 includes ESM Iterations 1-3: ONES natural person federal credit union exam Program (Contact Type 10, 11, 22, 23, 26, 27, and 28) and joint exam programs with two SSAs. ** Release 2 includes ESM Iteration 4: Core examination and supervision functionality including Consumer Complaints, Corporate CU, Fair Lending, Risk Focused Exam, ONES Quarterly, SCUEP, Bank Purchase, Compliance, Conservatorship Admin, Fraud, NFICU, Loan and Share ingest and analytics capability. Liquidations contact configuration and enhancements to core functionality will continue into operations and maintenance.					
Detailed project description	The ESS&IH projects will put access to the key examination and supervision capabilities into a streamlined toolset allowing the NCUA's Examiners and Supervisors to be more efficient, consistent, and effective. The overarching ESS&IH project scope and key deliverables include a new, flexible, technical foundation to enable current and future NCUA business process modernization initiatives, a central user interface (CUI), which will serve as a common point of access for future ESM applications, secure transfer of data between the NCUA and third parties, and replacement of the NCUA's legacy exam system, AIRES, with new Commercial-Off-The-Shelf (COTS) solutions. This project represents the first deliverable of the NCUA's Enterprise System Modernization program.					

	In 2020, OBI/OCIO enhanced and expanded the Modern Examination and Risk Identification tool (MERIT) and its related suite of examination and supervision solutions (ESS) (e.g., NCUA Connect, DEXA, Admin Portal) and distributed ESS to a pilot group of NCUA, SSA, and credit union users. This release completed the core ESS&IH project scope/IT capability; however, because of the coronavirus pandemic, the NCUA delayed deploying MERIT to all NCUA staff, SSAs, and credit union users on its use until 2021. Through the end of 2020, the NCUA will continue to add staff and states onto the MERIT system for select contacts as part of an expanded pilot. In 2021, the NCUA will continue to enhance MERIT and the ESS suite of applications based on pilot user feedback. Capital funds will be used to upgrade platforms and surge contractor support in conjunction with the Agency's plans to deploy the system to all remaining users and train them, and initiate the transition from AIRES to MERIT. Investment objectives include: • Process Efficiency and Scalability – To enable the NCUA staff to effectively oversee all credit unions, from the smallest to the largest, with various types of examinations from a single platform; • Process Flexibility and Adaptability – To adjust to new regulatory processes, demands, and priorities rapidly to an increasingly sophisticated credit union industry; • Improved Analytics – To enhance the ability to identify and evaluate risk in credit unions effectively through deep, detailed, "vertical" and "horizontal" analysis of credit unions using various analytical techniques and tools; • Robust and Flexible Data Collection – To securely collect and share financial and non-financial data with flexible workflows to automate manual processes and efficiently route work assignments; • Risk-based Examination Approach – To focus examiner resources on credit unions and asset portfolios that pose the most risk to the credit union industry; and, • Modern IT Infrastructure – To enable current and future business process modernization including a single point of entry to related IT services. Time Management System (TMS), Management Automated Resource System (MARS), and National Supervision Policy Manual (NSPM) tools are not in scope of this project. Replacement of these legacy systems will be included in future efforts under the ESM program.	
Quarterly project schedule and deliverables	March/2021	Complete the on-boarding and training of expanded pilot users.
	June/2021	Complete priority enhancements informed from the expanded pilot.
	August/2021	Start training and onboarding of NCUA Staff and SSAs.
	December/2021	Complete training and onboarding of NCUA staff and SSAs.
Performance Benchmark for Investment	As a result of implementation of Modern Examination and Risk Identification tool (MERIT) and its related suite of examination and supervision solutions (ESS) (e.g., NCUA Connect, DEXA, Admin Portal) the users will be able to achieve • Better controlled access to examination data across the organization. • Faster and well-organized ability to request and submit items for the examination. • Collaboration and real-time information for examiners, team members, and supervisors, including state supervisory authorities on joint exams.	

	• Opportunities for credit union users to manage examination findings and view completed examination reports. • Business process improvements to achieve exam efficiencies, including less data redundancy and relational support between scope tasks, questionnaires, and findings.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	If significant policy changes are made to support the Agency response to CARES/COVID-19 and the MERIT O&M team doesn't have the resources to support the changes, then users may be required to utilize workarounds with impacts to user adoption and data collection.	Maintain regular monthly communications with the Office of Examination & Insurance team on planned activities and estimated timelines. Prioritize and reserve contractor capacity for high-priority enhancements.
	If COVID-19 interrupts travel in 2021 or users are unable to attend the planned training, then the MERIT training strategy will be impacted.	Monitor ongoing developments and changes related to the pandemic. Develop alternative training strategies to address potential roadblocks.
	If the response to user reported system bugs and requests for help are slow, then users may become frustrated and user adoption could be impacted.	Define O&M service levels and manage user expectations. Actively manage O&M backlog and pro-actively communicate status and plans to users.

Project name	**Enterprise Central Data Repository (ECDR)**
Project sponsor	Office of the Chief Information Officer
Customers/ beneficiaries	Internal: All NCUA Offices External: Credit Unions, Credit Union members and the public will indirectly benefit from this project.
Budget	
Link to NCUA strategic goals	Goal 1: Ensure a Safe and Sound Credit Union System. The Enterprise Central Data Repository (ECDR) project will enable credit union examiners to fulfill strategic objective 1.2, "provide high-quality and efficient supervision," by providing a data platform that will enable NCUA to more accurately and cost-effectively assess risks to the credit union system. In turn, the system will enable the NCUA to better identify and evaluate credit union risk and more efficiently conduct its mission through data analytics. Goal 3: Maximize organizational performance to enable mission success. The Enterprise Central Data Repository (ECDR) project will enable credit union examiners to perform their work more effectively and efficiently, helping the NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation" by providing the central data repository on which the agency's enterprise data analytics and ESM initiative will rely, and that will improve the integrity, security and business value of NCUA's data.
Project Performance (note: ☑ indicates achievement of performance measure in year)	

$ in thousands	**2020**	**2021**	**2022**	**2023**	**2024**
Acquisition	$1,096*	$1,626	$0	$0	$0
Operations and Maintenance	$0	$587	$1,787	$1,757	$1,750

Performance measure	**2020**	**2021**	**2022**	**2023**	**2024**
Expand infrastructure to support legacy data required for MERIT	☑	☑			
Continue to ingest ONES quarterly loan data	☑	☑	☑	☑	☑
Continue to ingest MERIT data	☑	☑	☑	☑	☑
Eliminate duplicate data tables	☑	☑	☑		
Accurately categorize data (enterprise, analytics, etc.)	☑	☑	☑		
Migrate infrastructure to the cloud				☑	
Call Report tables consolidated into ECDR	☑				
Exam tables consolidated into ECDR	☑	☑			
Member Financial tables consolidated into ECDR		☑			
Expand BI Reporting & Analytics across the Agency	☑	☑	☑	☑	☑

Detailed project description	The Enterprise Central Data Repository (ECDR) project will implement a data repository that will serve as the enterprise data integration point for MERIT, ONES' analytic tools the NCUA's legacy applications and provide a platform to support future data and analytic initiatives. ECDR is a critical component used for the import/export of data to and from the Modern Examination and Risk Management Tool (MERIT) and is the repository for the Home Mortgage Disclosure Act (HMDA) data as well as other sources. ECDR supports NCUA's goal to leverage and expand existing data capabilities, integrate new data sources, develop dashboards, and supports advanced data modeling/predictive analysis efforts. The ECDR is an enterprise solution for the NCUA that will allow the organization to transition through a phased approach from the existing legacy databases to a cloud-based data repository while meeting the agency's requirements.	
Quarterly project schedule and deliverables	March/2021	• Enhanced Credit Union Dashboard system
	June/2021	• Complete Exam data migrated to ECDR for analytical purposes • Complete Institutional Financial (Call Report) data migrated to ECDR for analytical purposes • Support for MERIT Iteration 4 (Institutional Financial Data for All Credit Unions)
	September/2021	• Member Financial Data ALM for Production
	December/2021	• Shared application data in ECDR
Performance Benchmark for Investment	• Improved data quality by governing enterprise data in one place, better ensuring consistency, accuracy and availability of data across NCUA • Provides ability to access and analyze historical data allowing for more ease of in-depth analysis • NCUA will build a central data repository to support enterprise data analytics leveraging lessons learned from federal agencies and private industry. • The data repository will be scalable to accommodate additional data requirements. • ALM integration with ECDR will be automated so that ONES can directly access data from ECDR to use in ALM models for stress testing. • MERIT integration with ECDR will be automated so that legacy regional reports can be maintained until modernization.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	If resources assigned to this project are needed to support high priority tasks, then there may be impacts to this project.	Continuous communication with OCIO Management on task prioritization and/or resource conflicts.
	If requirement changes are needed, then there may be impact to the schedule.	Hold regular status meetings with project teams and OPIs to keep requirements delivery on schedule. Escalate any requirements changes or expansion of requirements immediately to determine the impact of such changes.
	If there are schedule delays with the cloud environment, then additional storage may be required on premise.	Continue to communicate with the ESS team. Prepare for possible delays in moving to cloud by increasing storage by the time solution is scheduled to migrate to Test.

Project name	**Enterprise Data Program (EDP)** *formerly Enterprise Data Analytics, Governance and Reporting Services*					
Project sponsor	Office of Business Innovation					
Customers/ beneficiaries	Internal: All NCUA Offices External: N/A					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$450	$350	$350	$350	$200
	Operations and Maintenance	$0	$0	$0	$0	$150
Link to NCUA strategic goals	Goal 1: Ensure a Safe and Sound Credit Union System. The EDP will enable agency staff to better fulfill their responsibility to "provide high-quality and efficient supervision," which is NCUA strategic objective 1.2 by maturing data management practices in order to ensure the use of high-quality data in operations, reporting, and analytics. Goal 3: Maximize organizational performance to enable mission success. The EDP will enable agency staff to perform their work more effectively and efficiently, helping the NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation" by managing enterprise data via effective collaboration among stakeholders on new data standards - as the data lifecycle of involves multiple offices across the agency.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Assess and align EDP with Federal Data Strategy and Evidence-Based Policy Making Act	☑	☑	☑	☑	☑
	Continue Training and Support of Operation of the Enterprise Data Governance Council	☑	☑	☑	☑	☑
	Implement data governance for initial data standards for Exam and Institutional Financial Data Domains	☑	☑			
	Conduct Critical Data Element Inventory for Exam and Institutional Financial Data Domains	☑	☑			
	Develop initial business requirements for enterprise business intelligence capability for reporting and analytics	☑	☑			
	Develop and implement a collaborative framework to design and validate an enterprise business intelligence capability for reporting and analytics	☑	☑	☑	☑	☑
	Conduct Business Metadata Gap Assessment for Exam and Institutional Financial Data Domains		☑			

	Conduct market research on tools to meet business meta data catalogue needs		☑			
	Implement data governance for additional data domains and phases of the data lifecycle		☑	☑	☑	☑
Detailed project description	The NCUA's Chief Data Officer leads the Enterprise Data Program, which is comprised of a business data lead, a data steward team, a representative central data governing body, and data subject matter experts throughout the agency. The primary goal is to enable the NCUA to manage enterprise data as a strategic asset through its full lifecycle. Early discovery efforts for an Enterprise Data Reporting Solution (DRS) as part of NCUA's Enterprise Solution Modernization program identified the need to first develop an enterprise-level data governance strategy and framework as the foundation to facilitate business intelligence capability for enhanced reporting and analytics. The resulting business construct is NCUA's EDP. The EDP will reduce risks facing the current data environment and improve NCUA's overall reporting and data analysis capabilities. This will be accomplished through governed data and implementation of enterprise business intelligence capability to conduct risk analysis and target exams and supervision where needed to enhance the agency's ability to adapt to institution and industry conditions. The initial collaborative efforts of the EDP concentrate on enhancing clarity of enterprise data used in reporting and analytics for examination and credit union financial data. This work will complement, not replace, other aspects of the agency's existing data management and compliance processes (e.g. collection decisions, security, privacy, records management). The scope will evolve over time based on priorities and capacity.					

Project name	**NCUA Website Development**					
Project sponsor	Office of External Affairs and Communications					
Customers/ beneficiaries	External: Visitors to NCUA Public Websites					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$100	$100	$100	$100	$100
Link to NCUA strategic goals	Goal 2: Provide a regulatory framework that is transparent, efficient and improves consumer access. The website development project will assist the NCUA to share information with the public, credit unions, Congress, and the media about the agency and its functions, Board actions, and other matters. The project helps the NCUA achieve Strategic Objective 2.1, "deliver an effective and transparent regulatory framework," and Strategic Objective 2.2, "Enforce federal consumer financial protection laws and regulations in federal credit unions." The web services contract provides on-demand, agile support for the completion and delivery of special web projects and tasks requested by various NCUA offices of primary interest on behalf of the NCUA Chairman, Board members, Executive and Deputy Executive Director. Goal 3: Maximize organizational performance to enable mission success. The website development project ensures that the NCUA is utilizing the efficient technology and business processes for managing the content of its public-facing websites.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	N/A					
Detailed project description	The website development project serves the web-related needs of the NCUA and visitors to its public websites. This funding request supports improvements to the website, such as an improved user experience, and provides support for design, development, and maintenance of the NCUA.gov and MyCreditUnion.gov. The project scope includes: (1) search engine optimization; (2) a digital asset management system; (3) data visualization and other improvements to how data is presented on the public website; (4) migrating legacy systems and utilities over to the agency's current content management system; and (5) improve the websites' compliance with Section 508 is a part of the Rehabilitation Act of 1973.					
Quarterly project schedule and deliverables	March/2021	ITSS web services contract implemented				
	June/2021	High-priority projects implemented on a continuous basis on NCUA.gov will improve the presentation of financial performance data, and highlight the ACCESS initiative (Advancing Communities through credit, Education, Stability and Support).				
	September/2021					
	December/2021					

Performance Benchmark for Investment	The completion of updated visual design, content that conforms with Section 508 and usability standards, improved website traffic and engagement rates and design documents that conform with *NCUA Web Style Guide*.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	Urgent requests for website updates could result in content not compliant with approved style guides and accessibility standards.	OEAC will ensure content complies with requirements of the *NCUA Communications Manual*, *NCUA Web Style Guide*, Section 508, and Web Content Accessibility Guides (WCAG). OEAC will follow the change request process by creating OneStop requests for every project or request.
	New high priority project requests may result in unfunded requirements exceeding the contract budget.	OEAC will work with the agency's business units to forecast potential projects and develop project plans that are efficient and that support the agency's strategic objectives.

Project name	**Performance Management System (PMS) Replacement**					
Project sponsor	Office of Human Resources					
Customers/ beneficiaries	Internal: All NCUA staff					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$0	$154	$0	$0	$0
	Operations and Maintenance			$36	$36	$36
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The Performance Management System (PMS) Replacement project will assist all NCUA employees to perform their work more effectively and efficiently, helping NCUA achieve strategic objective 3.2, "Deliver an efficient organizational design supported by improved business processes and innovation." The new PMS will be the NCUA's primary system for maintaining performance plans.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Initiate and plan the acquisition of a new PMS	☑				
	Acquire a modern, cost-efficient cloud-based PMS that meets agency requirements		☑			
	Prepare and provide access to a new PMS to ~1,200 end users		☑			
Detailed project description	NCUA's current performance management solution, ePerformance, was acquired in 2012 through a sole source acquisition. • The current ePerformance system contract will end April 27, 2022. • As a best practice, OCIO reviews major technological systems every five years for replacement/renewal • ePerformance has not been reevaluated since it was acquired eight years ago A replacement system is needed to enable employees to complete all phases of NCUA's performance management program. The system will facilitate employee performance plan issuance, plan acknowledgement, progress review acknowledgment, and the establishment of a final year-end evaluation for 1200 employees. The system will support standardized workflows and management of over 350 performance plan packages. Without the funding requested, NCUA would need to extend the current contract via sole source or maintain records as hard copies.					
	March/2021					
	June/2021					

Quarterly project schedule and deliverables	September/2021	Award contract and configure PMS
	December/2021	Implementation of PMS
Performance Benchmark for Investment	The planned PMS will • Facilitate employee performance plan issuance, plan acknowledgement, progress review acknowledgment, and the establishment of a final year-end evaluation. • The planned PMS will provide Single Sign-on (SSO). • The planned PMS will be hosted on FedRAMP environment. • The planned PMS will provide a COTS product that integrated with the Learning Management system and automate the Individual Development Plan (IDP) workflow.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	If technical issues arise during the data migration process, it could result in the loss of performance records, content or other data.	Maintain additional copy of data prior to migration.

Project name	**Continuous Diagnostics and Mitigation**					
Project sponsor	Office of the Chief Information Officer					
Customers/ beneficiaries	Internal: All NCUA External: All Credit Unions					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$0	$900	$0	$0	$0
	Operations and Maintenance	$0	$0	$300	$300	$300
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The Continuous Diagnostics and Mitigation project will help NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation" by implementing secure, reliable, and innovative technology solutions that will ensure the confidentiality, integrity, and availability of NCUA information and information systems.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Optimize existing technology and capabilities.	☑	☑			
	Implement the capabilities required of the Federal Continuous Diagnostics and Mitigation program.	☑	☑			
	Identify data attributes and reporting required of the Federal Continuous Diagnostics and Mitigation program.		☑			
	Enhance visibility of NCUA assets, users, and activities on the network.	☑	☑			
	Define and track metrics for detection, alerting, and reporting of anomalous asset, users, and network activity.	☑	☑			
Detailed project description	The objective of the Continuous Diagnostics and Mitigation (CDM) project is to enhance the overall security posture of NCUA with capabilities to monitor vulnerabilities and threats in near real-time. This is achieved by implementing capabilities and technical controls to identify what is on the network, who is on the network, what is happening on the network, and to protect data in use, transit, and at rest. This increased situational awareness will allow NCUA to prioritize actions to					

	mitigate or accept cybersecurity risks based on the potential impact to the NCUA mission. Specific technologies for 2021 include endpoint and data protection capabilities with ongoing evaluation of enterprise cloud provider security stacks (e.g., M365) and prioritized investments based upon protection gap analyses.	
Quarterly project schedule and deliverables	January/2021	Establish Data Protection program with OPI stakeholders.
	April/2021	Create/update policies for data protection. Acquire tools and capabilities for endpoint protection.
	June/2021	Acquire tools and capabilities for data protection. Conduct pilot test of endpoint protection capabilities.
	December/2021	Conduct pilot test of data protection capabilities. Deploy endpoint protection capabilities agency-wide.
Performance Benchmark for Investment	Return on Security/Infrastructure Investment (ROSI) – This project improves system security and infrastructure stability while mitigating the risk of catastrophic system failure. Therefore, to gauge the benefit of the investment, the cost of acquiring the new system can be compared to an estimate of the economic loss that will be prevented by improved system performance. This calculation is shown in the ROSI equation: $$ROSI = \frac{reduction\ in\ economic\ loss\ - cost\ of\ solution}{cost\ of\ the\ solution}$$ • The reduction in economic loss is the difference between the annual measured loss prior to the investment and the projected loss after the investment, inclusive of any compliance benefits or potential impact on corporate goodwill. The economic loss is calculated using average contract labor rates and average workforce labor rates representing a potential loss of productivity for a given timeframe.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	The NCUA Information Security Support Services contract will be recompeted which may result in a new contract team that may impact the schedule of activities for 2021.	Create integrated master schedule with clear process for resource prioritization and scheduling.
	If the acquisition timeframe is extended, then the implementation schedule will be delayed.	Provide all required procurement artifacts well in advance of deadlines and manage all activities closely with clear escalation paths for higher level issue resolution.
	If resources are assigned to other assignments, then the implementation schedule will be delayed.	Create integrated master schedule with clear process for resource prioritization and scheduling.

Project name	**Microsoft Office M365 Implementation**					
Project sponsor	Office of the Chief Information Officer					
Customers/ beneficiaries	Internal: All NCUA External: All Credit Unions					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$0	$1,450	$0	$0	$0
	Operations and Maintenance	$0	$0	$0	$0	$0
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The Microsoft Office 365 Implementation project will enable credit union examiners and all NCUA staff to perform their work more effectively and efficiently, helping NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation" by utilizing Microsoft 365 applications, which includes: Excel, OneNote, Outlook, PowerPoint, Groups, Teams, Planner, and Word. Users will be able to connect with Office M365 services such as SharePoint Online, Exchange Online, OneDrive and Teams for collaboration and business productivity. Investment in these projects helps ensure business continuity and efficient operations by improving system availability and stability.					
Project Performance Reduce administrative overhead by 75 percent (administrative overhead to monitor and mitigate risk for end of life (EOL) and failing systems is approximately 5% of total contract spend) through: - eliminating ad hoc support for EOL equipment, - reducing maintenance requirements. (note: ☑ indicates achievement of performance measure in year)	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Complete Readiness Assessment	☑				
	Acquire M365 Licenses	☑				
	Prepare/Develop Environments/Networks/Exchanges, and AD.	☑				
	Acquire Premier Services including O365 DSE	☑				
	Complete OCIO Business Pilot	☑				
	Initiate Initial Velocity Migration to Exchange and Teams		☑			
	Begin SharePoint Migrations		☑			
	Complete OneDrive Migration		☑			
	Complete SharePoint Migrations			☑		

Detailed project description	The purpose of the M365 Implementation is to empower our NCUA employees by delivering the most advanced innovations in management, collaboration, enterprise security, and business analytics, through cloud services. Modernized technology solution to M365 will reduce abundant security risks as well as reduce the footprint to maintain and manage antiquated, i.e. near end-of-life, products specifically Exchange 2010.	
Quarterly project schedule and deliverables	March/2021	Begin SharePoint Migration
	June/2021	Complete OneDrive Migration
	September/2021	
	December/2021	Complete SharePoint Migration – Close to 50 apps over 1TB data
Performance Benchmark for Investment	• Enhanced capabilities resulting in lower contract support costs, • Greater integration from modernized interfaces and software, and • Predictable upgrade and vulnerability management paths	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	If Ops and Security teams are not trained to support M365 for the business pilot, the two M365 architects/engineers and Tech Lead will not be able to sustain support for all end-users throughout the business pilot and beyond.	Allow for necessary training and workshops for Tier1-3 Operations as well as Security
	If dedicated resources are assigned to other assignments, then the implementation schedules will be delayed.	Create integrated master schedule with clear process for resource prioritization and scheduling.

Project name	**Enterprise Laptop Lease**					
Project sponsor	Office of the Chief Information Officer					
Customers/ beneficiaries	Internal: All NCUA External: State Supervisory Authority (SSA)					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$650	$807*	$2,075	TBD	TBD
	Operations and Maintenance					
	*To lessen the impact on end-users who will be transitioning to M365 and receiving MERIT training in 2021, the NCUA plans to undertake a laptop refresh cycle in 2022.					
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The Enterprise Laptop Lease project will assist all employees to perform their work more effectively and efficiently, helping NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation." New hardware for NCUA's employees provides staff with new functionality and NCUA improved security features that enhance user productivity, increased mobile functionality, and lower IT administrative costs due to a decreased need for support services.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Purchase NCUA's existing fleet of laptops near end of Q2 2021	N/A	☑	N/A	N/A	N/A
Detailed project description	The purpose of the Enterprise Laptop Lease project is to provide the NCUA with a more efficient, mobile friendly, and secure tool to help better perform their jobs at a reasonable cost. The project scope includes: (1) the selection of new, standard laptop configurations; (2) image and compatibility testing; (3) device acquisition; and (4) the managed deployment of the new devices to end users. Out year costs are associated with the required lease payments. All stakeholders who use the NCUA-provided and supported laptops to perform their work will receive the new laptops. By including hardware and OS support into the lease agreement contract, and following a three-to-four year replacement lifecycle, the NCUA will be able to keep pace with changes in workstation and OS technology in a cost-effective manner.					
Quarterly project schedule and deliverables	March/2021					
	June/2021					
	September/2021					
	December/2021	Purchase the entire fleet of laptops				

Performance Benchmark for Investment	The NCUA business requirements will be compared to device performance benchmarks to determine the necessary standard workstation configurations. The NCUA will follow the Office of Management and Budget's (OMB's) Category Management Policy guidance pertaining to the acquisition of desktops and laptops as applicable.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	N/A, project completed.	N/A, project completed.

Project name	**Information Technology (IT) Infrastructure, Platform and Security Refresh**					
Project sponsor	Office of the Chief Information Officer					
Customers/ beneficiaries	Internal: All NCUA External: All Credit Unions					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$2,000	$3,870	$1,200	TBD	TBD
	Operations and Maintenance	$0	$1,068	$1,068	$1,068	$1,068
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The Information Technology (IT) Infrastructure, Platform and Security Refresh project will enable credit union examiners to perform their work more effectively and efficiently, helping NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation" by refreshing and/or replacing co-located and Regional routers, switches, production storage, virtual servers, wireless infrastructure and equipment, virtual private networks, firewalls, security tools (endpoint protection, password manager, derived credential, security information and event management, governance and risk compliance (GRC), and data loss prevention (DLP)) and end-of-life and end-of-service components. Investment in these projects helps ensure business continuity and efficient operations by improving system availability and stability.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Reduce administrative overhead by 3.75%		☑			
	Award of more cost-effective infrastructure and security support contracts will save ~$4M		☑			
Detailed project description	The purpose of the Information Technology (IT) Infrastructure, Platform and Security Refresh project is to ensure that NCUA data is secure and operations are stable by refreshing and/or replacing COLO and Regional routers, switches, firewalls, virtual servers, wireless infrastructure and equipment, virtual private networks, security tools (to include GRC and DLP) and other network end-of-life and end-of-service components.					
Quarterly project schedule and deliverables	March/2021	• Complete Phase I of refresh and/or replacement: Servers and Storage devices (Server 2008 replacement, potential cloud infrastructure initial implementation (M365)), and complete derived credentials capability for mobile device access to NCUA business applications				
	June/2021	• Complete the replacement of Network Security Scan devices and Cybersecurity tools (endpoint protection, GRC and DLP)				

	September/2021	• Complete Phase II of refresh and/or replacement: Network devices and switches
	December/2021	• Complete the replacement of NCUA wide wireless antennas and routers
Performance Benchmark for Investment	Return on Security/Infrastructure Investment (ROSI) – This project improves system security and infrastructure stability while mitigating the risk of catastrophic system failure. Therefore, to gauge the benefit of the investment, the cost of acquiring the new system can be compared to an estimate of the economic loss that will be prevented by improved system performance. This calculation is shown in the ROSI equation: $$ROSI = \frac{reduction\ in\ economic\ loss\ - cost\ of\ solution}{cost\ of\ the\ solution}$$ The reduction in economic loss is the difference between the annual measured loss prior to the investment and the projected loss after the investment, inclusive of any compliance benefits or potential impact on corporate goodwill. The economic loss is calculated using average contract labor rates and average workforce labor rates representing a potential loss of productivity for a given timeframe.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	If the acquisition timeframe is extended, then the implementation schedule will be delayed.	Provide all required procurement artifacts well in advance of deadlines and manage all activities closely with clear escalation paths for higher level issue resolution.
	If resources are assigned to other assignments, then the implementation schedule will be delayed.	Create integrated master schedule with clear process for resource prioritization and scheduling.

Project name	**Refresh VOIP Phone System**					
Project sponsor	Office of the Chief Information Officer					
Customers/ beneficiaries	Internal: All NCUA External: All Credit Unions					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$0	$950	$0	$0	$0
	Operations and Maintenance	$0	$0	$0	$0	$0
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The Refresh Voice over Internet Protocol (VoIP) Phone System project will enable credit union examiners to perform their work more effectively and efficiently, helping NCUA achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation" by fully replacing the end of life infrastructure, platform and endpoints to ensure voice communications capabilities which ensure business continuity.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Stand up VoIP infrastructure, deploy and configure VoIP platform, and deploy all user and conference room endpoints*		☑			
	*Full project completion is dependent upon the NCUA's return to normal, onsite operation.					
Detailed project description	The purpose of the Refresh Voice over Internet Protocol (VoIP) Phone System project is to fully replace NCUA's telephone system (infrastructure, platform, and endpoints) to ensure voice communications capabilities in order to ensure that business continuity and operations are stable. NCUA VoIP voice components include Session Initiation Protocol (SIP), call control, external and internal call routing, local and long-distance call plans, international calling plans and VoIP desk/soft phone. In addition, NCUA is evaluating how to integrate the VoIP infrastructure with M365, which would give NCUA users a better collaboration experience. Once installed, the new phone system will help ensure business continuity, since the current system is no longer supported by the manufacturer, presenting a high risk of permanent, unanticipated failure.					
Quarterly project schedule and deliverables	March/2021	Acquisition Award				
	June/2021	Begin replacement of VoIP appliances.				
	September/2021					
	December/2021	Complete VoIP replacement of all appliances and close out.				
	Risk		**Mitigation**			

Project Risks and Mitigation Strategies	If the acquisition timeframe is extended, then the implementation schedule will be delayed.	Provide all required procurement artifacts well in advance of deadlines and manage all activities closely with clear escalation paths for higher level issue resolution.
	If resources are assigned to other assignments, then the implementation schedule will be delayed.	Create integrated master schedule with clear process for resource prioritization and scheduling.
	If onsite access to NCUA offices continues to be restricted due to the COVID-19 pandemic, hardware installation and testing could be delayed.	Utilize local OCIO and NCUA resources to perform physical installation and testing with assistance from Central Office resources.

Project name	**Central Office HVAC System Replacement**					
Project sponsor	Office of the Chief Financial Officer					
Customers/ beneficiaries	Internal: All NCUA Headquarters Building Occupants External: All NCUA Headquarters Building Visitors					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$750	$500	$0	$0	$0
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. The NCUA headquarters Heating, Ventilation, and Air Conditioning (HVAC) system replacement project will improve the operations of the agency's largest building while lowering utility costs by installing more energy-efficient systems, helping achieve strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation." The current HVAC system is 27 years old, and by replacing it the NCUA will ensure its infrastructure meets all current codes for life safety, accessibility, and security. The new system will result in cost savings, increased energy and operational efficiency, and lower maintenance costs.					
Project Performance	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Energy Consumption (kWh/degree days)	1.8K	1.6K	=<1.55K	=<1.55K	=<1.55K
	System Outages (unscheduled repair visits)	<30	<20	<10	<10	<10
Detailed project description	The project will replace all HVAC systems in the headquarters building to include all cooling towers, air handlers, boilers and HVAC components. The current HVAC system is original to the facility, 27 years old and obsolete; some component parts are no longer available. HVAC systems are the biggest users of electricity in a facility, and the anticipated life span of these system's major components is approximately 20-25 years. The current system is at the end of its usable life and it is not working efficiently. Additionally the maintenance and operating costs have increased considerably and system components are failing more frequently, which are clear signs of decreased reliability. A design and proposal has been completed with the anticipated replacement of the first cooling tower beginning the fall of 2021. Additionally all building HVAC controls are in the process of being replaced. Follow on phases include the replacement of the second cooling tower and boiler system.					
Quarterly project schedule and deliverables	March/2021	Solicit cooling tower vendors.				
	June/2021	Award contract for first cooling tower.				
	September/2021	Begin installation of first cooling tower.				
	December/2021	Complete first cooling tower project.				

Performance Benchmark for Investment	The replacement will improve building efficiency by an estimated 15 percent, which exceeds the 2011 Energy Code that mandates, for existing nonresidential buildings 10,000 square feet and larger: (1) an energy efficiency audit must be performed once every 5 years identifying specific cost-effective measures that would save energy; and (2) the reduction of energy consumption of 5% by the introduction of more efficient systems.	
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**
	Schedule. The schedule can be impacted by demand and cooling tower manufacturing lead times.	Cooling tower installation will be planned for the fall or winter months, allowing adequate lead time, to prevent disruption of building operations during spring and summer.
	Ongoing existing system failures. In 2020, the NCUA headquarters building experienced over 20 HVAC isolated system failures due to aging equipment.	HVAC System Replacement plan encompasses replacing parts showing high levels of deterioration first to address the most common failure types

Project name	**Austin, TX Office Building Modernization**					
Project sponsor	Office of the Chief Financial Officer					
Customers/ beneficiaries	Internal: All Austin, TX Building Occupants External: All Austin, TX Building Visitors					
Budget	**$ in thousands**	**2020**	**2021**	**2022**	**2023**	**2024**
	Acquisition	$274	$750	$250	$0	$0
	O&M			$25	$25	$25
Link to NCUA strategic goals	Goal 3: Maximize organizational performance to enable mission success. Repairs to NCUA's Austin, Texas office building will improve operations at the facility and help enable the agency to meet its strategic objective 3.2, "deliver an efficient organizational design supported by improved business processes and innovation." Many of the systems and building elements in the Austin office building have not been adequately maintained or modernized, and this investment will ensure that facility infrastructure meets current building codes for life safety, accessibility, and security. Once the investments have been completed, equipment replaced, and areas modernized, better management of maintenance schedules will result in increased energy and operational efficiency. In addition to addressing deferred maintenance, the NCUA will also use these funds to determine the most effective and cost-efficient approach to meet its current and future space requirements for Southern Region employees.					
Project Performance (note: ☑ indicates achievement of performance measure in year)	**Performance measure**	**2020**	**2021**	**2022**	**2023**	**2024**
	Repair Critical items identified in field assessments	☑	☑			
	Repair Potentially Critical items identified in field assessments		☑	☑	☑	
Detailed project description	The NCUA assessed the condition of its office building in Austin, Texas in 2018 and identified a significant amount of required improvements, such as replacing the fire alarm system, repairing and replacing doors and sensors, and installing fire-proof roofing. In addition, nearly all of the windows in the 30+ year old building required replacement in 2019. The 2020 and 2021 investments will support repairing or replacing all of the items identified as critical and potentially critical, and will modernize the facility generally. These capital improvements are required in order for the facility to continue routine and safe operations, align with the life cycle replacement required for critical infrastructure, and provide a productive workforce environment. Future year budgets will fund additional repair or replacement projects in a priority order.					
Quarterly project schedule and deliverables	March/2021	Repair of critical and potentially critical items, as identified in field assessments.				
	June/2021					
	September/2021					
	December/2021					
Performance Benchmark for Investment	The repairs are expected to improve building efficiency by at least 20%, which will reduce the general cost of ownership for NCUA facilities.					
Project Risks and Mitigation Strategies	**Risk**	**Mitigation**				
	Facility systems will continue to fail due to lack of maintenance	Depending on priorities, resources may be reprogrammed to repair failing equipment				
	Cost. Construction cost increases.	Adjust the scope, schedule, or priority of planned renovation work.				
	Schedule. Projects may not be delivered on time.	Contractor support services have been acquired to provide additional construction management and oversight.				

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Part VII

Department of Homeland Security

8 CFR Parts 215 and 235

Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 215 and 235

[Docket No. USCBP–2020–0062]

RIN 1651–AB12

Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) is required by statute to develop and implement an integrated, automated entry and exit data system to match records, including biographic data and biometrics, of aliens entering and departing the United States. Although the current regulations provide that DHS may require certain aliens to provide biometrics when entering and departing the United States, they only authorize DHS to require certain aliens to provide biometrics upon departure under pilot programs at land ports and at up to 15 airports and seaports. To advance the legal framework for DHS to begin a comprehensive biometric entry-exit system, DHS is proposing to amend the regulations to remove the references to pilot programs and the port limitation to permit collection of biometrics from aliens departing from airports, land ports, seaports, or any other authorized point of departure. In addition, to enable U.S. Customs and Border Protection (CBP) to make the process for verifying the identity of aliens more efficient, accurate, and secure by using facial recognition technology, DHS is proposing to amend the regulations to provide that all aliens may be required to be photographed upon entry and/or departure. U.S. citizens may voluntarily opt out of participating in CBP's biometric verification program. This proposed rule also makes other minor conforming and editorial changes to the regulations.

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

ADDRESSES: Please submit comments, identified by docket number, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2020–0062.

Due to COVID–19 related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Due to COVID–19 related restrictions, CBP has temporarily suspended its on-site public inspection of submitted comments.

FOR FURTHER INFORMATION CONTACT: Michael Hardin, Director, Entry/Exit Policy and Planning, Office of Field Operations, U.S. Customs and Border Protection, by phone at (202) 325–1053 or via email at *michael.hardin@cbp.dhs.gov.*

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Table of Abbreviations and Acronyms

APC—Automated Passport Control
ADIS—Arrival and Departure Information System
APIS—Advance Passenger Information System
CBP—U.S. Customs and Border Protection
DHS—Department of Homeland Security
DHS TRIP—DHS Traveler Redress Inquiry Program
DOJ—Department of Justice
DOS—Department of State
DMIA—Immigration and Naturalization Service Data Management Improvement Act of 2000
ICE—U.S. Immigration and Customs Enforcement
INA—Immigration and Nationality Act
IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004
MPC—Mobile Passport Control
MRZ—Machine-Readable Zone
NPRM—Notice of Proposed Rulemaking
OBIM—Office of Biometric Identity Management
OTTI—Department of Commerce's Office of Travel and Tourism Industries
PIA—Privacy Impact Assessment
TSA—Transportation Security Administration
TVS—Traveler Verification Service
USCIS—U.S. Citizenship and Immigration Services
US-VISIT—United States Visitor and Immigrant Status Indicator Technology
VWP—Visa Waiver Program

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the rule. Comments that will provide the most assistance will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change. All submissions received must

include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

II. Executive Summary

As discussed in Section III (Background), the Department of Homeland Security (DHS) is mandated by statute to develop and implement an integrated, automated entry and exit data system to match records, including biographic data and biometrics,[1] of aliens entering and departing the United States.[2] In addition, Executive Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, published in the **Federal Register** at 82 FR 13209, states that DHS is to expedite the completion and implementation of a biometric entry-exit tracking system. Although DHS, through U.S. Customs and Border Protection (CBP), has been collecting biometric data from certain aliens arriving in the United States since 2004,[3] currently there is no comprehensive system in place to collect biometrics from aliens departing the country.

Implementing an integrated biometric entry-exit system that compares biometric data of aliens collected upon arrival with biometric data collected upon departure is essential for addressing the national security concerns arising from the threat of terrorism, the fraudulent use of legitimate travel documentation, aliens who overstay their authorized period of admission (overstays) or are present in the United States without having been admitted or paroled, and incorrect or incomplete biographic data for travelers.

As recognized by the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission), combatting terrorism requires a screening system that examines individuals at multiple points within the travel continuum.[4] An integrated biometric entry-exit system provides an accurate way to verify an individual's identity, and, consequently, can improve security and effectively combat attempts by terrorists who use false travel documents to circumvent border checkpoints. It can also be used to biometrically verify that a person who presents a travel document is the true bearer of that document, which will help prevent visa fraud and the fraudulent use of legitimate travel documentation.

Such a system would also allow DHS to confirm more concretely the identity of aliens seeking entry or admission to the United States and to verify their departure from the United States. By having more accurate border crossing records of aliens, DHS can more effectively identify overstays and aliens who are, or were, present in the United States without having been admitted or paroled and prevent their unlawful reentry into the United States. It will also make it more difficult for imposters to utilize other travelers' credentials. In addition, performing biometric identity verification can help DHS reconcile any errors or incomplete data in a traveler's biographic data.[5] Ultimately, this provides DHS with more reliable information to verify identity and to strengthen its ability to identify criminals and known or suspected terrorists.

DHS has faced a number of logistical and operational challenges in developing and deploying a biometric exit capability. This is, in part, because U.S. airports generally do not have designated and secure exit areas for conducting outbound inspections, recording travelers' departures, or comparing biometric information against arrival data. U.S. land ports of entry present even more infrastructure and operational challenges due to geographic limitations (many border crossings involve crossing a bridge or tunnel), and a myriad of transportation alternatives for crossing a land port of entry (*e.g.,* car, bus, rail, foot).

CBP has been testing various options to collect biometrics at entry and departure. These tests are described in detail in Section III.E of this document. The results of these tests and the recent advancement of new technologies, including facial recognition technology, have provided CBP with a model to implement a comprehensive biometric entry-exit solution. CBP has determined that facial recognition technology is currently the best available method for biometric verification, as it is accurate, unobtrusive, and efficient. This technology uses existing advance passenger information along with photographs which have already been provided by travelers to the government for the purpose of facilitating international travel, to create ''galleries'' of facial image templates to correspond with who is expected to be arriving or departing the United States on a particular flight, voyage, etc. These photographs may be derived from passport applications, visa applications, or interactions with CBP at a prior border inspection. Once the gallery is created based on the advance information, the facial recognition technology compares a template of a live photograph of the traveler to the gallery of facial image templates. Live photographs are taken where there is clear expectation that a person will need to provide documentary evidence of their identity. If there is a facial image match, the traveler's identity has been verified.

In the initial stage of implementation, CBP plans to expand its facial recognition system to commercial air ports of entry. CBP plans to eventually establish a biometric entry-exit system at all air, sea, and land ports of entry.

CBP estimates that a biometric entry-exit system can be fully implemented at all commercial air ports of entry within the next three to five years. For land and sea ports of entry and private aircraft, CBP plans to continue to test and refine biometric exit strategies with the ultimate goal of implementing a comprehensive biometric entry-exit system nationwide.[6] The proposed

[1] Biographic data includes information specific to an individual traveler such as name, date of birth, and travel document number, which are data elements stored in that traveler's passport, visa, or lawful permanent resident card. A biometric refers to a form of identification based on anatomical, physiological, and behavioral characteristics or other physical attributes unique to a person that can be collected, stored, and used to verify the identity of a person, *e.g.,* fingerprints, photographs, iris, DNA, and voice print.

[2] Numerous federal statutes require DHS to create an integrated, automated biometric entry and exit system that records the arrival and departure of aliens, compares the biometric data of aliens to verify their identity, and authenticates travel documents presented by such aliens through the comparison of biometrics. These include: Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215, 114 Stat. 337; Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–828, 110 Stat. 3009–546; Section 205 of the Visa Waiver Permanent Program Act of 2000, Public Law 106–396, 114 Stat. 1637, 1641; Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56, 115 Stat. 272, 353; Section 302 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act), Public Law 107–173, 116 Stat. 543, 552; Section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, 118 Stat. 3638, 3817; Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, 121 Stat. 266, 338; and Section 802 of the Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114–125, 130 Stat. 122, 199 (6 U.S.C. 211(c)(10)).

[3] *See* Section III.B (Current Entry-Exit Process) for further discussion.

[4] The 9/11 Commission Report at 384–386, available at *http://govinfo.library.unt.edu/911/report/911Report.pdf.* Accessed October 23, 2020. *See also* Section III.C.

[5] *See* Section III.C. for further explanation.

[6] Private aircraft are non-commercial flights, sometimes referred to as general aviation. See 19 CFR 122.1(h).

regulatory changes are necessary to enable CBP to continue its testing and refinements, and implement permanent programs efficiently once the best solution is identified. As explained below, under the current regulations, CBP can only conduct pilot programs at a limited number of ports of entry at air and sea, and may only collect biometrics from a limited population. If this proposed rule is adopted as a final rule, CBP would continue to expand testing as necessary.

Because CBP is still in the testing phase to determine the best way to implement biometric entry-exit for land and sea ports of entry and private aircraft, CBP has not included, in this proposed rule, an analysis of the costs and benefits of implementing a facial recognition based biometric entry-exit program for land and sea ports of entry and private aircraft. CBP welcomes comments from the public regarding the potential impact of this proposed rule in these environments. Additionally, before CBP moves forward with a large scale implementation at land or sea ports of entry or for private aircraft, the Commissioner of CBP will publish a notice in the **Federal Register** that notifies the public, specifies the details of these plans, and requests public comments.

If CBP determines that the implementation of the specified facial recognition entry-exit program in these environments results in significant delays at ports of entry or exit, CBP will temporarily discontinue these efforts until the average processing time has improved to be under 125 percent of the baseline (manual processing without biometrics).

Although the current regulations authorize DHS to require certain aliens to provide biometrics on entry and departure, those regulations are too limited in scope to advance the legal framework for establishing a comprehensive biometric entry-exit system. The regulations authorize DHS to require biometrics from certain aliens seeking admission to the United States. *See* section 235.1(f) of title 8 of the Code of Federal Regulations (CFR). They also authorize DHS to require biometrics from certain aliens upon departure from the United States under pilot programs at land ports and up to 15 air and seaports. *See* 8 CFR 215.8(a). This proposed rule advances a legal framework for DHS collection and use of biometrics from aliens and for CBP's comprehensive biometric entry-exit system by removing the reference to pilot programs and the port limit.

In addition, this proposed rule provides that all aliens may be required to be photographed upon entry and/or departure. The use of facial recognition technology upon entry and departure will make the process for verifying an alien's identity more efficient and accurate. It will enable CBP to match the traveler's photograph with their vetted biographic information. The ability to biometrically verify the identity and confirm the departure of aliens will improve security and help DHS detect overstays and aliens who are or were present in the United States without having been admitted or paroled, and prevent their illegal reentry. DHS acknowledges that most overstays are of a rather limited duration and that many overstays are accidental in nature. Regardless of the length of time, however, overstaying past the authorized period of admission is unlawful and carries consequences for future visits to the United States. See Section 212 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1182 (INA 212). Having accurate entry and exit records is a fundamental piece of the U.S. immigration system and detecting overstays supports said system.

Furthermore, DHS data supports the conclusion that some status violators and illegal aliens also have links to terrorism and criminal activity. Ensuring the traveler's photograph matches with their vetted biographic and biometric information, helps CBP prevent visa fraud and the use of fraudulent travel documents, or the use of legitimate travel documents by imposters, and identify criminals and known or suspected terrorists.

Under this proposed rule, CBP will comply with all legal requirements (*e.g.,* the Privacy Act of 1974, Section 208 of the E-Government Act of 2002, and Section 222 of the Homeland Security Act of 2002, as amended) and Departmental and government-wide policies that govern the collection, use, maintenance, and disposition of personally identifiable information, including biometrics. To ensure data minimization of U.S. citizen photographs, once CBP verifies that a traveler is a U.S. citizen, CBP will not retain in its database the photo of that U.S. citizen which is collected as part of CBP's biometric verification program. Rather, photos of U.S. citizens collected as a result of their participation in this program will be discarded within 12 hours of verification of the individual's identity and citizenship.

III. Background

A. Statutory and Executive Authority

Numerous federal statutes require DHS to create an integrated, automated biometric entry and exit system that records the arrival and departure of aliens, compares the biometric data of aliens to verify their identity, and authenticates travel documents presented by such aliens through the comparison of biometrics. The following discussion covers the most relevant statutory and executive authority for the issuance of this rule.

The creation of an automated entry-exit system that integrates electronic alien arrival and departure information was authorized in the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215, 114 Stat. 337, 339 (8 U.S.C. 1365a). The DMIA provides that the entry-exit system should integrate all authorized or required alien arrival and departure data that is maintained in electronic format. The DMIA also provides for DHS to use the entry-exit system to match the available arrival and departure data on aliens. DMIA section 2 (8 U.S.C. 1365a(e)).

In December 2004, Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, 118 Stat. 3638, 3817 (8 U.S.C. 1365b). Section 7208 of IRTPA provides for DHS to collect biometric exit data for all categories of aliens who are required to provide biometric entry data. IRTPA requires that the entry and exit data system contain, as an interoperable component, the fully integrated databases and data systems maintained by DHS, the Department of State (DOS), and the Department of Justice (DOJ) that process or contain information on aliens. Section 7208 of IRTPA also requires that the entry and exit data system have current and immediate access to information in the databases of Federal law enforcement agencies and the intelligence community, which is relevant to the determination of whether a visa should be issued and the admissibility or deportability of an alien. Section 7208 of IRTPA provides a complete list of entry-exit system goals, which include, among other things, screening travelers efficiently. Finally, section 7208 of IRTPA requires the Secretary of Homeland Security to develop a plan to accelerate full implementation of an automated biometric entry and exit data system.

In the 2016 Consolidated Appropriations Act, Congress specified that DHS must submit a plan to

implement a biometric entry and exit capability and established a funding mechanism available to the Secretary of Homeland Security, beginning in fiscal year 2017, to develop and implement a biometric entry and exit system. *See* Consolidated Appropriations Act, 2016, Public Law 114–113, 129 Stat. 2242, 2493.

The following statutes also require DHS to take action to create an integrated entry-exit system:

- Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–828, 110 Stat. 3009–546;
- Section 205 of the Visa Waiver Permanent Program Act of 2000, Public Law 106–396, 114 Stat. 1637, 1641;
- Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56, 115 Stat. 272, 353;
- Section 302 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act), Public Law 107–173, 116 Stat. 543, 552;
- Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, 121 Stat. 266, 338;
- Section 802 of the Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114–125, 130 Stat. 122, 199 (6 U.S.C. 211(c)(10)).

On March 6, 2017, the President signed Executive Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States (82 FR 13209). Section 8 of this Order requires the Secretary of Homeland Security to expedite the completion and implementation of a biometric entry-exit tracking system for ''in-scope travelers'' [7] to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States, and periodically report to the President on DHS's progress in this regard.

DHS also has broad authority to control alien travel and to inspect aliens under various provisions of the INA. Under this authority, DHS may require aliens to provide biometrics and other relevant identifying information upon entry to, or departure from, the United States. Specifically, DHS may control alien entry and departure and inspect aliens under sections 215(a) and 235 of the INA (8 U.S.C. 1185, 1225). Aliens may be required to provide fingerprints, photographs, or other biometrics upon arrival in, or departure from, the United States, and select classes of aliens may be required to provide information at any time. *See, e.g.,* INA 214, 215(a), 235(a), 262(a), 263(a), 264(c), (8 U.S.C. 1184, 1185(a), 1225(a), 1302(a), 1303(a), 1304(c)); 8 U.S.C. 1365b. Pursuant to section 215(a) of the INA (8 U.S.C. 1185(a)), and Executive Order No. 13323 of Dec. 30, 2003 (69 FR 241), the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to require aliens to provide biographic, biometric, and other relevant identifying information as they depart the United States. Under section 214 of the INA (8 U.S.C. 1184), DHS may issue regulations, such as those concerning requirements to provide biometrics upon entry or departure, the compliance of which may be a condition of admission and maintenance of status of nonimmigrant aliens while in the United States.

Finally, DHS is authorized to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of the INA and the administration of DHS. *See* INA 287(b) (8 U.S.C. 1357(b)).

B. Current Entry-Exit Process

Pursuant to the authorities discussed in the previous section, CBP is responsible for implementing an integrated, automated entry-exit system that matches the biographic data and biometrics of aliens entering and departing the United States. Furthermore, to carry out its mission responsibilities to control the border and to regulate the arrival and departure of both U.S. citizens and aliens, CBP has the authority to confirm the identity of all travelers and verify that they are the authorized bearers of their travel documents.

The entry-exit process as it exists today serves this essential border security mission entrusted to CBP, while also serving the need to facilitate legitimate cross-border travel. The following sections describe the current entry-exit process in more detail and provide background on the relevant laws and obligations that pertain to both individuals who attempt to enter and exit the United States, as well as the commercial air or sea carriers who transport those individuals.

1. APIS Data Collection

The Aviation and Transportation Security Act of 2001, Public Law 107–71, 115 Stat. 597, and the Enhanced Border Security and Visa Entry Reform Act of 2002, Public Law 107–173, 116 Stat. 543, together mandated the collection of certain biographical manifest information on all passengers and crew members who arrive in or depart from (and, in the case of crew members, overfly) the United States on a commercial aircraft or vessel. The carrier is generally required to transmit the required manifest information electronically to CBP through the Advance Passenger Information System (APIS).[8] This requirement aligns with global standards developed by the World Customs Organization, International Air Transport Association (IATA), and the International Civil Aviation Organization. According to IATA, over 70 countries now require airlines to send advance passenger information before the flight's arrival.[9] In addition, United Nations Security Council Resolution 2178, adopted by the United States, called upon Member States to require airlines provide advance passenger information regarding flights into, out of and through their territories to detect the travel of UN-listed terrorists.[10]

APIS information includes, but is not limited to, the following information: Full name, date of birth, citizenship, passport/alien registration card number, travel document type, passport number, expiration date and country of issuance (if passport required), alien registration number, country of residence, passenger name record locator number, and U.S. destination address (when applicable). The carrier also collects and transmits to CBP the traveler's U.S. destination address (except for U.S. citizens, lawful permanent residents, crew and persons in transit through the United States) and country of residence.

APIS data allows CBP to effectively and efficiently facilitate the entry and departure of legitimate travelers into and from the United States. Using APIS data, CBP officers can access information on individuals with outstanding wants or warrants and information from other government agencies regarding high risk persons; confirm the accuracy of that information by comparison with information obtained from the traveler and from the carriers; and make immediate determinations as to a traveler's security risk and admissibility and other determinations bearing on CBP's

[7] Although the term ''in-scope travelers'' is not defined, DHS interprets this to mean those travelers who are required to provide biometric information upon entry to the United States.

[8] See the APIS regulations at 19 CFR 122.49a, 122.49b, 122.49c, 122.75a, and 122.75b.

[9] *See https://www.iata.org/whatwedo/passenger/Pages/passenger-data.aspx.* Last Accessed October 23, 2020.

[10] *See https://www.justice.gov/file/344501/download.* Last Accessed October 23, 2020.

inspectional and screening responsibilities.

During the entry processing of the traveler, a CBP officer will verify the traveler's documents. *See* Section III.B.2. Through this process, CBP can verify the accuracy of the APIS information the carrier provided to CBP.[11] CBP does not receive APIS data for individuals traveling to the United States by foot (pedestrian travelers) or by private vehicle, but it does receive APIS data on a voluntary basis from bus and rail carriers crossing the land border.

2. Current Entry Process

Any traveler who requires a nonimmigrant visa to travel to the United States must apply to the DOS under specific visa categories depending on the purpose of their travel, including those as visitors for business, pleasure, study, and employment-based purposes.[12] DOS also checks every visa applicant's biographic and biometric data (*i.e.,* fingerprints and facial images) against U.S. Government databases for records indicating potential risk factors, including security, criminal, and immigration violations.

Under DHS regulations, upon arrival into the United States, travelers are required to present themselves to CBP for inspection. *See* 8 CFR 235.1. Under the current inspection process, CBP obtains information directly from the traveler via travel documents (*e.g.,* passport) presented and/or verbal communications between a CBP officer and the traveler. As a part of this process, a CBP officer typically takes a physical passport from the traveler and electronically ''reads'' the passport using its Machine-Readable Zone (MRZ) to pull up the traveler's biographic data for inspection. In addition, for aliens (except for those exempt from biometric collection under 8 CFR 235.1), CBP collects fingerprints from the traveler to biometrically verify identity by comparing the travelers fingerprints with those previously collected as a part of a visa application, immigration benefits application, or prior inspection by CBP. Once the identity of the traveler is validated in this manner, the CBP officer conducts an interview with the traveler to establish the purpose and intent of travel, and to determine an alien's admissibility.

At some airports or seaports, some of these processes are facilitated for certain travelers through use of Automated Passport Control kiosks, Mobile Passport Control (mobile apps), or Global Entry kiosks. All travelers must still present themselves to a CBP officer to complete the inspection process. In the land environment, biometric collection may be required when an I–94 is issued. CBP does not typically issue an I–94 for Mexican nationals admitted as nonimmigrants for a period of 72 hours to visit within 25 miles of the border or for Canadian citizens traveling to the United States for business or pleasure.[13]

If the travel document is reported as lost or stolen, upon swiping the document to bring up the biographic information of the traveler, CBP systems will alert the CBP officer. In the case of imposters using legitimate documents that have not been reported lost or stolen by their true owners, biometric identifiers (*e.g.,* fingerprints) enable CBP to determine if the traveler is the true bearer of the travel document.

As the regulations currently exempt certain aliens from the collection of biometrics, including those under 14 and over 79, as well as individuals in certain visa classes, CBP does not use fingerprints to confirm the traveler's identity in these cases. For these exempt aliens, as well as those without fingerprints on file (*i.e.,* first time VWP travelers[14]), CBP must rely on the interview during the primary inspection process to determine if the traveler is using a lost or stolen travel document.[15] If the CBP officer has a law enforcement concern, then he or she may conduct law enforcement checks (querying but not retaining biometrics) on those exempt individuals, but not for the purpose of biometrically verifying the traveler's identity.

3. Current Exit Process

APIS requirements also apply to travelers departing the United States. CBP electronically records a traveler's departure by air or sea using the biographic manifest information provided by the commercial air or vessel carrier. Unlike at entry, however, CBP does not routinely inspect travelers departing the United States to confirm that the APIS departure data is accurate or that the traveler is the true bearer of his or her travel document.

Currently, persons departing the United States via a commercial aircraft must present their boarding pass and identification when being screened by the Transportation Security Administration (TSA).[16] Before boarding, travelers must also present their travel documents and boarding passes to the carrier's representative at the gate, who visually reviews the travel documents and validates the boarding pass with the carrier's ticketing system.[17] However, once the traveler has been screened by TSA and is in the secure area of the terminal, travelers generally do not have their photo identification scrutinized again before boarding the aircraft.

CBP uses APIS information along with other law enforcement information and technology to determine whether CBP needs to further inspect outbound travelers. CBP's outbound operations enable it to enforce U.S. laws applicable upon departure from the United States and effectively monitor and control the outbound flow of goods and people.

In the land environment, CBP does not receive APIS data.[18] Persons

[11] While APIS data has been shown to be highly accurate, information gaps remain. At entry, CBP Officers can, using biometrics and CBP system information, adjudicate any records with incorrect information. However, due to resource constraints there is generally no CBP officer stationed at departure locations to confirm that the APIS data submitted matches the traveler. Using biometrics upon exit, CBP can close informational gaps caused by inaccurate APIS data without additional personnel.

[12] Under the Visa Waiver Program (VWP), most citizens or nationals of participating countries may travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. VWP travelers must have a valid Electronic System for Travel Authorization (ESTA) approval prior to travel. Through ESTA, CBP conducts enhanced vetting of VWP applicants in advance of travel to the United States, to assess whether they are eligible to travel under the VWP, or whether they could pose a risk to the United States or the public at large. All ESTA applications are screened against security and law enforcement databases, and CBP automatically refuses authorization to individuals who are found to be ineligible to travel to the United States under the VWP. Similarly, current and valid ESTAs may be revoked if concerns arise through recurrent vetting.

[13] *See* 8 CFR 235.1(h).

[14] For travelers traveling under the Visa Waiver Program for the first time, CBP will not have fingerprints on file as these individuals are not required to submit biometrics prior to travel. As such, during the primary inspection process, CBP currently collects fingerprints from these travelers. For future travel, CBP will use the fingerprints collected to biometrically verify his or her identity by comparing the fingerprints with those previously collected during the first visit to the United States.

[15] See footnote 40 regarding an NPRM published by USCIS proposing to remove the age restrictions on fingerprint collection.

[16] TSA incorporates unpredictable security measures, both seen and unseen, to accomplish its transportation security mission, *see https://www.tsa.gov/travel/security-screening.* Last Accessed October 26, 2020.

[17] Pursuant to 19 CFR 122.49a, 122.49b, 122.49c, 122.75a, and 122.75b, the carrier is responsible for comparing the travel document presented by the traveler with the travel document information it is transmitting to CBP in order to ensure that the information is correct, the document appears to be valid for travel purposes, and the traveler is the person to whom the travel document was issued.

[18] While bus and rail carriers are not required to submit APIS data, CBP encourages these carriers to participate in CBP's Voluntary APIS Program, *See https://www.cbp.gov/travel/travel-industry-personnel/apis2.* Accessed October 26, 2020.

departing the United States at the land border are also not consistently subject to CBP inspection, as they are upon arrival. As a result, land departures may not be recorded accurately.[19]

C. National Security and Immigration Benefits of a Biometric Entry-Exit Program

Currently, CBP has a comprehensive automated biographic information-based system that vets and checks aliens entering and departing the United States. While this information is extremely valuable to CBP in completing its mission, no biographic information-based system, by itself, can definitively verify the identity of persons presenting travel and identity documents. As stated by the 9/11 Commission:

> Linking biometric passports to good data systems and decision making is a fundamental goal. No one can hide his or her debt by acquiring a credit card with a slightly different name. Yet today, a terrorist can defeat the link to electronic records by tossing away an old passport and slightly altering the name in the new one.[20]

Since the 9/11 Commission Report was released, security features in passports have become significantly stronger. Forensic security features in passports have improved, and most countries began to issue electronic passports (e-Passports) around 2005. E-Passports contain an electronic chip embedded in the document that contains the photo of the bearer and the information contained on the passport's data page, such as the name, date of birth, and country of issuance. The International Civil Aviation Organization maintains standards for the issuance of e-Passports and these standards are adopted by most countries around the world.

The increasingly sophisticated features in modern passports have led to the increased use of legitimate documents by imposters posing as the owners of the documents. Twenty years ago, it was far more common to encounter a passport that had been altered (*i.e.,* changing the name or photo on a document issued legitimately) or manufactured fraudulently. While these cases still occur, the use of e-Passports, combined with sophisticated forensic security features, have made this method of passport fraud prohibitively expensive in most cases. Those seeking to evade detection by DHS or other border or transportation security agencies are turning instead to a relatively cheaper method of fraud—using a non-altered travel document legitimately issued to another person.

This type of fraud is mitigated because carriers are required to ensure that the person presenting the travel document is the person to whom the travel document was issued, pursuant to 19 CFR 122.49a(d), 122.49b(d), 122.75a(d) and 122.75b(d). However, the best tool to combat this fraud is to biometrically verify that a person who presents a travel document is the true bearer of that document. CBP's biometric tests using facial recognition technology support this conclusion. Within three weeks of implementing new facial recognition technology at Washington Dulles International Airport, CBP identified two imposters attempting to enter the United States by using another person's passport.[21] Since then, CBP has identified five additional imposters, for a total of seven imposters identified in the air environment, including two with genuine U.S. travel documents (passport or passport card), who were using another person's valid travel documents as a basis for seeking entry to the United States.[22] In addition, CBP's facial recognition technology has identified at least 138 imposters, including 45 travelers with genuine U.S. travel documents (passport or passport card) attempting to enter the United States using another person's travel documents at the San Luis and Nogales, Arizona land border ports.[23] Several of these imposters identified in the land environment had criminal histories including assault, extortion, kidnapping, and drug smuggling. CBP anticipates that the number of imposters it is able to catch will increase as the program expands. While it is difficult to quantify the number of instances in which such fraud has occurred but not been identified by CBP because facial recognition technology is not broadly used at present, DHS expects that the implementation of this rule would greatly enhance DHS's ability to identify more of these imposters.

In addition to the benefits this technology can provide on entry, an integrated system, including biometric exit, is also essential for maintaining the integrity of the U.S. immigration system. Under current immigration laws, entering or staying in the United States without official permission from the U.S. government can cause a person to be legally barred from reentry to the United States for a number of years following departure or removal. Pursuant to INA 222(g), a nonimmigrant visa will be void if an alien remains in the United States beyond his or her period of authorized stay. For aliens traveling under the Visa Waiver Program, to remain eligible for the program, aliens must comply with the conditions of admission, including remaining in the U.S. only for the authorized period of stay.[24] Depending on the duration of a person's ''unlawful presence'' in the United States, that alien may be barred from returning to the United States for three or ten years.[25] The absence of an effective biometric exit process has enabled aliens who are present in the United States without having been admitted or paroled or who overstayed their authorized period of admission (overstays) to evade immigration laws and avoid the time bars associated with unlawful presence.

Through its limited deployment of biometric exit pilots, CBP has been able to process and document hundreds of aliens who were present in the United States without having been admitted or paroled.[26] These cases follow a similar fact pattern. Upon the collection of the traveler's biometrics, the system is unable to generate a match to any photographs of the traveler on record. Further inspection by CBP officers confirms that the traveler was not previously inspected by CBP or DHS, indicating that they entered the United States illegally. In such cases, CBP creates a biometric exit record for this traveler that will be available to other DHS component agencies, such as U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE), as well as the Department of State. If the traveler

[19] CBP and the Canada Border Services Agency are exchanging biographic data, travel documents, and other border crossing information collected from individuals traveling between the countries at land border ports of entry. This data exchange allows both governments to expand their situational border awareness so that the record of a traveler's entry into one country can establish a record of exit from the other country. *See https://www.dhs.gov/publication/beyond-border-entryexit-program-phase-ii* and *https://www.dhs.gov/news/2019/07/11/us-and-canada-continue-commitment-securing-our-borders-begin-phase-iii-entryexit.* Accessed October 26, 2020.

[20] The 9/11 Commission Report at 389, *available at http://govinfo.library.unt.edu/911/report/911Report.pdf.* Accessed October 26, 2020.

[21] *See https://www.cbp.gov/newsroom/local-media-release/second-impostor-three-weeks-caught-cbp-biometric-verification.* Last accessed October 23, 2020.

[22] *See https://docs.house.gov/meetings/HM/HM00/20190710/109753/HHRG-116-HM00-Wstate-WagnerJ-20190710.pdf.* Last accessed October 23, 2020.

[23] *See id.*

[24] 8 U.S.C. 1187(a)(7) and 8 CFR 217.

[25] 8 U.S.C. 1182(a)(9)(B)(i).

[26] Source: CBP Enterprise Management Information System-Enterprise Data Warehouse. *See* Privacy Impact Assessment available at *https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp_emis_edw-appendixd-april2019.pdf.* Last Accessed October 23, 2020.

has no other derogatory information, then CBP allows the traveler to depart, but maintains a record of the encounter which is used to inform future admissibility-related determinations.

As stated in Executive Order 13768, *Enhancing Public Safety in the Interior of the United States,* ''interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety.'' [27] DHS data supports the conclusion that certain status violators and illegal aliens also have links to terrorism and criminal activity.[28]

Using biometrics, CBP has apprehended criminal aliens who were present in the United States without having been admitted or paroled. For instance, during a recent outbound operation, CBP's facial recognition generated a ''no-match'' result for a passenger resulting in further inspection by a CBP officer which then confirmed that the traveler was an alien who was present in the United States without admission or parole and was wanted for aggravated sexual abuse of a minor. Other examples of aliens identified through DHS's biometric verification system include previously removed aliens who committed felonies such as armed robbery with a firearm, assault with a deadly weapon, and aggravated assault. Since the inception of its biometric exit pilots, CBP has encountered hundreds of cases with similar fact patterns. Because there is no comprehensive system currently in place to collect biometrics at exit, CBP has no way of knowing precisely how frequently these types of cases occur.

Identifying aliens who overstay their period of authorized admission is best addressed with a biometric exit program. Each year, millions of visitors are admitted to the United States for limited times and purposes. According to DHS's Entry/Exit Overstay Report for fiscal year 2019,[29] 676,422 of nearly 55 million aliens admitted for business or pleasure through air and sea ports of entry that were expected to depart the United States in fiscal year 2019 overstayed their authorized period of admission. This report likely understates the total number of overstays for fiscal year 2019. This is because, due to data reliability concerns, the Overstay Report only included data for aliens who lawfully entered the United States under nonimmigrant visa categories for temporary visitors for business or pleasure. It did not include aliens who entered the United States under other visa categories.

In addition, biometric exit verification can allow CBP to address errors that sometimes appear in an alien's biographic data. Although CBP is typically able to successfully vet aliens seeking admission into and departing from the United States based on biographic data, in some cases a biographic check can fail due to errors or incomplete data. Conducting biometric verification at departure can help uncover these issues in an alien's biographic data and protect the accuracy of recorded border crossings.

During the course of its biometric exit pilots, CBP encountered a number of cases where collecting biometrics from departing travelers revealed errors or incomplete data in a traveler's biographic record. For instance, on one occasion, CBP's biometric query of a departing traveler revealed that he was previously convicted for armed robbery with a firearm and had been deported from the United States. The traveler's biographic data, however, did not reflect this information because of a misspelling on the traveler's deportation record. On another occasion, CBP's biometric query revealed that a traveler had been previously removed from the United States under a false identity. Because the traveler had been traveling under the traveler's true identity, a review of the traveler's biographic record did not alert the CBP officer to this important factual information.

In each of these cases, the biometric query revealed the missing data from the traveler's biographic data. By performing a biometric check at departure, CBP can reconcile any errors or incomplete data in the traveler's biographic data, increasing the level of accuracy of CBP's border crossing records. Ultimately, this provides CBP with more reliable information to better identify persons of law enforcement or national security concern.

Finally, a comprehensive and integrated biometric entry-exit system serves an important tool in our fight against global terrorism. Since the 9/11 attacks, the United States remains vulnerable to the threat of global terrorism. The 9/11 Commission recognized that combatting terrorism requires a screening system that examines individuals at multiple points within the travel continuum:

> For terrorists, travel documents are as important as weapons. Terrorists must travel clandestinely to meet, train, plan, case targets, and gain access to attack. To them, international targets present great danger, because they must surface to pass through regulated channels, present themselves to border security officials, and attempt to circumvent inspection points . . . each of these checkpoints is a screening, *a chance to establish that these people are who they say they are* and are seeking access for their stated purpose, to intercept identifiable subjects, and to take effective action.
>
> The job of protection is shared among these many defined checkpoints. By taking advantage of them all, we need not depend on any one point in the system to do the whole job. The challenge is to see the common problem across agencies and functions and develop a common framework—an architecture—for an effective screening system.'' [30]

The Under Secretary General for the United Nations Office of Counter-Terrorism said, ''Terrorists, including foreign terrorist fighters use a wide variety of techniques to travel to destinations all over the world. With the number of international travelers continuing to increase, it is essential that we develop efficient counter-terrorism measures that facilitate rapid, efficient and secure processing at our borders.'' [31] Manuals prepared by terrorist groups such as the Islamic State, also known as ISIS, explicitly understand the need to forge identity papers, passports, and visas to circumvent border checkpoints and smuggle people across borders. Recognizing terrorism as one of the most serious threats to international peace and security and the need to take immediate action to address the evolving threat environment, the United Nations Security Council adopted a resolution on December 21, 2017, calling on member nations to increase aviation security and to develop and implement systems to collect biometric data to properly identify terrorists.[32] The resolution was co-sponsored by 66 countries, including the United States, and passed the Security Council with unanimous support.

Although CBP's security mission has mainly been focused on identifying

[27] *See* 82 FR 8799 (January 30, 2017).

[28] *See https://www.dhs.gov/news/2017/07/12/written-testimony-plcy-cbp-and-ice-senate-judiciary-subcommittee-border-and.* Accessed October 26, 2020.

[29] *Available at https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf.* Accessed October 26, 2020.

[30] The 9/11 Commission Report at 384–386 (emphasis added), *available at http://govinfo.library.unt.edu/911/report/911Report.pdf.* Accessed October 26, 2020.

[31] *See https://www.un.org/counterterrorism/cct/border-security-and-management.* Accessed October 26, 2020.

[32] S/RES/2396 (2017), *available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2396(2017).* Accessed October 26, 2020.

known or suspected terrorists seeking admission to the United States, identifying and intercepting these individuals at departure is critical to effectively combatting terrorism here and abroad. Individuals who seek to inflict harm on the American homeland are not limited to those attempting to enter the United States. Some of these individuals may seek to depart the United States in order to inflict harm to U.S. interests and allies abroad or engage in the terrorist/jihadist movement abroad for training or coordination. For individuals on a terrorist watch list, law enforcement and intelligence agencies may have a need to track that individual's movements and travel. If that individual can depart the country under an alias without detection, then that impacts the ability of these law enforcement and intelligence agencies to operate effectively. Preventing these individuals from leaving the United States, or at minimum, gaining intelligence on their whereabouts, is critical to diminishing a terrorist network's ability to mobilize.

The need for identifying and tracking suspected terrorists departing the United States is further borne out by current research on the movements of such individuals. According to the George Washington University's Program on Extremism, out of the 186 individuals who have been charged in the United States on offenses related to the Islamic State since March 2014, 39% were accused of attempting to travel or successfully traveled abroad.[33]

CBP, as the agency entrusted with securing the border, must verify the identity of those entering and departing with as much accuracy as possible, especially individuals linked to terrorism or criminal activity. As discussed in the 2018 National Strategy for Counterterrorism,[34] one of the priority actions for the U.S. Government is to enhance detection and disruption of terrorist travel. By collecting and sharing relevant information on terrorist travel and identities, this information can be used for the benefit of the public and private section to identify and disrupt the movement of terrorists.

CBP's biometric exit program will provide another layer of identity verification and another opportunity to stop these individuals from departing. Despite the agency's resource constraints at departure, CBP has identified many recent national security cases that resulted from examining foreign nationals departing the United States on international flights. In several of these cases, CBP's outbound examination of the individual revealed his or her connections to terrorist and militia groups abroad. Using a biometric verification system, CBP can update the individual's border crossing record with this information, linking it to his or her biometrics, which provides greater assurance that the government will be able to identify this individual in the event of future encounters.

Identifying overstays and aliens who are present in the United States without admission or parole is essential to maintaining the integrity of the U.S. immigration system and to national security as a whole. Expanding the biometric entry-exit program to create an integrated system will enable CBP to better identify overstays and aliens who are present in the United States without admission or parole. Furthermore, by providing an accurate way to verify an individual's identity, a biometric entry-exit system can effectively combat attempts by foreign national terrorists to circumvent border checkpoints using false identity documents. Establishing such a system is crucial to our efforts to respond to the continuing threat of global terrorism.

D. Biometric Entry-Exit Program History

1. Implementation of US-VISIT

In 2003, DHS established the legacy United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program to develop a system to collect biographic data and biometrics from aliens at U.S. ports of entry.

On January 5, 2004, DHS implemented the first phase of the legacy US-VISIT biometric program by publishing an interim final rule in the **Federal Register** (69 FR 468), which provided that certain aliens seeking admission to the United States through nonimmigrant visas must provide fingerprints, photographs, or other biometrics upon arrival in, or departure from, the United States at air and sea ports of entry. The interim final rule amended 8 CFR 235.1 to authorize DHS to require certain aliens who arrive at designated U.S. air and sea ports of entry to provide biometric data to CBP during the inspection process. DHS designated the air and sea ports of entry where the collection of biometrics from certain aliens upon entry would occur in a series of notices published in the **Federal Register**.[35]

The January 5, 2004 interim final rule also added 8 CFR 215.8 to provide that the Secretary, or designee, may establish pilot programs to collect biometric information from certain aliens departing the United States at up to 15 air or sea ports of entry, designated through notice in the **Federal Register**. Pursuant to § 215.8(a)(1), DHS designated the 15 air and sea ports of entry where the collection of biometrics under exit pilot programs would occur in a series of notices published in the **Federal Register**.[36]

On August 31, 2004, DHS implemented the second phase of the legacy US-VISIT biometric program by publishing an interim final rule in the **Federal Register** (69 FR 53318) expanding the US-VISIT program to include aliens seeking admission under the Visa Waiver Program (VWP)[37] and travelers arriving at designated land border ports of entry. DHS designated the land ports of entry at which biometrics would be collected from certain aliens upon entry in two notices published in the **Federal Register**.[38] The

[33] *See* GW Extremism Tracker, The George Washington University, *https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Jun19%20Tracker.pdf* (last accessed October 26, 2020).

[34] *See https://www.dni.gov/index.php/nctc-newsroom/item/1911-white-house-releases-national-strategy-for-counterterrorism.* Accessed October 26, 2020.

[35] On January 5, 2004, DHS issued a notice in the **Federal Register** (69 FR 482) designating 15 airports and 14 seaports for the collection of biometrics from aliens upon entry. On August 20, 2004, DHS published a notice in the **Federal Register** (69 FR 51695) identifying six new air and sea ports of entry for inclusion in the legacy US-VISIT program and removing two ports of entry that were inadvertently included in the legacy US-VISIT program in the January 5, 2004 notice.

[36] On January 5, 2004, DHS issued a notice in the **Federal Register** (69 FR 482) identifying one airport and one seaport as ports designated for the collection of biometrics from aliens departing the United States under exit pilot programs. On August 3, 2004, DHS published a notice in the **Federal Register** (69 FR 46556) designating 13 additional ports for the collection of biometrics from aliens departing the United States under exit pilot programs. On August 20, 2004, DHS published a notice in the **Federal Register** (69 FR 51695) replacing two ports of entry inadvertently included in the exit pilot programs in the August 3, 2004 notice with two airports to maintain the full number of 15 exit pilot programs.

[37] Pursuant to INA 217 (8 U.S.C. 1187), the Secretary of Homeland Security, in consultation with the Secretary of State, may designate certain countries as VWP program countries if certain requirements are met. Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of 90 days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The list of countries which currently are eligible to participate in VWP is set forth in 8 CFR 217.2(a).

[38] On November 9, 2004, DHS published a notice in the **Federal Register** (69 FR 64964) identifying the 50 most trafficked land border ports of entry where biometric data would be collected from certain aliens upon entry. On September 14, 2005, DHS published a notice in the **Federal Register** (70

Continued

August 31, 2004 interim final rule also amended § 215.8 to authorize DHS to establish pilot programs to collect biometrics from aliens upon departure at designated land border ports of entry, in addition to the 15 designated air or sea ports at which DHS was authorized to conduct biometric exit pilot programs. *See* 8 CFR 215.8(a)(1).

On December 19, 2008, DHS published a final rule in the **Federal Register** (73 FR 77473) expanding the population of aliens subject to legacy US-VISIT to nearly all aliens, including lawful permanent residents.[39] The rule also finalized the August 31, 2004 interim final rule without change.

As a result of the above rules and notices, DHS now collects biometrics from aliens upon entry, with certain exemptions provided in the regulations, at all air, sea and land ports of entry. The following categories of aliens currently are exempt from the requirements under 8 CFR 215.8 and 235.1 to provide biometrics upon arrival to, and departure from, the United States at a U.S. port of entry:

- Aliens under the age of 14 and over the age of 79;[40]
- Aliens admitted on an A–1, A–2, C–3 (except for attendants, servants, or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 visa;
- Certain Taiwan officials who hold E–1 visas and members of their immediate families who hold E–1 visas unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements; and
- Canadian citizens under INA 101(a)(15)(B) (8 U.S.C. 1011(a)(15)(B)) who are not otherwise required to present a visa or be issued Form I–94 or Form I–95 for admission or parole into the United States.[41]

See 8 CFR 235.1(f)(1)(ii), (iv); 8 CFR 215.8(a)(1)–(2). In addition, the Secretary of State and the Secretary of Homeland Security may jointly exempt classes of aliens from this requirement. The Secretaries of State and Homeland Security, in consultation with the directors of the relevant intelligence agencies, also may exempt any individual from this requirement. *See* 8 U.S.C. 1365b; 8 CFR 235.1(f)(1)(iv)(C)–(D); 8 CFR 215.8(a)(2)(iii)–(iv).

2. Exit Pilot Programs and the Transfer of Entry and Exit Operations to CBP

While DHS successfully implemented biometric entry capability at all ports of entry, establishing a biometric exit solution posed greater challenges. From January 2004 through May 2007, DHS conducted a series of exit pilot programs at 12 airports and 2 cruise ports across the United States.[42] These pilots were conducted pursuant to 8 CFR 215.8.[43] Under these exit pilot programs, DHS evaluated various technologies and processes to collect biometric data from aliens at the time of departure. DHS found that biometrics provide a significant enhancement to the existing ability to match arrival and departure records as biometrics provides greater assurance of identity verification. In addition, DHS found that each of the various technologies used to collect biometric exit records worked and that compliance with biometric exit procedures improved when the process was convenient for travelers. In a report dated June 28, 2007, the Government Accountability Office stated that ''in particular, on average only about 24 percent of those travelers subject to US-VISIT actually complied with the exit processing steps. The evaluation report attributed this, in part, to the fact that compliance during the pilot was voluntary, and that to achieve the desired compliance rate, the exit solution would need an enforcement mechanism.'' [44]

However, DHS also found that the collection process used during those pilots was inadequate and unsuitable for a nationwide deployment because it required significant DHS resources and also depended upon the facility operator, in this case airports, to provide adequate space for the collection of biometric data. The pilots beginning in 2004 used kiosks placed between the security checkpoint and airline gates that would collect a traveler's fingerprint biometrics. The traveler had the responsibility to find and use the devices, with varying degrees of support from the airports where the pilots were deployed. DHS also hired contract teams to assist travelers in finding and using the kiosks. Although the specific fingerprint technology collection generally worked as intended when it was utilized, the overall compliance rate was low because travelers often departed without providing their biometrics.

DHS concluded from these pilots that it was generally inefficient and impractical to introduce entirely new government processes into an existing and familiar traveler flow, particularly in the air environment. Unlike many airports in Europe and around the world, United States transportation infrastructure was not built with departure control in mind, and does not have existing space within its airports to biometrically process departing travelers. Because DHS was required to secure space within the airports from the private sector, and because space within airports is limited and valuable from a commercial perspective, DHS's biometric exit pilots tended to operate in relatively inconvenient locations, which contributed to low compliance rates. Overall, DHS concluded that a biometric collection process that fit, to the extent practicable, within the existing traveler flow was necessary for successful implementation. The facial recognition technology required to reliably implement biometric exit processes into existing traveler flows has not been available until recently. Overall, DHS's conclusion is that the process of collecting biometric exit records should be integrated into the existing departure process.

From May through June 2009, DHS operated two biometric air exit pilots as required by the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law 110–329, 122 Stat. 3574, 3669–70. DHS announced the implementation of these biometric air exit pilots at Atlanta, Georgia (Hartsfield-Jackson Atlanta International Airport), and Detroit, Michigan (Detroit Metropolitan Wayne County Airport), by notice published in the **Federal Register**.[45] The pilots tested the collection of biometric exit data in two scenarios: First, the collection of biometric information consisting of one or more electronic fingerprints by CBP at the departure gate using a hand-held

FR 54398) identifying additional land ports of entry in which aliens would be enrolled in legacy US-VISIT upon entry into the United States.

[39] *See* INA 101(a)(3). The term ''alien'' means any person not a citizen or national of the United States.

[40] On September 11, 2020 USCIS published an NPRM proposing to remove the age exemptions in 8 CFR 215.8 and 8 CFR 235.1 regarding biometrics collection at entry and exit. *See,* 85 FR 56338.

[41] This category of exemptions covers Canadian citizens traveling on a B1 or B2 visa.

[42] The ports of entry included in the pilot were: Baltimore/Washington International Thurgood Marshall Airport; Chicago O'Hare International Airport; Denver International Airport; Dallas Fort Worth International Airport; Miami Cruise Terminal; San Juan Luis Munoz Marin International Airport; Detroit Metropolitan Wayne County Airport (McNamara Terminal); Newark Liberty International Airport; San Francisco International Airport; Los Angeles Cruise Terminal; Hartsfield-Jackson Atlanta International Airport; Philadelphia International Airport; Ft. Lauderdale/Hollywood International Airport; and Seattle-Tacoma International Airport.

[43] *See* footnote 36.

[44] *See* U.S. Government Accountability Office, ''Prospects for Biometric US-VISIT Exit Capability Remain Unclear'' (June 28, 2007), *available at https://www.gao.gov/assets/120/117187.pdf.*

[45] 74 FR 26721 (June 3, 2009).

mobile device or other portable device; and second, biometric information consisting of one or more electronic fingerprints collected by TSA at the TSA security checkpoint using a mobile device. Although the technology worked as expected and DHS successfully captured the biometric data, DHS concluded that the use of mobile and portable devices to capture electronic fingerprints would be extremely resource-intensive and costly to implement and maintain on a larger scale.

Beginning in December 2009, CBP conducted the Temporary Worker Visa Exit Program Pilot in San Luis, Arizona and Douglas, Arizona, under which aliens admitted on certain temporary worker visas were required to depart from designated land ports of entry and submit certain biographical and biometric information at one of the outdoor kiosks established for this purpose.[46] In its evaluation of the pilot, CBP identified several issues, including difficulties participants experienced in understanding the requirements and using the kiosks, resource and staffing burdens, unreliable kiosk operability due to the harsh desert climate, and infrastructure challenges. As a result, CBP discontinued the Temporary Worker Visa Exit Program Pilot in September 2011.[47]

In 2013, pursuant to the Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113–6, 127 Stat. 198, Congress transferred US-VISIT's entry-exit policy and operations, including responsibility for implementing a biometric exit program, to CBP; US-VISIT's biometric identity management functions to the newly created Office of Biometric Identity Management (OBIM) within DHS's National Protection and Programs Directorate (now Cybersecurity and Infrastructure Security Agency[48]); and US-VISIT's overstay analysis mission to ICE within DHS.

E. Recent Developments in the Biometric Entry-Exit System

In 2015 and 2016, CBP conducted the following four biometric tests, three at airports and one at a land port: (1) Biometric Exit Mobile Air Test (BE-Mobile); (2) 1 to 1 Facial Comparison Project; (3) Southwest Border Pedestrian Exit Field Test; and (4) Departure Information Systems Test. In October 2017, CBP began testing a streamlined entry process using facial recognition technology known as ''Simplified Arrival.'' Since 2017, CBP has partnered with a number of airlines and airport authorities to test a facial-recognition exit process for international flights at certain locations. In 2018, CBP began conducting biometric pilot programs at the land border in Anzalduas, Texas and Nogales and San Luis, Arizona. Summaries of the tests, lessons learned, and conclusions are set forth below.

1. Biometric Exit Mobile Experiment (BE-Mobile)

In the summer of 2015, CBP began deploying the BE-Mobile pilot at the 10 highest volume international airports in the United States.[49] Under this pilot, CBP officers stationed at the passenger loading bridges of selected flights used a handheld mobile device to scan fingerprints and passports of certain aliens at the time of their departure from the United States at designated airports. The biometric and biographic data collected by the BE-Mobile device was matched against data such as departures and arrivals in the United States, criminal histories, and lawful immigration status. The goal of the BE-Mobile pilot was to evaluate the viability of using handheld mobile technology to collect exit data from a sample population on randomly selected flights within a specified airport, as well as to evaluate the viability of implementing biometric exit in conjunction with CBP's outbound enforcement operations.[50]

In its evaluation of the pilot, CBP concluded that while the handheld mobile technology can effectively capture biometric data and match that data against DHS databases, the handheld devices required too much time and manpower to be a biometric exit solution on all flights departing the United States. However, CBP concluded that BE-Mobile does provide some benefits when used to assist with outbound enforcement operations. For instance, BE-Mobile allows officers to identify travelers who have suspicious travel histories or other derogatory information for further investigation by searching databases that detail individuals' travel patterns, visa status, and criminal records. Similarly, BE-Mobile can identify travelers exiting the country who do not have corresponding entry information, indicating that they potentially entered the country without having been admitted or paroled. Finally, BE-Mobile may identify individuals who have overstayed their period of admission, allowing CBP to collect more accurate overstay information.

CBP is currently utilizing the same technology tested in the BE-Mobile pilot at the original 10 airports as an enforcement tool for use by CBP officers. Since 2017, CBP has expanded the use of the BE-Mobile technology as an enforcement tool to additional airports and, more recently, land ports.[51] BE-Mobile technology also serves as an additional identity verification tool for CBP's biometric pilots using facial recognition technology in the air and land environments, and CBP is considering it for use in the sea environment, as well.

2. 1 to 1 Facial Comparison Project

From March to May 2015, CBP tested the 1 to 1 Facial Comparison Project at Dulles International Airport.[52] This pilot was intended to assist CBP officers in matching travelers to their passport photo. After the conclusion of the pilot program, the technology was deployed for use at both Dulles International Airport and John F. Kennedy International Airport for U.S. citizens and first-time VWP travelers. The technology compares a photograph taken of the traveler by a CBP officer upon entry to the photograph stored on the traveler's electronic passport to assess whether the individual applying for entry into the United States is the

[46] In December 2008, DHS promulgated a final rule establishing the Temporary Worker Visa Exit Program under 8 CFR 215.9, to be started on a pilot basis. *See* 73 FR 76891 (Dec. 18, 2008) (final rule establishing the Temporary Worker Visa Exit Program at 8 CFR 215.9 for aliens admitted on an H–2A visa) and 73 FR 78104 (Dec. 19, 2008) (final rule amending 8 CFR 215.9 to include aliens admitted on an H–2B visas). CBP, through notices published in the **Federal Register**, designated aliens admitted under H–2A and H–2B visas who entered the United States at either the port of San Luis, Arizona or the port of Douglas, Arizona as participants in the Temporary Worker Visa Exit Program Pilot. *See* 73 FR 77049 (Dec. 18, 2008) (notice designating H–2A temporary workers and the ports of entry), and 73 FR 77817 (Dec. 19, 2008) (notice designating H–2B temporary workers); *see also* 74 FR 42909 (Aug. 25, 2009) (notice announcing the postponement of the pilot until December 8, 2009).

[47] *See* 76 FR 60518 (Sept. 21, 2011).

[48] As a result of the Cybersecurity and Infrastructure Agency Act of 2018, OBIM was transferred to the DHS Management Directorate.

[49] *See* 80 FR 44983 (July 28, 2015).

[50] CBP conducts traveler targeting operations to vet inbound and outbound travelers from commercial airlines to identify potential high-risk individuals, such as terrorists.

[51] *See* Biometric Exit Mobile Program PIA, *available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp026a-bemobile-june2018.pdf.* Last Accessed October 26, 2020.

[52] *See https://www.dhs.gov/publication/facial-recognition-air-entry-pilot; https://www.cbp.gov/sites/default/files/documents/502050_1to1%20Face%20ePassport_Fact%20Sheet%208.5x11_OFO_05222015_FINAL_Online.pdf.* Accessed October 26, 2020.

same person to whom the passport was legally issued.[53]

Although the capability was tested at the time of entry to the United States, the information gathered through the pilot was intended to also inform the acquisition of a biometric exit capability. The results of the pilot showed that biometric facial matching can increase the confidence with which CBP officers verify individuals' identities without a negative impact to port of entry operations and traveler wait times. Further, the results of this pilot aided CBP in determining the appropriate technical specifications needed for the air travel environment, which CBP could then test at exit by air.

3. Southwest Border Pedestrian Exit Field Test

From February to May 2016, CBP conducted a pilot program to test facial and iris scanning technology at the Otay Mesa port of entry south of San Diego, California.[54] The purpose of the test was to determine if biometric technology could be effectively used in an outdoor land environment without significant impact to operations and wait times, and to determine if collecting biometrics in conjunction with biographic data upon exit would assist CBP in identifying individuals who have overstayed their period of admission.

Under this pilot program, CBP collected biographic data from all travelers departing the United States at the Otay Mesa port of entry, and biometrics (facial images and/or iris scans) from all aliens, except for those exempt pursuant to 8 CFR 215.8(a)(2) and 235.1(f)(1)(iv), entering and departing the Otay Mesa port of entry on foot. Before departing, travelers scanned their passports at a radio frequency identification-enabled kiosk. One collection lane was equipped with facial and iris scanning equipment that required the traveler to pause for biometric data collection. Another lane was equipped with technology that collected facial and iris images while the traveler continued through the lane without pausing.

The pedestrian exit field test allowed CBP to test the capability of biometrics other than fingerprints in an outdoor environment. The pilot also provided information about the physical challenges to implementing face and iris scanning technology at land ports of entry. The successful implementation of a biometric capture system requires infrastructure tailored to mitigate both environmental factors that degrade image quality and human factors that inhibit travelers from properly interacting with the biometric capture system. Environmental factors included issues such as light, temperature, and items within the biometric camera field of view. Certain human factors, such as traveler attire and attentiveness, did impact technology effectiveness. The test highlighted the need for biometric scanning equipment to be located inside for protection from the elements, while recognizing that some land ports of entry do not have sufficient space for such infrastructure.

4. Departure Information Systems Test

In June 2016, in partnership with an airline, CBP deployed the Departure Information Systems Test pilot at Atlanta's Hartsfield-Jackson International Airport.[55] The goal of the pilot was to evaluate the effectiveness of biometric facial recognition matching of a real-time photograph of an individual to a gallery of photographs stored in a database. The field trial was designed to use existing CBP systems and to leverage data already provided to CBP by the traveler and airlines for matching purposes. Additionally, the field trial was designed to support existing business practices of airlines and fit within existing infrastructure at U.S. airports.

During the pilot, photographs of travelers taken during boarding were compared to photographs taken previously (as part of a U.S. passport application, a U.S. visa application, or through DHS encounters such as admission processing) that had been stored in the gallery. The names on the outbound flight manifest were used to populate the gallery with potential matches to the travelers boarding the flight. The device used to capture the photographs upon departure consisted of a camera, document reader, and display tablet. The display tablet instructed travelers to present their boarding pass to the reader as they approached the unit. Once the boarding pass was scanned, a camera captured a photograph of the traveler's face. After the system matched the photograph to the photographs in the gallery, an indicator light appeared and the traveler was instructed to proceed to board the plane. In the event the system did not produce a match, a CBP officer could attempt to verify the traveler's identity through in person manual review and use of other available information.

For the pilot, CBP deployed the capability at one gate and for one daily nonstop flight from Atlanta to Tokyo. Today, this technology, now operating as the Traveler Verification Service (TVS), is recording biometric exit records for a limited number of daily international flights at a number of international airports.[56]

5. Land Border Biometric Tests

In 2018, CBP began testing a number of different processes to develop a biometric entry-exit system to track aliens entering and departing the United States at the land border. For example, in September 2018, CBP began a technical demonstration at the San Luis port of entry in Arizona, testing the collection of photographs from pedestrian travelers entering the United States.[57] Under this technical demonstration, CBP uses a facial recognition system to collect photographs of in-scope travelers entering the United States. CBP expanded this pilot to Nogales, Arizona in October 2018 and to Brownsville, Texas; Progresso, Texas; and Blaine, Washington in 2020.

CBP has also explored using facial recognition technology in the vehicle environment. From August 2018 to February 2019, CBP conducted the Vehicle Face demonstration at Anzalduas, Texas, which captured facial images of vehicle occupants ''at speed'' under 20 mph and biometrically matched the new images against a TVS gallery of recent travelers.[58] For this demonstration, CBP installed several cameras in inbound lanes just prior to the existing vehicle lane infrastructure and in outbound lanes just beyond the license plate reader vehicle footprint. Vehicles proceeded through the respective inbound and outbound lanes as normal, with CBP officers processing vehicle occupants at the primary inbound booths using existing CBP software applications and technology. This process captured the biographic data of the vehicle occupants, associated the travelers with the vehicle, and created an exit crossing record for the

[53] The 1 to 1 Facial Comparison Project focused on U.S. citizens and first-time Visa Waiver Program travelers because fingerprint biometrics are already available to verify other travelers upon admission to the United States.

[54] *See* 80 FR 70241 (Nov. 31, 2015) and PIA, *available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-swborderpedestrianexit-november2015.pdf.* Accessed October 26, 2020.

[55] *See https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-dis%20test-june2016.pdf* and *https://www.cbp.gov/newsroom/local-media-release/cbp-deploys-test-departure-information-systems-technology-hartsfield.* Accessed October 26, 2020.

[56] *See https://www.biometrics.cbp.gov/air* for an up to date listing of these airports.

[57] *See https://www.cbp.gov/newsroom/local-media-release/cbp-implement-facial-comparison-technical-demonstration-port-san-luis.* Accessed October 26, 2020.

[58] *See* 83 FR 56862 (Nov. 14, 2018).

occupants. The identification numbers assigned to the exit crossing records were associated with scene and facial images captured during this demonstration so that analysts could compare the biographic crossing data with the facial images and biometric matching. This demonstration did not impact the current experience of the travelers or officers, except during normal outbound operations in which CBP officers stopped vehicles and processed the occupants using a TECS System application.

After an evaluation of these and any other pilot programs, CBP plans to implement a long-term biometric exit solution at the land border that would address the unique operational and infrastructure challenges that exist in that environment.

6. Simplified Arrival

In October 2017, CBP began testing Simplified Arrival, a streamlined entry process using facial recognition technology at Atlanta's Hartsfield-Jackson International Airport. Under Simplified Arrival, CBP uses facial recognition technology to biometrically verify a traveler's identity. Under this process, CBP uses APIS manifest data to retrieve existing traveler photographs from government databases, including CBP's own data systems, passport and visa databases of the Department of State, and other DHS holdings such as DHS's Automated Biometric Identification System (IDENT), to build a photo gallery of travelers who are expected to arrive in the United States. At the inspection booth, CBP captures a ''live image'' of the traveler and matches it to a photograph in the pre-assembled gallery. Both the live image and the gallery photograph are displayed to the CBP officer along with the traveler's biographic data. The CBP officer then conducts an interview with the traveler to validate the results and complete the inspection process.[59]

In addition to Atlanta, CBP is now testing Simplified Arrival for arriving travelers on international flights at locations including, Miami International Airport, Orlando International Airport, George Bush Intercontinental Airport, Houston Hobby, San Antonio International Airport, San Francisco International Airport, Dallas—Fort Worth International Airport, Norman Y. Mineta San Jose International Airport, Fort Lauderdale-Hollywood International Airport, Washington Dulles International Airport, McCarran International Airport, Detroit Metropolitan Airport, San Diego International Airport, John F. Kennedy International Airport, Newark International Airport, and Los Angeles International Airport. CBP is also testing Simplified Arrival for arriving travelers processed through the preclearance facilities at locations including Queen Beatrix International Airport, Aruba; Shannon Airport and Dublin Airports, Ireland; and Abu Dhabi International Airport, United Arab Emirates.[60]

7. Public-Private Partnerships

Since June 2017, certain airlines, such as JetBlue Airways, Delta Air Lines, and British Airways, have volunteered to use their own technology in partnership with CBP to test a facial recognition-based boarding process for international flights that would facilitate identity verification, and also assist CBP in meeting its congressional mandate to implement biometric exit. In compliance with CBP's business requirements, these stakeholders deployed their own camera operators and camera technology meeting CBP's technical specifications to capture photographs of travelers boarding certain international flights via a facial biometric capture device. The photographs are sent to CBP's TVS via a secure, encrypted connection, which will indicate to the airline if each traveler's identity can be verified.

The technology has the potential to speed up the departure for airlines and travelers, as it enables identity verification without manual verification of the boarding pass and scanning of the passport. This new process can assist carriers to more efficiently and accurately comply with their obligation to ensure that the person presenting the travel document is the person to whom the travel document was issued, pursuant to 19 CFR 122.49a(d), 122.49b(d), 122.75a(d) and 122.75b(d). In some of these tests, the biometric verification process has replaced the use of boarding passes. Eventually, participating airlines may choose to eliminate boarding passes entirely or use the technology to speed up other processes.

Participating airlines, in partnership with CBP, are testing this facial recognition-based boarding process on select international flights at locations including: Atlanta Hartsfield-Jackson International Airport, Boston Logan International Airport, Chicago O'Hare International Airport, Dallas/Fort Worth International Airport, Detroit Metropolitan Wayne County Airport, Fort Lauderdale—Hollywood International Airport, William P. Hobby Airport, George Bush Intercontinental Airport, McCarran International Airport, Miami International Airport, Minneapolis-St. Paul International Airport, Newark Liberty International Airport, John F. Kennedy International Airport (New York), Orlando International Airport, Portland International Airport, Salt Lake City International Airport, San Antonio International Airport, San Francisco International Airport, Washington Dulles International Airport, and Ronald Reagan Washington National Airport.[61]

F. Proposed Facial Recognition Based Entry-Exit Process

Based on CBP's extensive biometric tests discussed above, DHS has determined that facial recognition technology can provide a successful foundation for a biometric exit solution, as well as an improved and more streamlined biometric entry process. The following sections will discuss CBP's proposed facial recognition based entry-exit process. This process will be implemented first at commercial air ports of entry. Full implementation at for land and sea ports of entry will follow after CBP has tested and refined its biometric exit strategies in those environments.

Some of the facial recognition based entry and exit processes described below may already be implemented in limited form at entry or under biometric exit pilot programs. For such existing processes, CBP adheres to all applicable laws or regulations that govern its collection of biometrics. If this proposed rule is implemented, CBP will be able to collect facial images under the processes described here from all aliens arriving and departing the United States.

1. Benefits of a Facial Recognition Based Process

Using facial recognition technology, CBP has developed a model for moving forward with implementing a biometric exit solution, starting at airports. As fingerprint scans have proven to be an effective law enforcement tool, CBP will continue to capture fingerprints as the initial identification biometric. CBP may elect not to collect fingerprints for subsequent identity verification where CBP has implemented facial

[59] Currently, U.S. citizens and aliens exempt under 8 CFR 235.1(f) may voluntarily participate in Simplified Arrival or instead undergo the normal inspection process.

[60] *See https://www.biometrics.cbp.gov/air* for an up to date list of locations where CBP is testing Simplified Arrival.

[61] *See https://www.biometrics.cbp.gov/air* for an up to date list of locations where CBP is testing facial recognition on international flights departing from the United States.

recognition. Fingerprint scans can be used for most aliens should facial recognition fail to properly identify the traveler.

CBP has determined that facial recognition technology is currently the best available method for biometric verification as it is efficient, accurate, and unobtrusive. The key benefit of a biometric entry-exit system based on facial recognition is its efficiency; it can leverage information that all travelers provide to the U.S. government as a condition for international travel. Photographs of all travelers are readily available to DHS through sources such as previous encounter photos and visa databases, eliminating the need to collect new information and add another layer to travel process. In addition, a system that matches a traveler's facial biometrics against a limited number of stored photographs, rather than an entire government database of photographs, significantly reduces the amount of time necessary to verify a traveler's identity. As a result, CBP is able to verify the identity of arriving or departing travelers with a high degree of efficiency while facilitating travel for the public.

Biometric verification using facial recognition is highly accurate. As of September 2018, CBP's facial recognition technology was able to match travelers at a rate of greater than 97 percent. If the system fails to match a traveler, then a manual review of the traveler's document is performed, just as the process is conducted today. Additionally, CBP has a rigorous process in place to review data and metrics associated with biometric facial recognition matching performance. CBP is working with DHS Science and Technology (S&T) Directorate to continue to develop and refine methods to analyze any differences that are discovered in matching performance (*e.g.,* age,[62] gender, and citizenship) based on the available data collected through biometric entry-exit operations. CBP is also seeking the expertise of the National Institute of Standards and Technology (NIST) in evaluating the performance and core algorithm capability of face recognition algorithms. CBP's presently available data demonstrates marginal differences in match rate between age, gender, or citizenship.[63] CBP will continue to work with its partners to develop methods to address any performance variations within the system.

As an added benefit, a biometric entry-exit system based on facial recognition is relatively unobtrusive. It relies on current traveler behaviors and expectations; most travelers are familiar with cameras and do not need to learn how to have a photograph taken. Finally, the biometric capture device can be installed at an airline departure gate without any necessary changes to existing airport infrastructure.

To fully implement an effective biometric entry-exit system in a secure and comprehensive manner, and to avoid another layer in the travel process, DHS has concluded that it may be necessary to collect photographs from all aliens upon entry and/or departure from the United States.[64] In this proposed rule, DHS proposes to amend the regulations to provide that all aliens may be required to be photographed upon entry and/or departure. Failure to comply with a requirement to be photographed upon entry and/or departure may be found to constitute a violation of the terms of the alien's admission, parole, or other immigration status and, where the failure to comply is upon entry, may result in a determination that the alien is inadmissible under section 212(a) of the Immigration and Nationality Act or any other law.[65]

By collecting photographs from all aliens departing the United States, DHS can more effectively verify their identity and confirm their departure. This collection also helps identify visa overstays and aliens who are present in the United States without having been admitted or paroled, and prevent their illegal reentry into the United States, as well as prevent visa fraud and the use of fraudulent travel documents. It also helps DHS identify known or suspected terrorists or criminals traveling using someone else's documents, before they depart the country. By confirming that the traveler is not the true bearer of a presented travel document, the traveler would then be subject to further inspection, first by the airline and also in some circumstances by CBP officers, which may include fingerprinting and/or an interview. Through this additional inspection, CBP would be better able to identify known criminals and other threats to border security.

The collection of photographs from all aliens avoids the need to have different processes at the point of departure for alien travelers who are currently subject to the collection of biometrics and those who are not. Collecting photographs from all alien travelers aligns with international passport standards, which require a photograph of the traveler on the document regardless of age or classification. Having multiple processes for different alien travelers at the departure gate would add another layer to the travel process and place significant burdens on carriers, airports and other port facilities, and the traveling public. Also, at certain locations, such as at an international departure gate at an airport, there may not be sufficient space for multiple lines of alien travelers.

DHS has also determined that the collection of photographs from all aliens at entry is necessary, without regard to age or visa classification. Based on NIST's research, CBP has found that effectiveness of a biometric entry-exit system based on facial recognition improves when more sources of biometrics are available to match against.[66] A photograph collected from a traveler upon entry to the United States would provide DHS with another data point to match against a photograph collected upon departure, in addition to the photographs already available to DHS through sources such as previous encounter photos and visa databases. In addition to improving the system's matching performance, establishing a requirement that all aliens may be photographed without exemption enables DHS to biometrically verify the identity of all alien travelers traveling to and from the United States, thereby helping prevent visa fraud and the fraudulent use of legitimate travel documentation.

Collecting photographs from all aliens at entry also enables CBP to implement

[62] Currently, the regulations provide that aliens younger than 14 or older than 79 are exempt from the collection of biometrics upon entry and departure from the United States. *See* 8 CFR 215.8(a) and 235.1(f)(1); *see also* Section III.D.1 for more discussion. CBP will collect additional data on these populations and evaluate match rates once the regulations are amended to include these age groups.

[63] Based on June 2017–May 2018 CBP Air Exit data from ATL, HOU, IAD, IAH, JFK, LAS, LAX, MIA, ORD, SEA, SFO. Please see Evaluating Bias in the docket for this rulemaking. *See also* NIST Interagency Report 8271, available at *https://doi.org/10.6028/NIST.IR.8271.*

[64] Currently, the regulations provide that certain aliens are exempt from the collection of biometrics upon entry and departure from the United States. *See* 8 CFR 215.8(a) and 235.1(f)(1); *see also* Section III.D.1 for more discussion.

[65] *See* proposed 8 CFR 215.8(b) and 235.1(f)(1)(iv). In the event of technical failures preventing the capture and matching of photographs of travelers at exit, air carriers will be directed to use manual boarding processes until the systems are functional. In this scenario, a biographic exit record will be created for the traveler but a biometric confirmation will not exist. A missing biometric confirmation record based on technology or operational failures is not considered non-compliance with departure requirements.

[66] *See* NIST Interagency Report 8238, *available at https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8238.pdf. See* NIST Interagency Report 8271, *available at https://doi.org/10.6028/NIST.IR.8271.https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8238.pdf.*

a streamlined entry process using facial recognition for all such aliens. For example, under the Simplified Arrival process described above, CBP primarily uses photographs rather than fingerprints to verify the traveler's identity and retrieve the traveler's biographic information for inspection. Facial recognition technology can perform the function of biometrically verifying an alien traveler's identity much more efficiently than collecting and comparing his or her fingerprints. During CBP's current inspection process, most aliens are subject to being photographed upon arrival into the United States at primary inspection. The Simplified Arrival process, which is based on this requirement, utilizes integrated biometric identity verification with the retrieval of a traveler's biographic data from a single capture of a photograph. In doing so, the Simplified Arrival process eliminates the need for CBP to scan a passport or travel document to pull up the traveler's biographic data for inspection because a facial recognition scan performs this same function more quickly. Ultimately, using facial recognition at entry can eliminate several administrative processes that will increase the speed at which CBP can inspect travelers arriving in the United States. By eliminating the administrative tasks involved in scanning a travel document or collecting fingerprints, CBP can devote more resources to interviewing an alien traveler to determine his or her admissibility.

As noted above, DHS proposes in this rule to collect photographs from all aliens regardless of their age. This will enable DHS to associate the immigration records created for children to their adult records later, which will help combat trafficking of children, and confirm the absence of criminal history or associations with terrorist or other organizations seeking to violate applicable law. The current regulations that exempt biometric collection based on the age of the individual (*i.e.,* under 14 and over 79) were based on technological limitations on collecting fingerprints from children and elderly persons, as well as traditional law enforcement policies and other policies, such as not running criminal history background checks on children. These policies are no longer applicable to CBP's facial recognition based biometric entry-exit program, as the use of biometrics has expanded beyond criminal history background checks and now plays a vital role in identity verification and management. The use of facial recognition also obviates the technological problems previously associated with fingerprints.

Certain privacy advocates have expressed concern over the accuracy of facial matching technology especially as it relates to demographics such as age, race and gender. By expanding the scope of individuals subject to facial image collection, the accuracy of the facial matching system will improve for all segments of the population, including children and the elderly, as it would be matching against more recent photos of the traveler rather than older, outdated visa photos.[67] Additionally, as discussed above, the proposed change to remove biometric exemptions for aliens would also alleviate the need to have multiple processing procedures for aliens, which would be a resource intensive process. For land and sea ports of entry and private aircraft, CBP plans to continue to test and refine biometric exit strategies with the ultimate goal of implementing a comprehensive biometric entry-exit system nationwide. The proposed regulatory changes would support CBP's efforts to regularly conduct a variety of statistical tests to bolster performance thresholds and minimize any possible bias impact on travelers of certain race, gender or nationality.

In this proposed rule, CBP has not analyzed the costs and benefits for implementing a facial recognition based biometric entry-exit program for land and sea ports of entry and private aircraft because CBP is still in the testing phase to determine the best way to implement biometric entry-exit within each of these unique environments. CBP would welcome comments from the public on the rule's impact on land and sea ports of entry and private aircraft.

CBP is continually evaluating how to best implement a biometric entry-exit system that is efficient, accurate, and secure and incorporates the latest technology. These evaluations will allow CBP to determine if new technology or new methods of employing existing technology might improve the entry-exit system.

2. Facial Recognition Technology Gallery Building

CBP has developed a matching service for all biometric entry and exit operations that use facial recognition, regardless of the method of entry or exit (*i.e.,* air, land, and sea). For all biometric matching deployments, TVS relies on biometric templates generated from pre-existing photographs that CBP already maintains, known as a ''gallery.'' These images may include photographs captured by CBP during previous entry inspection, photographs from U.S. passports and U.S. visas, and photographs from other DHS encounters. CBP builds ''galleries'' of photographs based on where and when a traveler will enter or exit. If CBP has access to APIS manifest information, CBP will build galleries of photographs based on upcoming flight or vessel arrivals or departures. If CBP does not have access to APIS manifest information, such as for pedestrians or privately owned vehicles at land ports of entry, CBP will build galleries using photographs of ''frequent'' crossers for that specific POE, taken at that specific POE, that become part of a localized photographic gallery. CBP's TVS facial matching service then generates a biometric template for each gallery photograph that is stored in the TVS virtual private cloud for matching when the traveler arrives or departs.

3. General Collection Process

Due to the complexities in logistics across the entry and exit environments, CBP will collect photographs of the arriving or departing traveler via several different methods depending on the local port of entry. Generally, when travelers present themselves for entry or exit, they will encounter a camera connected to CBP's cloud-based TVS facial matching service via a secure, encrypted connection. This camera matches live images with existing photo templates from passenger travel documents. The camera may be owned by CBP, the air or vessel carrier, another government agency such as TSA, or an international partner governmental agency. Once the camera captures a quality image and the system successfully finds a match among the historical photo templates of all travelers from the gallery associated with that particular manifest, the traveler proceeds to inspection for an admissibility determination by a CBP Officer, or is permitted to depart the United States. When a ''no match'' occurs, CBP may use an alternative means to verify the traveler's identity, such as a manual review of the travel document. See Section III.F.6 for more discussion.

4. Facial Recognition Based Entry Process

Historically, prior to admission to the United States, CBP has used a manual process to inspect travel documents, such as passports or visas, to initiate system checks and verify a traveler's identity, travel history, and any law or

[67] *See* NIST Interagency Report 8271, *available at https://doi.org/10.6028/NIST.IR.8271.*

border enforcement concerns that may require attention. The new primary entry solution uses biometrics to initiate the transaction and system checks, using facial recognition as the primary biometric verification modality. This shift from a biographic, document-based system to a biometric-initiated transaction requires travelers to provide facial photos for identity verification purposes. This enables CBP to more accurately verify identity and citizenship by matching the traveler's photograph with vetted and validated biographic information. Studies show that humans can benefit in face recognition tasks when assisted by a machine, and vice versa. [68]

Under Simplified Arrival, CBP uses CBP-owned cameras, CBP's primary arrival subsystem of TECS, and the facial matching service to capture facial biometric data from travelers seeking to enter the United States. All travelers proceed to the entry lanes within CBP's Federal Inspection Services (FIS) area, where a camera captures an image of the traveler's face. The TECS primary arrival subsystem transmits the image to TVS. In order to biometrically identify the traveler, TVS automatically creates a template from the image and uses the template to query against a gallery of known identities, based on the manifests for all incoming flights for that day.

Once the traveler is matched, TVS transmits the match results, along with a TECS system-generated unique traveler identifier and a unique photo identifier generated by CBP's Automated Targeting System (ATS)–Unified Passenger (UPAX) module to TECS. In turn, the TECS primary arrival subsystem uses the unique traveler identifier to retrieve the traveler's biographic information from the APIS manifest. Additionally, the TECS subsystem uses the ATS–UPAX-generated identifier to retrieve the historical image (which had matched with the new image) stored in UPAX. The CBP officer has the ability to view and evaluate the traveler's biographic data, along with any derogatory information, in the TECS primary arrival application, along with associated biometric match results from TVS. The CBP officer then conducts the standard inspection interview and establishes the purpose and intent of travel. Upon admission or entry, CBP updates the traveler crossing history in TECS to reflect a confirmed arrival into the United States. Inbound processing for travelers on commercial sea vessels (*e.g.,* cruise ships) will resemble the air entry process, as this travel method is also based on an APIS traveler manifest.

Even with the use of facial recognition technology upon entry, CBP still leverages APIS information and screens it against TECS records and other law enforcement databases in order for CBP to ascertain if any security or law enforcement risks exist.

At this time, CBP is not actively using galleries of known travelers in the land environment. This is because private rail and bus lines are not required to submit APIS manifests (although, in some cases, private rail and bus lines submit APIS to CBP voluntarily) and CBP does not receive any manifest for pedestrians crossing the land border on foot or for persons traveling in private vehicles. However, CBP is developing processes that would enable the use of TVS at the land border. For example, CBP may briefly retain local galleries of travelers who have recently crossed at a given POE and are expected to cross again within a given period of time. CBP is conducting tests to determine feasibility. Currently, in San Luis and Nogales, Arizona, CBP is using facial recognition technology to compare the traveler against the photo in the travel document presented (1:1 comparison). Expanding the scope of travelers that may be required to present biometrics will allow CBP to continue to examine the possibility of using galleries in the land environment.

5. Facial Recognition Based Exit Process

CBP is using biometric technologies in voluntary partnerships with other federal agencies and commercial stakeholders. These partnerships enable CBP to more effectively verify the identities of individuals entering and exiting the United States, identify aliens who are violating the terms of their admission, and expedite immediate action when such violations are identified.

In some partnership arrangements, an airline or airport authority partner staffs TVS biometric collection and the boarding process, rather than CBP. These stakeholders are assisting CBP in meeting the congressional biometric entry-exit system mandate. Some of these partners are already using traveler photographs in their own business processes. A number of airlines and airport authorities may choose to leverage their own technology in partnership with CBP to facilitate identity verification. Based on agreements with CBP, these stakeholders deploy their own camera operators and camera technology to operate TVS for identity verification. These stakeholders must adhere to strict business requirements and the cameras must meet CBP's technical specifications to capture facial images of travelers prior to use. Each camera is connected to the TVS via a secure, encrypted connection. While the photo capture process may vary slightly according to the unique requirements of each participating airline and airport authority, the IT infrastructure supporting the backend process is the same.

During the boarding process, CBP's facial recognition matching service allows CBP to biometrically verify the identity of travelers departing the United States with the assistance of airline or airport partnerships. At the departure gate, each traveler stands for a photo in front of a partner-provided camera. Aided by the authorized airline or airport personnel, the partner-owned camera attempts to capture a usable image and submits the image, sometimes through an authorized integration platform or vendor, to CBP's cloud-based TVS facial matching service. TVS then generates a template from the departure photo and uses that template to search the assembly of historical photo templates in the cloud-based gallery. Some airlines continue to accept boarding passes at the gate, while other carriers accept CBP's biometric identity verification in lieu of boarding passes as part of a new paperless, self-boarding process. In the latter process, the carrier may employ technologies (such as automated gates) to further automate the boarding process. For example, a traveler whose photo has generated a positive match with a photo in the gallery, will be directed to board the plane. As CBP verifies the identity of the traveler, either through the automated TVS facial recognition process or manual officer processing, the backend matching service returns the ''match'' or ''no-match'' result, along with the associated unique identifier. Carriers, pursuant to the APIS regulations, are responsible for comparing the travel document to validate the information provided and ensure that the person presenting the document ''is the person to whom the travel document was issued.'' 19 CFR 122.49a, 122.49b, 122.49c, 122.75a, and 122.75b. The use of TVS provides a more efficient and accurate way to meet this requirement.

Typically, on air exit, CBP is not permanently stationed at the gate. Therefore, CBP currently must rely on

[68] See *https://www.pnas.org/content/pnas/115/24/6171.full.pdf.* See also *https://onlinelibrary.wiley.com/doi/abs/10.1002/acp.2968.* Accessed October 26, 2020. See also *https://royalsocietypublishing.org/doi/full/10.1098/rsos.170249#RSOS170249C16.* Accessed October 26, 2020.

the review of biographic data (provided via APIS) to determine whether further inspection on departure is warranted and whether an outbound enforcement teams should be sent to the gate. With the use of facial recognition technology, outbound enforcement teams are informed immediately when a no match occurs (via notification on mobile device) and can then determine if additional inspection is warranted.

Outbound processing for travelers on commercial sea vessels (*e.g.,* cruise ships) would resemble the air exit process. It is expected that this process will also be based on an APIS traveler manifest, although further testing is needed to refine and implement this process. At the land border, as part of CBP's outbound enforcement efforts, CBP has begun recording departures of Third Country Nationals (TCN) encountered during outbound operations at land crossings, both biographically and with facial images and fingerprint biometrics. A TCN is defined as a foreign national who is attempting to enter either Canada or Mexico but is not a citizen of either country. TCNs departing the United States by land are those individuals who are currently subject to biometric collection under existing CBP regulations.

6. Alternative Procedures and Public Notices

Currently for air exit, all travelers, including U.S. citizens, may notify the airline-boarding agent if they would like to opt out of the facial-recognition based process at the time of boarding and request that an alternative mean of validation be employed. Airline personnel would then conduct manual identity verification using the travel document, and may notify CBP to collect biometrics, if applicable. Under the proposed rule, alien travelers would no longer be able to opt out. Alternative procedures would only be available to U.S. citizen travelers.

All U.S. citizens are subject to inspection upon arrival into and departure from the United States to confirm their identity and citizenship. Where CBP has implemented a biometric verification program, participation by U.S. citizens in CBP's biometric verification program is voluntary. Such participation provides a more efficient boarding process or admission process and a more accurate and efficient method for verifying the identity and citizenship of U.S. citizens. A U.S. citizen traveler who does not wish to have his or her photograph taken may request an alternative inspection process. For example, in the event a U.S. citizen elects not to be photographed at airports where CBP is conducting biometric exit verification, an airline gate agent will perform a manual review of the U.S. citizen's passport. If there is some question as to the authenticity of the passport or whether the person presenting the passport is the person to whom the passport was lawfully issued, the airline will contact CBP for additional inspection, and a CBP officer may perform a manual review of the passport. A CBP officer may ask questions to validate identity and citizenship. At other departure locations, such as at a land port where CBP is conducting biometric verification, CBP provides appropriate alternative procedures. As biometric collection progresses, CBP believes that it will save travelers time. If this is the case, the alternative inspection process may be a slower process than the automated process, but every effort will be made to not delay or hinder travel.

As discussed in Section III.E.6, Simplified Arrival enables CBP to use facial recognition to streamline the entry process for all arriving travelers. This process has been implemented at certain locations and will be expanded. For U.S. citizens, participation is voluntary. CBP provides appropriate alternative procedures for U.S. citizens who choose not to participate in the biometric verification process at entry. The alternative procedures proposed in this rule are intended to be similar to the existing process at entry today, in which a CBP officer would physically examine the traveler's documentation to ensure the bearer is the true owner, and scan the document to pull up the traveler's data for inspection. *See* Section III.E.6.

CBP strives to be transparent and provide notice to individuals regarding its collection, use, dissemination, and maintenance of personally identifiable information (PII). When airlines or airports are partnering with CBP on biometric air exit, the public is informed that the partner is collecting the biometric data in coordination with CBP. CBP provides notice to travelers at the designated ports of entry through both physical and either LED message boards or electronic signs, as well as verbal announcements in some cases, to inform the public that CBP will be taking photos for identity verification purposes. CBP also provides notice to the public that a traveler may opt out of having their photo taken and request an alternative procedure. CBP works with carriers, airports, and other port facilities to incorporate appropriate notices and processes into their current business models.

Upon request, CBP officers provide individuals with a tear sheet with Frequently Asked Questions (FAQ), opt-out procedures, and additional information on the particular demonstration, including the legal authority and purpose for inspection, the routine uses, and the consequences for failing to provide information. Additionally, in the FIS, CBP posts signs informing individuals of possible searches, and the purpose for those searches, upon arrival or departure from the United States. Privacy information on the program, such as System of Records Notices and Privacy Impact Assessments (PIAs), are published on *www.dhs.gov/privacy.* CBP will also continue to make program information, such as Frequently Asked Questions, available for the public on CBP's biometrics website at *www.cbp.gov/biometrics.*

7. ''No Match'' Procedures

CBP has designed the entry and exit inspection process such that, in the event of a mismatch, false match, or ''no match,'' CBP may use alternative means to verify the traveler's identity and ensure that the traveler is not unduly delayed. If the system fails to match a traveler, then a manual review of the traveler's document is performed. On entry, the CBP officer may continue to conduct additional screening or request fingerprints (if appropriate) to verify identity. Each inspection booth at entry is equipped with a fingerprint reader.

At departure, after the manual review of the travel document (*i.e.,* scanning a boarding pass and checking a traveler's passport), the airline or cruise line may notify CBP's outbound enforcement teams should additional inspection be required.[69] In such case, CBP officers may inspect the traveler's passport or other valid travel document. If the traveler is subject to biometric collection (under the current regulations or under the amended regulations once this rule is finalized), the officer may swipe the traveler's document in the MRZ of the BE-Mobile device and collect the traveler's fingerprints. BE-Mobile uses fingerprints, facial images, and the existing connections between ATS–UPAX and DHS IDENT for all

[69] Communication between CBP's outbound enforcement team and airlines/cruise lines is not unique to locations where facial recognition is implemented. During the outbound inspection, CBP may interview the traveler as well as use BE-Mobile devices. CBP conducts outbound enforcement operations using BE-Mobile devices in all modes of transportation and also at locations where facial recognition technology (*i.e.,* biometric exit boarding) is unavailable. Neither the operations nor the technology is exclusive to locations where facial recognition based biometric exit is implemented.

biometric queries and storage. CBP encrypts data on the wireless handheld device as it is collected and encrypts the biometric and biographic data during transmission to and from internal and external systems. No information is retained on the BE-Mobile device.

The BE-Mobile device transfers prints and passport information to the appropriate DHS and CBP information technology system to identify any law enforcement lookouts related to the traveler. In addition, the device matches the traveler to the APIS manifest and creates a confirmed exit record in such CBP systems as APIS and the Arrival and Departure Information System (ADIS). If the system checks yield no derogatory information, the CBP officer allows the traveler to board/continue travel.

Based on the inspection results and the queries using the newly collected biometric and biographic data, if CBP finds actionable derogatory information on the traveler, the CBP officer may escort the traveler to the FIS area to conduct further questioning and take the appropriate actions under CBP's law enforcement authorities.

In the event that an individual does experience a delay or issue as an outcome of these processes, travelers may contact the CBP Info Center and/or DHS Traveler Redress Inquiry Program (TRIP). Signage and tear sheets at select ports of entry where the TVS is employed provides information on how to contact the CBP Info Center and/or DHS TRIP. In addition, travelers may request information from the on-site CBP officer or gate agent.

8. U.S. Nationals, Dual Nationals and Lawful Permanent Residents

Under the INA, a U.S. national is either a citizen of the United States, or a person who, though not a U.S. citizen, owes permanent allegiance to the United States. *See* INA section 101(a)(22). Non-citizen U.S. national status applies only to individuals who were born either in American Samoa or on Swains Island to parents who are not citizens of the United States.[70]

Dual nationals are individuals who owe allegiance to both the United States and the foreign country. They are required to obey the laws of both countries, and either country has the right to enforce its laws. For purposes of international travel, U.S. nationals, including dual nationals, must use a U.S. passport (or alternative documentation as required by 22 CFR part 53) to enter and leave the United States. *See* INA 215(b) (8 U.S.C. 1185(b)); *see also* 22 CFR 53.1.

For purposes of this proposed rule, a U.S. national or dual national who presents as a citizen of another country will be processed as a foreign national and their photo will be retained accordingly, unless they are able to present evidence of U.S. citizenship or nationality.[71]

Under immigration law, lawful permanent residents (LPRs) are aliens authorized to live permanently within the United States.[72] As such, for purposes of this proposed rule, LPRs will be processed as aliens.

9. Business Requirements for Public-Private Partnerships

The business requirements implemented by CBP with its partners govern the retention and use of the facial images collected using CBP's facial recognition technology. CBP prohibits its approved partners such as airlines, airport authorities, or cruise lines and participating organizations (*e.g.,* vendors, systems integrators, or other third parties) from retaining the photos they collect under this process for their own business purposes. The partners must immediately purge the images following transmittal to CBP, and the partner must allow CBP to audit compliance with this requirement. As discussed in the November 2018 PIA, CBP has developed Business Requirements to document this commitment. In order to use TVS, private sector partners must agree to these Business Requirements. After this rule is implemented, the Business Requirements document will be updated and available for viewing on *cbp.gov*.

IV. Proposed Regulatory Changes

A. General Biometric Exit Requirement for Aliens

To advance the legal framework for the full implementation of a biometric exit capability as described above, DHS is proposing to amend the regulations in 8 CFR that set forth the requirements for providing biometrics upon entry and departure. Currently, 8 CFR 215.8(a)(1) authorizes DHS to collect biometric exit information from certain aliens on departure from the United States pursuant to pilot programs at air, land, or sea ports of entry and places a limit of 15 air or sea ports of entry at which such biometric exit pilots may be established. The reference to pilot programs and the 15 air or sea port limitation hinders DHS's ability to expand and fully implement a comprehensive biometric exit solution. Therefore, DHS is proposing to amend § 215.8 by removing the reference to pilot programs and the 15 air or sea port limit.

B. Collection of Photographs From Aliens Upon Entry and Departure

As discussed in Section III.D.1, DHS regulations implementing the legacy US–VISIT program provide that certain categories of aliens are exempt from the collection of biometrics upon arrival to, and departure from, the United States. *See* 8 CFR 235.1(f); 8 CFR 215.8(a)(1)–(2). These exemptions are not statutorily based. As discussed in Section III.A, DHS has broad statutory authority to control alien travel, inspect aliens and require biometrics from aliens upon arrival in, or departure from, the United States.

To implement a biometric entry-exit system based on facial recognition, DHS is proposing to amend the regulations to provide that all aliens may be required to be photographed upon departure from the United States. The exemptions of certain aliens from the collection of biometrics in § 215.8(a)(1)–(2) will no longer pertain to the collection of photographs from aliens upon departure. Specifically, DHS is proposing to amend § 215.8 to add new paragraph (a)(1), which provides that an alien may be required to be photographed when departing the United States to determine identity. The collection of photographs from an alien upon departure will assist DHS in determining the alien's identity and whether immigration status in the United States has been properly maintained.

In addition, DHS is proposing to amend § 235.1(f) to add new paragraph (1)(ii), which provides that an alien seeking admission may be required to be photographed to determine the alien's identity, admissibility, and whether immigration status in the United States has been properly maintained. As for the collection of photographs upon departure, the exemptions in § 235.1(f)(1)(ii) will no longer pertain to the collection of photographs from aliens seeking admission.

[70] *See Dual Nationality,* U.S. Department of State, *https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html.*

[71] A person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction and must present a U.S. passport or alternative documentation as required by 22 CFR part 53. If such person fails to satisfy the examining immigration officer that they are a U.S. citizen, the person shall thereafter be inspected as an alien applicant for admission. 8 CFR 235.1(b).

[72] Under the INA, the term alien means any person who is not a citizen or national of the United States. 8 CFR 215.1(a). Therefore, a lawful permanent resident is an alien under the INA.

DHS is not proposing to change the existing exemptions in §§ 215.8 and 235.1(f)[73] for the collection of biometrics other than photographs (*e.g.,* fingerprints and other biometrics) from aliens upon entry to and departure from the United States. This is set forth in 8 CFR 215.8(a)(2)–(3) and 235.1(f)(1)(iii) and (vi) as amended in this document; *see also* Section IV.C.1 of this document. Notwithstanding these exemptions, DHS is authorized to collect biometrics from aliens, regardless of age, citizenship, or visa status, for law enforcement purposes or in other contexts not addressed by these regulations, such as from aliens attempting to enter the United States illegally between U.S. ports of entry. *See* Section III.A. As such, CBP may, on a case-by-case basis, collect biometrics other than photographs from aliens outside of the age limits or visa category exceptions.

C. Collection of Biometrics When Departing the United States and Other Minor Conforming and Editorial Changes

DHS is proposing to amend § 215.8(a) to specify that biometrics may be required ''when departing the United States.'' The current provision refers to ''upon departure from a U.S. port of entry.'' This amendment is necessary to allow for the collection of biometrics from individuals upon departure at locations other than at a U.S. port of entry.[74] Although the majority of travelers depart the country from a designated U.S. port of entry, a few travelers depart the country from locations that are not designated as ports of entry, such as Ronald Reagan Washington National Airport or John Wayne Airport, California.[75] To ensure the implementation of a biometric entry-exit system that tracks all individuals departing the country, DHS may require aliens to provide biometrics upon departure at U.S. ports of entry or when departing the United States at any other location.

In addition, DHS is proposing to make certain minor conforming and editorial changes in §§ 215.8 and 235.1(f). In § 215.8, DHS is proposing to redesignate paragraph (a)(2) as paragraph (a)(3), revise cross-references and add paragraph headings as necessary. In § 235.1(f), DHS is proposing to redesignate paragraph (f)(1)(ii) as paragraph (f)(1)(iii), paragraphs (f)(1)(iii) and (iv) as paragraphs (f)(1)(v) and (vi), add new paragraphs (f)(1)(ii) and (iv), and revise cross-references and add paragraph headings as necessary. In §§ 215.8 and 235.1(f), DHS is proposing to remove the phrase ''[t]he Secretary of Homeland Security or his or her designee'' and add in its place ''DHS'' and remove the phrase ''biometric identifiers'' and add in its place ''biometrics.''

Finally, DHS is proposing to amend §§ 215.8(a) and 235.1(f) to remove the specific references to fingerprints and photographs. Currently, these sections provide that any alien may be required ''to provide fingerprints, photograph(s) or other specified biometric identifiers'' upon arrival into or departure from the United States. Because this rule adds a separate sub-paragraph relating to the provision of photographs, the word ''photograph(s)'' in this provision is no longer appropriate. Furthermore, to allow the flexibility for DHS to employ different methods of biometric collection in the future, DHS is proposing to amend §§ 215.8(a) and 235.1(f) to provide instead that any alien, other than those exempt by regulation, may be required ''to provide other biometrics'' upon arrival into and departure from the United States. CBP has tested iris technology, for example, but biometric technology continues to advance and there may be other biometric options that may have potential for implementation in the future.

V. Withdrawal of 2008 Air Exit Notice of Proposed Rulemaking

On April 24, 2008, DHS published a notice of proposed rulemaking (NPRM) in the **Federal Register** (73 FR 22065) proposing a biometric exit program at air and sea ports that would require commercial air and vessel carriers to collect biometric data from aliens and submit this information to DHS within a certain timeframe. The proposed rule set out certain technical requirements and a substantive performance standard for the transmission of biometric data, but provided the carriers with some discretion in the manner of collection and submission of biometric data, including latitude in determining the location of the biometric data collection within the port of entry. DHS received 118 comments from the public in response to the NPRM. Most of the comments opposed the adoption of the proposed rule due to issues of cost and feasibility.

In consideration of the regulatory changes being made in this rule, the comments received, the results of the biometric exit pilots conducted in 2009,[76] and DHS's new approach to implementing a biometric entry-exit system, DHS has decided that the 2008 NPRM should be withdrawn. The withdrawal notice is being published concurrently with the publication of this proposed rule.

VI. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

Executive Orders 13563 (''Improving Regulation and Regulatory Review'') and 12866 (''Regulatory Planning and Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This rule is an ''economically significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

[73] The following categories of aliens currently are exempt from the requirements under 8 CFR 215.8 and 235.1 to provide biometrics upon arrival to, and departure from, the United States at a U.S. port of entry: Canadian citizens under Section 101(a)(15)(B) of the Act who are not otherwise required to present a visa or be issued a form I–94 or Form I–95; aliens younger than 14 or older than 79 on the data of admission; aliens admitted A–1, A–2, C–3 (except for attendants, servants, or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 visas, and certain Taiwan officials who hold E–1 visas and members of their immediate families who hold E–1 visas unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (d)(1)(ii); classes of aliens to whom the Secretary of Homeland Security and the Secretary of State jointly determine it shall not apply; or an individual alien to whom the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines it shall not apply.

[74] A port of entry is any location in the United States or its territories that is designated as a point of entry for aliens and U.S. citizens. *See* 8 CFR 235.1(a) (providing that application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port of entry); *see also* 8 CFR 100.4(a) (designating ports of entry for aliens arriving by vessel or by land transportation) and 100.4(b) (designating ports of entry for aliens arriving by aircraft).

[75] These airports are not ports of entry pursuant to 8 CFR 100.4(b) and do not have federal inspection processes or facilities, but still have a few flights that depart to international locations, mostly those that have CBP preclearance facilities (typically in Canada or the Caribbean). This proposed change would account for these departures from the United States.

[76] *See* Section III.D.2.

1. Need and Purpose of the Rule

DHS is statutorily mandated to develop and implement an integrated, automated entry and exit data system to match records, including biographic data and biometrics, of aliens entering and departing the United States. DHS is also required by Executive Order to expedite the completion and implementation of a biometric entry-exit tracking system. Since 2004, DHS, through CBP, has been collecting biometric data from aliens arriving in the United States, but currently there is no comprehensive biometric system in place to track when the aliens depart the country.

Since taking over entry and exit operations in 2013, CBP has been testing various options to collect biometrics at arrival and departure. The results of these tests and the recent advancement of facial recognition technology have provided CBP with a model for moving forward with implementing a comprehensive biometric exit solution. In the initial stage of implementation, CBP has expanded its biometric exit capability to a limited number of airports. These deployments are allowing CBP to fine-tune the process before implementing it on a nationwide basis. However, CBP is limited by regulation to collecting biometrics from aliens upon departure from air and seaports under pilot programs to 15 locations (no limits apply in the land border context). This rule will remove the reference to pilot programs and the port limit and establish that all aliens may be required to be photographed upon entry and/or exit.

Upon exit, U.S. citizens are currently typically processed similarly to aliens (*i.e.,* without the collection of photographs) and may generally continue to be inspected in the same way under this rule, even in situations where CBP has instituted a biometric exit program. Where CBP has instituted photograph collection at exit, U.S. citizens may be photographed voluntarily or request the existing alternative process. This rule will not change the option U.S. citizens have not to have their pictures taken and instead, to request alternative processing.

Currently, certain aliens are not subject to photograph collection. For example, aliens who are under the age of 14 or over the age of 79 are not required to be photographed at entry or exit. By providing that all aliens may be required to be photographed at entry and/or exit, CBP will be able to further expand the photograph collection program to allow for a more complete evaluation as it moves toward nationwide expansion.

Collecting photographs will allow CBP to know with better accuracy whether aliens are departing the country when they are required to depart, reduce visa or travel document fraud, and improve CBP's ability to identify criminals and known or suspected terrorists before they depart the United States. It will also allow for a substantial time savings for travelers.

2. Background, Baseline, and Affected Population

Under DHS regulations, upon arrival into the United States, travelers are required to present themselves to CBP for inspection under the immigration laws. *See* 8 CFR 235.1. Under the current air inspection process, CBP obtains information directly from the traveler via his or her travel documents (*e.g.,* passport) and/or verbal communications between a CBP officer and the traveler. As a part of this process, a CBP officer typically takes a physical passport from the traveler and electronically ''reads'' the passport using its MRZ to pull up the traveler's biographic data for inspection. In addition, for aliens (except for those exempt from biometric collection under 8 CFR 235.1), CBP collects fingerprints from the traveler to biometrically verify his or her identity by comparing the fingerprints with those previously collected as a part of a visa application, immigration benefits application, or earlier inspection process with CBP.[77] Once the identity of the traveler is validated in this manner, the CBP officer conducts an interview with the traveler to establish the purpose and intent of travel, and to determine admissibility.

The Aviation and Transportation Security Act of 2001 and the Enhanced Border Security and Visa Entry Reform Act of 2002 together mandated the collection of certain biographical manifest information on all passengers and crew members who arrive in or depart from (and, in the case of crew members, overfly) the United States on a commercial air or sea carrier. This collection is done through APIS. As APIS requirements apply equally to travelers departing the United States, CBP electronically records a traveler's departure by commercial air or sea using the biographic manifest information provided by the carrier. Unlike at entry, however, CBP does not routinely inspect travelers departing the United States to confirm that the APIS departure data is accurate or that the traveler is the true bearer of his or her travel document.

Currently, those departing the United States via the air environment must present their boarding pass and identification when being screened by TSA. Before boarding, travelers must also present their boarding passes to the carrier at the gate, who visually reviews the travel documents and validates the boarding pass with the carrier's ticketing system. However, once in the sterile area of the terminal, although travelers may be subject to random identification checks, travelers generally do not have their photo identification scrutinized again before boarding the aircraft.

CBP uses APIS information along with other law enforcement information and technology to determine whether CBP needs to further inspect outbound travelers. CBP's outbound operations enable it to enforce U.S. laws applicable upon departure from the United States and effectively monitor and control the outbound flow of goods and people.

In the land environment, CBP does not receive advance APIS data. Persons departing the United States at the land border are also not consistently subject to CBP inspection, as they are upon arrival. As a result, land departures may not be recorded accurately. For the purposes of this analysis, the process described above is the baseline.[78] This analysis assesses the incremental change from the baseline. CBP has operated various pilot programs over the years that deviate from the baseline and have guided CBP in its development of the air exit process under this rule. Tests continue at land and sea and at air entry. The costs and benefits of these pilots are sunk for the purposes of deciding whether to proceed with the regulatory program, but they are important for understanding the full costs and benefits of CBP's facial recognition program as a whole. As such, we analyze the effects of the facial recognition program over two time periods. First, we study the pilot period from 2017 to 2019. Then we study the regulatory period from 2020 to 2024.

CBP collects biometric data from most aliens entering the United States by air and sea at entry but does not generally collect biometric data at departure from aliens in any outbound environment, nor does it generally collect biometric data from U.S. citizens on a systematic basis upon entry or departure from the

[77] See section III.B.2 for more information on the current process.

[78] For a more detailed explanation of the baseline, see section III.B, titled ''Current Entry Exit Process,'' earlier in the preamble of this document.

United States.[79] DHS, through CBP, has been developing and testing additional biometric entry and exit capabilities since 2004.

What follows is a brief summary of the pilot programs and the current biometric entry-exit requirements for those affected by this rule. For a full history, see Section III.D above, titled ''Biometric Entry-Exit Program History.''

Since 2004, DHS and CBP have run a variety of pilot programs to test various biometric entry and exit capabilities. Tests have been conducted using a variety of technologies in different environments ranging from handheld devices for capturing fingerprints at airports upon entry to kiosks for pedestrians at land ports. CBP has most recently been testing facial recognition technology and has concluded that this is the preferred method of widespread biometric collection. It allows CBP to collect biometric data quickly and unobtrusively and the data can be easily compared with previously collected data to match the traveler with previous entries and with her/his passport or visa photograph. CBP already takes photographs of most aliens at entry during the routine inspection process and maintains them in a database. For aliens who have traveled to the United States previously, CBP's database includes a photograph from each entry. For aliens with visas, CBP's database also includes the photographs taken during the visa application process. Facial recognition technology compares a new photograph of an individual with previously captured photographs to ensure that the individual is who he or she claims to be.

In June 2016, CBP deployed a facial recognition pilot at the Hartsfield-Jackson Atlanta International Airport. This pilot was the first time a process similar to the one used under this rule was tested at exit. Based on the early success of the pilot in Atlanta, CBP expanded the use of facial recognition technology to additional airports. For the purposes of this analysis, the process at the eight airports shall be referred to as the initial pilot.[80] The facial recognition technology is now operating as TVS. Using the initial pilot, CBP is capturing photographs from all participating travelers on selected daily outbound flights at a number of international airports. Before boarding, travelers typically line up so an airline employee can scan their boarding passes. CBP has added a station along this line where CBP officers scan travelers' boarding passes and take their photographs. The photograph is compared with the photograph(s) in CBP's database to ensure there is a match. Under the initial pilot, an airline employee still scans the boarding pass after the facial recognition process is complete. According to a time in motion study of the biometric identity verification process, this process took 9 seconds of each traveler's time.[81] Overall boarding time is unaffected because the facial scans are done while the traveler is already in line waiting to board. Note that this is an estimate for the added time for the initial pilot and it does not apply to the end state solution under this rule because in the end state there will not be a boarding pass scan in addition to the facial recognition.

While this initial pilot model has been useful for testing the facial recognition software and process, it is not feasible for nationwide deployment because CBP does not have the staffing for such an expansion. Airlines have recognized the potential for facial recognition to speed up the process for airlines and travelers and have partnered with CBP to test the software in different locations and with alterations to the model. For example, British Airways began testing a new model at Los Angeles International Airport in November 2017, and is currently testing or planning to expand this at additional airports, including the Orlando International Airport. Under this model, airline employees operate the facial recognition gates rather than CBP. Once the match is made, there is no additional step of scanning the boarding pass or checking the traveler's identification. If there is not a match, the document is examined by an airline representative, and a CBP officer may also be notified to examine the document. British Airways has found that this process allows for boarding of its largest aircraft in 22 minutes, less than half the time under the usual process.[82]

Orlando International Airport has announced that it will soon begin building infrastructure to collect photographs of all arriving and exiting aliens.[83] The exit model will be similar to the British Airways pilot in that the exit process will be conducted by the airlines. Participating airlines may eventually choose to eliminate boarding passes entirely and may also use facial recognition to speed up other processes. TVS will also be tested at entry and is already being tested in certain other locations. CBP and airlines expect the implementation at entry to save considerable time. The existing version of 19 CFR 235.1 already specifically authorizes CBP to require photographs of most aliens at entry. This rule will expand the requirement to all aliens. This would simplify the testing at entry because no aliens would be eligible to opt out of the facial recognition process. Currently, this process is optional for all exempt travelers.

The rule will advance the legal framework to implement a biometric exit requirement using facial recognition technology on a nationwide basis. CBP lacks the resources to implement this program nationwide and will continue to work with airlines and airports to establish partnerships before doing so. Due to airline and airport interest, CBP expects to implement the program nationwide within five years.

While this analysis is primarily focused on the impacts of this rule once it is in effect, CBP has been using similar facial recognition in its pilot programs for several years, which have both costs and benefits to CBP and the public. To give the reader a full view of the effects of CBP's facial recognition program through the entire time it has been used, CBP analyzes the impact of

[79] CBP does collect biometric data from U.S. citizens in certain circumstances on a voluntary basis, such as under entry-exit pilot programs described herein, under CBP's trusted traveler programs, and may be compelled on a case-by-case basis for law enforcement purposes. For the Automated Passport Control (APC) kiosks, which are free, voluntary, and do not require a membership, the APC kiosks collect facial images from all travelers and fingerprints from VWP, U.S. visa, and non-Canadian LPR travelers. The kiosk captures a photo and then prints out a receipt with the traveler's face and biographic information. This process allows CBP Officers to make manual one-to-one comparisons of the newly-captured facial images with the travelers themselves. APC kiosk systems may not retain PII, including biographic and biometric data. APC Services retains PII via log records for no longer than 30 days. For Mobile Passport Control, although the traveler profile includes a facial photo, there is no option for the user to submit the profile itself, including the photo, to CBP. The traveler only submits the MPC ''trip'' which includes the traveler's biographic information, inspection question responses, and class of admission, if applicable.

[80] The eight airports include: Washington Dulles International Airport, Atlanta Hartsfield-Jackson International Airport, Houston George Bush Intercontinental Airport, Chicago O'Hare International Airport, Las Vegas McCarran International Airport, Houston William P. Hobby Airport, John F. Kennedy International Airport, and Miami International Airport.

[81] The time in motion study captured the ''stop and look'' scenario for currently ''in-scope'' travelers, which encompasses the reading a boarding pass, face capture and matching. If a traveler does not match, or matches erroneously, then a manual review, as occurs today, would be conducted; therefore, manual reviews are not included in the 9 seconds. Source: Communication with the Office of Field Operations on May 2, 2017.

[82] Source: *http://mediacentre.britishairways.com/pressrelease/details/86/2018-247/9247?ref=News.* Accessed October 26, 2020.

[83] *See https://www.cbp.gov/newsroom/national-media-release/cbp-advances-biometric-exit-mission-orlando-international-airport.*

the biometrics process over two time periods. First, we analyze the impacts in the initial facial recognition pilot period (2017–2019). This includes the systems and hardware development by CBP, the initial testing, and the photographic collection process operated by CBP at the initial pilot locations. Because the pilots have started at different times and new pilot locations are still being set up, we present the unit costs for the pilot time period in addition to the total cost of the initial pilot. The unit costs illustrate the effects of new pilots as they are added. Second, we analyze the impacts of facial recognition in the regulatory period beginning in 2019 when CBP moves to nationwide deployment. CBP expects deployment at all airports within five years, so we use the period of analysis of 2020–2024. For the regulatory time period, CBP estimates, to the extent data is available, the total projected costs, and cost savings, and benefits that result from the gradual nationwide expansion of the collection of photographs at exit and entry.

To estimate the number of U.S. citizens and aliens that could be affected by this rule, we use historical arrival and departure data from internal CBP databases and the international travel forecast produced by the Department of Commerce's Office of Travel and Tourism Industries (OTTI).[84] Table 1 shows the OTTI growth forecast from 2017–2024. We note that this is a forecast of inbound travel, not outbound. Quality forecasts of outbound air travel are not available, so we use inbound air travel as a proxy. Because most international travel is done on a round-trip basis, we believe that inbound air travel growth is a good proxy for outbound air travel growth. To the extent that inbound and outbound travel grow at different rates, the effects of this analysis could be overstated or understated.

TABLE 1—OTTI INTERNATIONAL TRAVEL FORECAST GROWTH RATES

Year	Growth rate (%)
2017	0.7
2018	55.7
2019	3.2
2020	22.7
2021	3.3
2022	3.6
2023	3.7
2024	3.7

Tables 2 shows the actual 2017 and projected 2018–2024 outbound air traveler volumes from the United States. Table 3 shows the projected inbound air traveler volumes for the same years.

TABLE 2—2017–2024 PROJECTED OUTBOUND AIR TRAVEL

Year	U.S. citizens	Aliens	Total
2017	50,375,295	64,784,389	115,159,684
2018	53,246,687	68,477,099	121,723,786
2019	54,950,581	70,668,366	125,618,947
2020	56,434,247	72,576,412	129,010,659
2021	58,296,577	74,971,434	133,268,011
2022	60,395,254	77,670,406	138,065,660
2023	62,629,878	80,544,211	143,174,089
2024	64,947,183	83,524,347	148,471,530

TABLE 3—2017–2024 PROJECTED INBOUND AIR TRAVEL

Year	U.S. citizens	Aliens	Total
2017	47,493,852	58,312,091	105,805,943
2018	50,201,002	61,635,880	111,836,882
2019	51,807,434	63,608,228	115,415,662
2020	53,206,235	65,325,650	118,531,885
2021	54,962,041	67,481,396	122,443,437
2022	56,940,674	69,910,726	126,851,400
2023	59,047,479	72,497,423	131,544,902
2024	61,232,236	75,179,828	136,412,064

This rule removes the existing limitation on biometric exit pilot programs at airports and seaports and establishes that all aliens may be required to be photographed upon departure. The practical effect of this change at air exit is that CBP will be able to continue expanding its biometric exit capability to additional locations, aliens will be subject to the collection of photographs at these locations, and U.S. citizens who voluntarily participate in CBP's biometric verification program will also have their photographs taken. The pace of the expansion will depend on how quickly CBP is able to enter into partnerships with airlines and airports. Given the level of interest in such partnerships so far, CBP expects that the program will expand steadily over the next five years until it has been implemented for most outbound commercial passenger air traffic. We therefore assume that 20 percent of travelers will be affected in 2020, 40 percent in 2021, 60 percent in 2022, 80 percent in 2023, and 97 percent in 2024 and beyond.[85] Table 4 shows the estimated number of aliens and U.S. travelers on outbound flights with the biometric process in each year.

[84] Source: U.S. Department of Commerce, International Trade Administration, Industry & Analysis, National Travel and Tourism Office; Statistics Canada; INEGI, Forecast of International Travelers to the United States by Top Origin Countries, October 2018. Available as a supporting document in the docket of this rulemaking.

The OTTI October 2018 forecast is only through 2023. For the purposes of this analysis, we use the 2023 growth rate for 2024.

[85] 97 percent corresponds to the portion of the international traveler volume that takes place at the 20 busiest airports.

TABLE 4—2020–2024 PROJECTED OUTBOUND AIR TRAVELERS ON FLIGHTS WITH BIOMETRICS

Year	U.S. citizens	Aliens	Total
2020	11,286,849	14,515,282	25,802,132
2021	23,318,631	29,988,574	53,307,204
2022	36,237,152	46,602,244	82,839,396
2023	50,103,902	64,435,369	114,539,271
2024	62,998,768	81,018,617	144,017,384

After implementation of this rule, as is currently the case under CBP's biometric exit pilot programs, participation by U.S. citizens will be voluntary. As is the case in the air pilots, U.S. citizens may request an alternative inspection process rather than being photographed. The alternative process is no different than what happens absent this is rule—an airline employee verifies the traveler's passport information and will contact CBP if they are concerned with the validity of the passport or the identity of the passport holder. Based on recent experiences under various pilots, and because the biometric process is expected to save time, CBP does not expect many to request the alternative process. Biometrics are captured with minimal inconvenience for the traveler and under the biometric exit pilot programs it has been extremely rare for travelers to decline to be photographed. We estimate the opt-out rate through reference to the Transportation Security Agency (TSA)'s biometrics pilot. TSA has recently begun testing facial recognition at some locations, comparing the photographs of travelers to CBP's gallery. During the test, TSA has made clear through signage that it was optional and the TSA agent asked travelers whether they wanted to opt out. TSA tracked the number of opt outs over two days in the summer of 2019 and found an opt-out rate of 0.18 percent across more than 13,000 travelers. We adopt this rate as our estimate for U.S. citizens who will opt out of biometric collection under this rule. We request comment on this assumption. CBP will continue to gather available data, to the extent possible on the opt-out rates as it continues its pilots until this rule is finalized and will update this assumption for the final rule. Table 5 shows the projected number of U.S. citizens who will be subject to photographs, excluding the 0.18 percent who we assume would request an alternative process.

TABLE 5—2020–2024 PROJECTED OUTBOUND U.S. CITIZENS SUBJECT TO BIOMETRICS

Year	U.S. citizen travelers
2020	11,266,533
2021	23,276,657
2022	36,171,926
2023	50,013,715
2024	62,885,370

3. Costs

We next analyze the costs of the biometrics process both for the pilot period and the nationwide deployment period. Because the various pilots have started at different times and new pilot locations are still being set up we focus on the unit costs for the pilot time period. For the regulatory time period, CBP estimates, to the extent data is available, the total projected costs and cost savings that result from the gradual nationwide expansion of the collection of photographs at exit and entry.

Pilot Period

As discussed above, CBP conducted a time in motion study during the initial biometric exit pilot. This study estimated that the biometric identity verification process added 9 seconds to a traveler's departure time.[86] We monetize the travelers' time burden using the Department of Transportation's recommended hourly wage rates for all-purpose air travel, $47.10.[87] The opportunity cost per traveler is approximately $0.12. Approximately 1,134,000 travelers traveled on flights that were part of the pilot programs in 2017.[88] Therefore, the approximate opportunity cost for these travelers in 2017 was $136,080. Similar numbers are expected for 2018 and 2019.[89]

Participation in the biometric exit pilot programs is voluntary for U.S. citizens, who may request an alternative inspection process. As discussed earlier, we estimate 0.18 percent of U.S. citizens request an alternative process. In the event a U.S. citizen elects not to be photographed at airports where CBP is conducting biometric exit verification, an airline gate agent will perform a manual review of the passport. If there is some question as to the authenticity of the passport or whether the person presenting the passport is the owner of the passport, the airline will contact CBP for additional inspection, which would take longer than the biometric process. However, as this is the current procedure without the rule, there is no new opportunity cost associated with this requirement.

CBP has borne the bulk of the costs of the biometric verification pilot programs. CBP's costs include the cost to develop the facial recognition capabilities, the cost of the hardware for the expansion of the biometric exit pilot programs and the annual operation and maintenance costs of that hardware, the cost of the required network upgrades, and the opportunity cost of the CBP officers who collect the biometrics. Table 6 shows the estimated hardware and software costs for the expansion of the biometric exit pilot programs. The expansion hardware is the cost of the hardware that has been placed during the initial pilot. The Biometric Pathway Development Costs are the software development costs required to create a service to operate facial recognition at airport international departure gates used for the biometric exit pilot

[86] During the initial pilots, the biometric verification process was done separately from the airline scan of the travelers' boarding passes. In some pilots, and in the regulatory period, biometric identification will be fully integrated into the boarding process, which will save the travelers time. See the benefits section for a discussion of the time savings in the regulatory period.

[87] Source: U.S. Department of Transportation, Office of Transportation Policy. *The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update),* ''Table 4 (Revision 2—2016 Update): Recommended Hourly Values of Travel Time Savings for Intercity, All-Purpose Travel by Air and High-Speed Rail.'' September 27, 2016. *Available at https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf.* Accessed October 26, 2020.

[88] Source: CBP's Borderstat Database.

[89] The first pilot began at a single airport in 2016. Because we do not have quality data for 2016 and because a relatively small number of flights and travelers were affected by this pilot, we begin our quantification of the pilot period in 2017, acknowledging that there were some small costs and benefits in 2016 as well.

programs and will serve as the foundation for use as the program becomes operational on a nationwide basis. This development includes creating open interfaces to accommodate multiple biometric collection devices, adapting current systems to survey and collect traveler images from existing data, transferring data between the point of collection and the CBP back-end, processing biometric data, and creating reports for awareness and analysis. Facial Recognition Technology Expansion Hardware O&M are the annual operations and maintenance costs for the hardware at the airports participating in CBP's biometric exit pilot programs. Matching Licenses are costs to procure back-end enterprise matching licenses for the airports participating in CBP's biometric exit pilot programs from the developer. It is anticipated that these costs are spread over the first two years of use. After the first two years, we estimate no further costs for CBP as airlines will be buying their own hardware, which is expected to have a useful life longer than the period of analysis.

During the pilot period, CBP installed the facial recognition technology hardware into existing airport gates at CBP's expense. Though the hardware does not use a significant amount of electricity, airports were concerned that their networks did not have sufficient bandwidth to accommodate the matching software. CBP has added additional capacity to allow for the needed bandwidth. This is included in the Cloud Hosting costs listed in Table 6.

CBP also bears the opportunity costs of assigning CBP Officers at each of the biometric exit pilot program flights. Two CBP Officers are assigned to each flight, and it takes an hour for each of them to process the travelers on a flight. There were 18 daily flights that were part of the initial biometric exit pilot programs (the initial pilot period), and staffing that number of flights takes approximately 13,140 hours of officer time (18 flights per day × 365 days per year × 2 officers). According to CBP's position model, the average loaded wage rate for a CBP Officer is $63.80 per hour.[90] We therefore estimate that it costs approximately $838,000 per year in officer time costs.

Table 6 shows CBP's estimated pilot costs for 2017–2019. These costs are based on the initial pilot period. The Air Technology Development, Air Technology Operations and Maintenance, and Biometric Pathway Development and Matching Licenses are fixed costs that will not change if the pilot is expanded to other flights. The remaining costs are variable and will increase when the pilot is expanded. The total variable cost over the three-year period is $44,074,000 or an average of $1,358,000 per year. The initial pilot period covered 18 scheduled flights per day. Dividing by 18 flights, the annual variable pilot cost to CBP is $80,657 per flight.

TABLE 6—CBP COSTS (UNDISCOUNTED THOUSANDS OF 2017 DOLLARS)—PILOT

Cost category	2017	2018	2019
Biometric Entry-exit—Air Technology Development	44,447	58,642	44,286
Biometric Entry-exit—Air Technology Operation & Maintenance	10,661	19,693	24,066
Facial Recognition Technology Expansion Hardware	804		
Biometric Pathway Development—Facial Recognition Technology Expansion	8,104		
Facial Recognition Technology Expansion Hardware O&M		243	
Cloud Hosting—Facial Recognition Technology	90	90	90
Matching Licenses	567	567	567
CBPO Time Cost	838	838	838
Total	65,512	80,073	70,090

In summary, the biometric exit pilot programs have resulted in costs to travelers and CBP. Table 7 shows the total costs during the pilot period. The unit cost per additional traveler would be 12 cents per departure. Annual costs to CBP per daily-scheduled flight added would be approximately $81,000 per flight.

TABLE 7—SUMMARY OF PILOT COSTS

[Undiscounted thousands of $2017]

Year	2017	2018	2019
Traveler Costs	$136	$136	$136
CBP Costs	65,512	80,073	70,090
Total Costs	65,648	80,209	70,226

Regulatory Period

The estimated costs during the regulatory time period (2020–2024) are substantially different than those in the pilot period. During the regulatory period, CBP will enter into partnerships with carriers and airports to streamline the process and eliminate redundancies. Facial recognition will be integrated into the boarding process and will result in time savings for all parties (see the benefits section below for more information), rather than a cost. As occurs today, CBP will continue to be available to adjudicate any issues.

The hardware cost in the regulatory period will be borne by the carriers and airports who partner with CBP.[91] CBP will give carriers and airports access to its facial recognition system and the carriers and airports will choose (and pay for) the hardware that best fits their needs. While this partnership is

[90] Source: CBP's Office of Finance Position Model.

[91] Costs to carriers and airports are limited to hardware costs. During the pilot period, carriers and airports have not needed additional staff, nor has there been a need for additional training as the system is intended to be integrated with the airline or airport departure control system.

voluntary, CBP expects that all commercial carriers and major airports will elect to participate within five years. As discussed above, we assume that the biometric exit process will be expanded by 20 percent each year. In total, there are approximately 2,500 departure gates that will need facial recognition hardware installed, so we assume that carriers and airports will install the hardware at 500 departure gates each year.[92] The cost of the hardware will vary by carrier and airport and may depend on how they intend to use the hardware. For example, if they intend to use it only at the exit gate, costs will be lower than if they also choose to use it for their own purposes, such as simplifying the baggage drop and claim process or for access into elite traveler lounge areas. CBP believes costs will range from $5,000 to $20,000 per departure gate, based on its experience procuring equipment during the pilot period. We use $20,000 as the primary estimate for the analysis as carriers and airports have expressed interest in using facial recognition for other purposes and are likely to purchase higher end cameras that will give them flexibility. It is also possible that costs will go down substantially over time as carriers and airports develop better and cheaper hardware. For example, the Washington Metropolitan Airports Authority has begun using modified iPads for its new facial recognition pilot.[93] If this hardware is successful and is adopted more broadly, the cost to carriers and airports would drop substantially. We request comment on these estimates. Carrier and airport hardware estimated costs for the regulatory period are reported in Table 8.

TABLE 8—2020–2024 CARRIER AND AIRPORT HARDWARE COSTS

[Undiscounted thousands of $2017]

Year	Gates	Cost—low	Cost—high
2020	500	2,500	10,000
2021	500	2,500	10,000
2022	500	2,500	10,000
2023	500	2,500	10,000
2024	500	2,500	10,000

Much of the costs to develop the facial recognition technology was incurred by CBP during the pilot period, but CBP will continue to incur some additional technology costs as facial recognition is expanded nationwide. In the first two years of the regulatory period, CBP expects to incur costs for final development and deployment of the technology. Throughout the period of analysis, CBP will also incur operations and maintenance costs. CBP's costs in the regulatory period are summarized in Table 9 below.[94]

TABLE 9—2020–2024 CBP TECHNOLOGY COSTS

[Undiscounted thousands of $2017]

Year	Development	O&M	Total
2020	43,449	21,802	65,251
2021	0	39,585	39,585
2022	0	31,605	31,605
2023	0	32,383	32,383
2024	0	33,178	33,178

Most aliens are already subject to a biometric requirement at entry, so there will be no change for those already photographed at entry. U.S. citizens are not currently required to be photographed at entry, and this rule does not change that. CBP continues to explore ways to streamline traveler processing upon entry and is developing pilot programs, often in coordination with industry partners, to help inform its decisions. CBP has been testing facial recognition to improve the arrival process. For example, CBP has implemented Simplified Arrival for travelers entering the United States at various airports. Under this new process, CBP uses facial recognition instead of scanning travelers' travel documents. The photograph is taken as the traveler approaches the CBP Officer for primary inspection. If there is a match, the officer does not need to scan the traveler's documents. If there is no match, the officer proceeds with the current process of scanning the documents. Simplified Arrival is still in its infancy, but early analysis indicates that this could save approximately 15 seconds of processing time per traveler on average, an estimate that could change once it has been tested further. As travelers' wait times are affected by not only their own processing time but also the processing time of everyone else ahead of them in line, this could have a very significant time savings for travelers. In fact, airlines have indicated that they are hopeful that Simplified Arrival will lead to even more time savings than the new exit procedure. At this time, there is not enough information to adequately evaluate the possible savings that results from Simplified Arrival.

Although CBP plans to eventually revamp the admission process to speed the inspection of arriving travelers and will likely use photographs in this process, this process would only be implemented if it results in a net time savings for travelers. In addition, U.S. citizens would generally have the option not to be photographed (though they would then not get the benefits of

[92] Source: Subject matter expert estimate. Communication with the Office of Field Operations on June 26, 2018.

[93] Source: *https://www.washingtonpost.com/transportation/2018/09/06/officials-unveil-new-facial-recognition-system-dulles-international-airport/?noredirect=on&utm_term=.ae3fdefbd1a6.* Accessed October 26, 2020.

[94] Source: CBP Biometric Entry-Exit Life Cycle Cost Estimate. September 20, 2017.

the shorter inspection process). Therefore, this rule imposes no cost on most aliens or U.S. citizens at entry. To the extent that CBP is able to extend its facial recognition capabilities to improve the entry process, it would result in time savings for all travelers and CBP. CBP will conduct a study of the effect of Simplified Arrival on wait times and will include the results in the analysis for the final rule.

This rule provides that all aliens may be required to be photographed at entry and/or exit. Under the current regulations only certain aliens are subject to such requirements. This expansion of the biometric entry-exit verification program will enable CBP to require all aliens to be photographed at entry and exit. There are no additional hardware costs for carriers or airports who photograph travelers. As discussed later in the Cost Savings section, the regulatory facial recognition exit process will result in opportunity cost savings for travelers. The savings to currently exempted aliens is included in the total cost savings for travelers in that section.[95] CBP will initially focus primarily on the air environment. In the near term, CBP also plans to gradually scale up efforts in the land and sea environments to determine the best way to fully implement biometric entry-exit in those environments pursuant to this rule. Most aliens are already photographed when entering by air. CBP is testing various biometric collection options, such as the Simplified Arrival process described earlier, that would apply to aliens who are not currently subject to photographs. CBP anticipates that such a process, once implemented on a nationwide basis, will result in a net time savings for travelers. Therefore, that change will impose no new costs on these currently exempted aliens.

This rule would also allow for the implementation of a biometric exit capability at land border ports. CBP already has authority to test biometric collection at land borders through pilot programs that are not subject to the limits that air and sea pilots have. CBP will continue testing biometric collection at land border ports, but a nationwide biometric exit solution at the land border in all modes of transportation is not feasible at this time and there is no near-term plan for such an expansion. As CBP already has the ability to test biometric collection at land border ports without a limit on the number of locations, this rule has no practical effect in that environment except that it would include currently exempt aliens in those tests. For any potential future process to be workable in the land environment it needs to be done in a way that minimizes the burden on the public and the ability to expand the pilots will help inform CBP on how to accomplish that. Because there is no near-term plan to expand the general requirement for biometrics to land and sea beyond pilots, we focus the analysis on the effects of the pilots. This analysis does not account for the costs, cost savings, or benefits of some future expansion to land and sea beyond pilot programs because it is impossible to predict what that expansion would entail.

The ability to collect photographs from currently exempt aliens will enhance CBP's ability to test various exit concepts at the land border. For example, CBP is considering testing biometrics of pedestrians exiting the United States on a limited basis under various scenarios. CBP has not yet determined this process, but it would likely involve providing notice that U.S. citizens may opt out of the test by approaching a CBP officer and requesting an alternative process. As this pilot is still being developed, we do not have a firm estimate of the time it will take to capture photographs or how many travelers would be affected. We note, however, that their time delay and opportunity cost will be no greater than the 9 seconds and 12 cents estimated above for the biometric exit pilot programs process.[96] When CBP begins requiring biometrics from all aliens exiting at the land border (*i.e.,* not through a limited pilot program), to the extent that requirement lengthens entry or exit processing, there will be additional opportunity costs for the travelers and CBP. CBP is endeavoring to use biometrics as a way to streamline the entry and exit process, and it believes any additional net time it will add to travelers will be minimal or non-existent. Depending on the particulars of the biometric collection, there may also be significant hardware and infrastructure costs to CBP.

This rule would add a provision that aliens may be photographed upon exit and entry. While this provision applies at all types of ports of entry, more testing will be conducted before full implementation for land and sea ports of entry and private aircraft. For the near future the photographic requirement will apply primarily at airports. Most aliens arriving by air are already photographed at entry and have their fingerprints captured, and such aliens already have their passport photographs examined visually when entering or exiting the United States. In addition, most aliens are photographed if they are required to apply for a U.S. visa. A facial recognition system would compare the traveler's face to the previously taken photographs to ensure there is a match. CBP acknowledges that the traveler may perceive this process to be a loss of privacy, which is a cost of the rule. Facial comparison has presented CBP with the best biometric approach because it can be performed relatively quickly, with a high degree of accuracy, and in a manner perceived as less invasive to the traveler (*e.g.,* no actual physical contact is required to collect the biometric). This approach, as with all biometric collections, poses privacy risks which, as discussed in the PIA for the TVS,[97] are mostly mitigated. Nevertheless, CBP's phased deployment has shown the use of facial recognition technology is successful in a variety of scenarios that meet CBP's business requirements while requiring minimal infrastructure investments and space redesign and having minimal impacts on travelers. Moreover, the phased deployment has allowed CBP to ensure that biometrics are collected, maintained, and used consistent with applicable privacy laws and best practices.

Table 10 summarizes the monetized costs of the regulatory period. These estimated costs are only for air exit. Any costs from an unknown future deployment at land or sea are not included in these estimates.

[95] Our data on the travelers that are affected by the pilot do not separate out the portion of travelers who are out of the scope of the pilot. We do not have separate data, for example, on the number of travelers who are under the age of 14. Because of this, the estimates in our analysis capture the impacts on all travelers, including the currently out of scope travelers.

[96] The process currently being used for pedestrians is similar to what is being used at airports. For vehicles, CBP is working on various concepts and is committed to a system that would not significantly increase wait times at the land border.

[97] *See* DHS/CBP/PIA–056, Privacy Impact Assessment for the Traveler Verification Service, issued Nov. 14, 2018, *available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-november2018_2.pdf.*

TABLE 10—2020–2024 REGULATORY COSTS

[Undiscounted thousands of $2017]

Year	CBP	Carriers/ airports—low	Carriers/ airports—high	Total—low	Total—high
2020	65,251	2,500	10,000	67,751	75,251
2021	39,585	2,500	10,000	42,085	49,585
2022	31,605	2,500	10,000	34,105	41,605
2023	32,383	2,500	10,000	34,883	42,383
2024	33,178	2,500	10,000	35,678	43,178

4. Cost Savings

In the regulatory period, CBP and airlines expect that the use of facial recognition will speed the entry and exit processes considerably, resulting in time savings for travelers and shorter plane turnaround times for carriers. Various airlines have been testing facial recognition models similar to what is planned under this rule. In one test, an airline partner has been able to board an Airbus A–380 with 350 travelers in only 20 minutes.[98] Another airline partner has reported to CBP that their baseline loading time for an A–380 is 45 minutes. In the test of the integrated facial recognition system used at the Orlando Airport, travelers have experienced a 15 minute time savings. According to one news article, this is down from 30 minutes for a 240-passenger plane.[99] In both tests, boarding times are reduced by approximately 50 percent. These estimates are for some of the largest planes carrying travelers and much of the time savings is due to a process that allows boarding through several doors. Smaller planes do not have as many doors so the time savings for their travelers is likely to be lower. Additionally, these initial implementation flights and locations were selected in part based on ease of implementation. Using a 50 percent or 15-minute time savings for all flights based on the savings in these pilots would overstate the time savings due to this rule. Because of the uncertainty surrounding the time savings, we present a range of time savings estimates. For the low end of the range, which serves as our primary estimate, we assume that average time savings due to this rule will be 5 minutes per traveler, or one third of the savings airline partners observed during the pilot. For the high end of the range, we assume that the time savings would be 10 minutes, or two thirds of the savings from the pilot. We request comment on these assumptions. CBP will be conducting time studies to refine our estimates and will use updated estimates, and will consider any public input on the estimates at the final rule stage.

To estimate the value of time savings of air travelers at exit due to this rule, we apply the assumed range of time savings (5 to 10 minutes) to the traveler projections from Table 4.[100] We then apply the $47.10 hourly value of time for these travelers to determine the total opportunity cost savings as a result of this rule. Table 11 shows the hours saved at air exit due to this rule during the 5-year regulatory period of analysis. Table 12 shows the value of this time savings. As shown, in the primary estimate the savings range from $101 million in the first year to $565 million in 2024, when full nationwide deployment is expected to occur at air exit. These estimated savings are for air exit only.

TABLE 11—2020–2024 PROJECTED TIME SAVINGS FOR AIR TRAVELERS AT EXIT

[Hours]

	2020	2021	2022	2023	2024
U.S Citizens—Primary	938,878	1,939,721	3,014,327	4,167,810	5,240,447
U.S. Citizens—High	1,877,756	3,879,443	6,028,654	8,335,619	10,480,895
Aliens—Primary	1,209,607	2,499,048	3,883,520	5,369,614	6,751,551
Aliens—High	2,419,214	4,998,096	7,767,041	10,739,228	13,503,103

TABLE 12—2020–2024 VALUE OF TIME SAVINGS FOR AIR TRAVELERS AT EXIT

[$2017]

	2020	2021	2022	2023	2024
U.S Citizens—Primary	44,221,142	91,360,880	141,974,809	196,303,832	246,825,076
U.S. Citizens—High	88,442,284	182,721,759	283,949,618	392,607,664	493,650,152
Aliens—Primary	56,972,483	117,705,151	182,913,806	252,908,823	317,998,070
Aliens—High	113,944,967	235,410,303	365,827,612	505,817,645	635,996,140
Total—Primary	101,273,367	209,230,777	325,144,629	449,566,639	565,268,232
Total—High	202,387,251	418,132,062	649,777,230	898,425,309	1,129,646,292

[98] Source: *https://www.cntraveler.com/story/orlando-airport-first-in-the-us-to-scan-faces-of-all-international-passengers.* Accessed October 26, 2020.

[99] Source: *https://www.forbes.com/sites/grantmartin/2018/06/24/orlando-airport-deploys-biometric-scanners-at-all-international-gates/#2a4a588118f9* and *https://www.washingtonexaminer.com/news/bye-bye-boarding-pass-us-airport-launches-first-ever-security-checkpoints-that-scan-your-face.* Accessed October 26, 2020.

[100] As a reminder, we assume that a small portion of U.S. citizens will request an alternative inspection. These costs include only the U.S. citizens who undergo the facial recognition process.

In addition to the savings to travelers, boarding an aircraft more quickly has a substantial benefit to airlines as they will be able to turn around aircraft more quickly. According to one study, reducing turn time by 10 minutes could lead to an improved aircraft utilization rate of 8.1 percent.[101] If there is a sustained decrease in turn times as a result of this rule, carriers could eventually reduce the number of aircraft in their fleets. In addition, to the extent the shorter turn time saves airline staff time, airlines could experience additional savings.

5. Benefits

The primary benefit of this rule is the security benefit of having biometric confirmation of the identification of those leaving the country by air. CBP has very good records of those legally entering the United States by air, land and sea. These records are enhanced for aliens through the collection of biometrics at entry. At departure, CBP has a record of the names of everyone leaving the United States by air or sea. However, these records are not verified with the same accuracy as at entry. Comparing biometrics at departure will enable CBP to know with greater certainty the identity of those leaving the United States, which will help detect and deter visa overstays and visa fraud; help identify persons attempting to fraudulently use travel documents; and alert authorities to criminals or known or suspected terrorists prior to boarding. Studies show that humans are best at identifying imposters when paired with technology.[102] CBP believes that facial recognition is the best available method for biometric identification as it is highly accurate, unobtrusive, and cost effective. This rule would expand CBP's ability to implement this biometric exit capability at additional locations before eventually implementing it nationwide.

An alien admitted to the United States on a visa or through the Visa Waiver Program (VWP) is permitted to remain in the country for the lawful period of admission (in the case of a VWP traveler, 90 days). An overstay occurs when a person enters the United States legally on a visa or through the VWP, but does not leave within the prescribed time period. Some aliens who overstay their lawful period of admission remain in the United States illegally for years. For Fiscal Year 2018, DHS estimates that about 666,500 aliens who entered by air or sea and were expected to depart that year overstayed their lawful period of admission, or 1.22 percent of aliens arriving by air and sea.[103] These figures are estimates because without biometrics, CBP cannot verify with certainty the identity of those leaving the United States. For example, many aliens sharing a common name may enter the United States in a given year. Biometrics allow CBP to better differentiate those who have identical names and basic biographic information, provide checks against the use of fraudulent identity documents, and better understand whether any particular alien left the United States on time or if the departing alien was a different person with the same name. Without biometrics it is difficult to know whether the alien leaving did so on time or if the departing alien was a different person with the same name.

Similarly, there are ways to exploit the current exit system to avoid the detection of passport and visa fraud. Currently, those departing the United States must present their boarding pass and identification when being screened by TSA. Before boarding, travelers also need to present their travel documents and boarding passes to the carrier at the gate, who visually reviews the travel documents and validates the boarding pass with the carrier's ticketing system. However, once in the sterile area of the terminal, although travelers may be subject to random identification checks, travelers generally do not have their photo identification scrutinized again before boarding the aircraft. This has allowed for passport and visa fraud.[104] During the boarding process, in addition to addressing customer service issues, such as baggage and seat assignments, gate agents are also required to check travel documents during what can often be a hectic boarding process. Using facial recognition technology reduces the number of documents that the gate agent needs to review thereby increasing the effectiveness of the limited fraudulent document detection and impostor identification training gate agents receive. Furthermore, people are most effective at identifying fraud when paired with technology. The facial recognition pilots have helped identify 77,000 visa overstays and 240 individuals who previously entered the United States without inspection.[105] CBP has also used facial recognition to identify several imposters attempting to fraudulently enter the United States and expects to have similar success on exit.[106]

Having an accurate accounting of visa overstays is important both for reasons of equity and government resources. The United States has set up a system whereby aliens may visit by legal means and the vast majority follow this system conscientiously, though it can sometimes take a significant amount of time to proceed through the immigration process. It is not equitable for these legitimate travelers and immigrants when others circumvent the legitimate process through illegal visa overstays. The success of those who are able to overstay their visas without consequences only encourages others to attempt to do the same. Further, overstays place a strain on government resources as the government must investigate and remove those who are not here legally. Compounding this problem is a lack of true identity verification, as DHS must spend time determining whether an individual actually overstayed his/her lawful period of admission before beginning the actual investigation. Biometric identity verification will give DHS the information it needs about those who have overstayed their visas and will allow it to focus on these individuals.

The public also has an interest in accurate identification at departure for law enforcement and national security reasons. Security agencies maintain an

[101] Source: Economic Impact of Airplane Turn Times. *Available at https://www.boeing.com/commercial/aeromagazine/articles/qtr_4_08/pdfs/AERO_Q408_article03.pdf.* Accessed on August 22, 2018.

[102] See ''NIST Study Shows Face Recognition Experts Perform Better with AI as Partner.'' Available at *https://www.nist.gov/news-events/news/2018/05/nist-study-shows-face-recognition-experts-perform-better-ai-partner. https://www.pnas.org/content/pnas/115/24/6171.full.pdf. https://www.nist.gov/news-events/news/2018/05/nist-study-shows-face-recognition-experts-perform-better-ai-partner.* See also *https://onlinelibrary.wiley.com/doi/abs/10.1002/acp.2968.* Accessed October 26, 2020. See also *https://royalsocietypublishing.org/doi/full/10.1098/rsos.170249#RSOS170249C16.* See also *https://royalsocietypublishing.org/doi/full/10.1098/rsos.170249#RSOS170249C16.* Accessed October 26, 2020.

[103] Source: Internal Database, as reported in the *FY 2016201820162018 Entry/Exit Overstay Report. Available at https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf.* Accessed September 1010, 2019.

[104] *Note:* TSA subjects all travelers entering the sterile area of an airport, and their carry-on belongings, to security screening at the checkpoint.

[105] Source: DHS Fiscal Year 2018 Entry/Exit Report. *Available at: https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf.* Accessed October 26, 2020. See also source: DHS Office of Inspector General Report: ''Progress Made, but CBP Faces Challenges Implementing a Biometric Capability to Track Air Passenger Departures Nationwide.'' *Available at https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-80-Sep18.pdf.*

[106] Source: CBP press release: *Second Imposter in Three Weeks Caught by CBP Biometric Verification Technology at Washington Dulles Airport. Available at https://www.cbp.gov/newsroom/local-media-release/second-impostor-three-weeks-caught-cbp-biometric-verification.* Accessed October 26, 2020.

extensive database of known and suspected terrorists, but sometimes they have incomplete information about them. In some cases, they may have photographs on a person of interest, but no name. In other cases, someone could be traveling under a false name with false documents. Having biometric identification would assist CBP in identifying these individuals during the travel process and taking appropriate action. Similarly, biometric identification would help CBP identify those wanted for a crime or who are the subject of a court order (such as in a child custody dispute) and intercept them before they are able to leave the country.

As discussed in the Costs section above, CBP is exploring various ways to use biometrics to streamline the entry process. This rule allows for the expansion of these tests as it provides the framework for CBP to require all aliens to be photographed at entry. Under the current regulations, certain aliens are not subject to this requirement, making a full evaluation of the concept impossible. Early analysis of the Simplified Arrival pilot suggests that it could save 15 seconds of processing time for all participating travelers, including U.S. citizens who voluntarily participate. CBP is expected to experience time savings as well, but it is unknown how much time it will save. CBP is expanding Simplified Arrival and will be doing time-in-motion studies to determine the effect on processing and wait times. We will include a discussion of the results in the final rule.

The development of a reliable facial recognition system could also have benefits for other government agencies. CBP is coordinating with TSA to test facial recognition to streamline its processes. Among other things, TSA is considering using facial recognition to improve the TSA Pre√™ process. TSA also plans to explore other ways facial recognition can improve security and traveler processing.[107] TSA's use of CBP's facial recognition system is still in its planning stage, so it is impossible to estimate any savings that could result. To the extent that TSA is able to improve security or reduce processing times for travelers, that would be an additional cost savings or benefit of this rule.

6. Net Benefits

As discussed in the cost section, the biometric exit pilot programs have resulted in costs to travelers and CBP. From 2017–2019, travelers experienced approximately $136,000 in opportunity costs per year. CBP spent $228 million to develop, maintain, and operate the initial pilots from 2017 to 2019. The unit costs to expand these pilots would be 12 cents per departure for travelers and $81,000 annually per daily-scheduled flight for CBP. These costs are summarized in Table 13.

TABLE 13—TOTAL PILOT COSTS 2017–2019

[Thousands of 2017 U.S. dollars]

	3% Discount rate	7% Discount rate
Total Present Value Cost	$215,222	$199,887
Annualized Cost	76,088	76,159

During the regulatory time period, the costs will be split by carriers and airports who will install the facial recognition hardware at gates and CBP, which incurs development and operations and maintenance costs. Table 14 shows the discounted costs of the regulatory time period. As shown, costs over the 5-year period of analysis range from $211 to $233 million, depending on the discount rate used. Annualized costs range are $51 million. Unquantified costs include the costs of expanding photographic collection of currently exempt aliens at entry. These costs are difficult to quantify as the Simplified Arrival concept has not yet been widely tested and this expansion will only occur if it is determined that the aliens experience net savings as a result.

TABLE 14—TOTAL REGULATORY COSTS 2020–2024

[Thousands of 2017 U.S. Dollars]

	3% Discount rate	7% Discount rate
Total Present Value Cost	$232,776	$210,719
Annualized Cost	50,827	51,393

This rule's establishment of a biometric identification system at departure will have benefits, including cost savings, to CBP and the public. Travelers will experience a time savings through a shorter boarding process. Table 15 shows the discounted savings as a result of this rule. As shown, CBP estimates that this rule will save travelers opportunity costs of between $1.289 and $1.480 billion over the 5-year period of analysis. On an annualized basis, this rule will save between $314 and $323 million. In addition, carriers may experience turn around cost savings and travelers may experience additional savings from a new Simplified Arrival process. Further, this rule will allow CBP to identify travelers with greater certainty, which will reduce travel document fraud. It will also give CBP a more accurate record of those who overstayed their visas.

[107] *See* TSA's Biometric Roadmap, *available at https://www.tsa.gov/sites/default/files/tsa_biometrics_roadmap.pdf.*

TABLE 15—TOTAL REGULATORY COST SAVINGS 2020–2024 FOR BOTH ALIENS AND U.S. CITIZENS

[Thousands of 2017 U.S. Dollars]

	3% Discount rate	7% Discount rate
Total Present Value Cost Savings	$1,480,137	$1,288,814
Annualized Cost Savings	323,195	314,330

Table 16 shows the net monetized cost savings for the rule's primary estimate. As shown, the rule will result in total net savings ranging from $1.078 million to $1.247 million, depending on the discount rate used. On an annualized basis, savings will range from $262 to $272 million. Accounting statements 1 and 2 show the costs, cost savings, and benefits of the rule for the pilot period and the regulatory period, respectively. The net cost savings listed in this table is for air exit only. Any costs, cost savings, and benefits from an unknown future deployment at land or sea are not included in these estimates.

TABLE 16—NET REGULATORY COSTS SAVINGS 2020–2024

[Thousands of 2017 U.S. Dollars]

	3% Discount rate	7% Discount rate
Total Present Value Cost Savings	$1,247,361	$1,078,094
Annualized Cost Savings	272,367	262,937

ACCOUNTING STATEMENT 1—PILOT PERIOD (2017–2019)

[Thousands of $2017]

	3% Discount rate	7% Discount rate
Costs:		
Annualized monetized costs	76,088	76,160.
Annualized quantified, but non-monetized costs.	None	None.
Qualitative (non-quantified) costs	None	None.
Cost Savings:		
Annualized monetized benefits	None	None.
Annualized quantified, but non-monetized benefits.	None	None.
Qualitative (non-quantified) costs	None	None.
Benefits:		
Annualized monetized benefits	None	None.
Annualized quantified, but non-monetized benefits.	None	None.
Qualitative (non-quantified) benefits	Enhanced security and identification of visa overstays.	Enhanced security and identification of visa overstays.

ACCOUNTING STATEMENT 2—REGULATORY PERIOD (2020–2024)

[Thousands of $2017]

	3% Discount rate	7% Discount rate
Costs:		
Annualized monetized costs	50,828	51,393.
Annualized quantified, but non-monetized costs.	None	None.
Qualitative (non-quantified) costs	Perceived privacy loss	Perceived privacy loss.
Cost Savings:		
Annualized monetized cost savings	323,195	314,330.
Annualized quantified, but non-monetized cost savings.	None	None.
Qualitative (non-quantified) cost savings	Shorter plane turn times. Potential additional savings at entry.	Shorter plane turn times. Potential additional savings at entry.
Benefits:		
Annualized monetized benefits	None	None.
Annualized quantified, but non-monetized benefits.	None	None.
Qualitative (non-quantified) benefits	Enhanced security and identification of visa overstays.	Enhanced security and identification of visa overstays.

7. Alternatives Analysis

CBP considered many types of biometrics and has concluded that partnering with carriers and airports to capture facial images is the most viable large scale solution as it is highly effective, cost effective, and less disruptive than other possible methods. Two other methods that were considered were fingerprint and/or iris scans and using CBP personnel and equipment to collect the facial scans.

CBP has tested fingerprint and iris scans on a limited basis to determine its effectiveness and scalability. CBP found that while these scans are highly effective in finding matches when data is available, they have numerous problems. First, CBP often lacks data to match against. Although CBP often has fingerprints from entry that it can use to match a departing alien, it does not typically capture iris scans. Nor are these biometrics typically included in passports. To use iris scans, CBP would need to establish a new way to capture a baseline iris scan to compare against at exit, which is not feasible. Fingerprint and iris scans are also more time consuming and the equipment needed is more expensive than facial recognition. Finally, these methods are more intrusive than taking a picture, so they present additional privacy concerns.

CBP also considered purchasing the facial recognition hardware and using CBP personnel to capture the facial images rather than having the carrier or airport purchase and operate it. This alternative would essentially expand the initial pilot nationwide. As discussed above, this would add an opportunity cost of 12 cents per traveler departure and $81,000 annually in costs for CBP per daily-scheduled flight. More importantly, since this would add a step to the boarding process rather than simplify the process, travelers would forgo the time savings estimated above and valued at $310 million per year. Further, this alternative approach would eliminate the advantage of giving carriers and airports access to the facial recognition capabilities, which allows them to use it for other purposes.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule.

The Regulatory Flexibility Act requires agencies to consider the impacts of their rules on small entities. This proposed rule would only directly regulate travelers. Travelers are individuals and are not considered to be small entities by the RFA. Carriers are indirectly affected by the rule as the rule does not place any requirements on the carriers, nor does it grant them any new rights. Any participation by carriers is strictly voluntary and CBP expects that carriers will only participate if they believe the benefits of participation outweigh the costs. CBP therefore certifies that this rule will not result in a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information related to this NPRM, including biometric exit, are approved by OMB under collection 1651–0138.

D. Privacy

CBP will ensure that all legal requirements (*e.g.,* the Privacy Act of 1974, Section 208 of the E-Government Act of 2002, and Section 222 of the Homeland Security Act of 2002, as amended) and applicable policies are adhered to during the implementation of the biometric entry-exit system.

CBP retains biographic records for 15 years for U.S. citizens and lawful permanent residents and 75 years for non-immigrant aliens, consistent with the DHS/CBP–007 Border Crossing Information (BCI) System of Records Notice (SORN).[108] Records associated with a law enforcement action are retained for 75 years in accordance with the DHS/CBP–011 TECS SORN.[109] CBP retains biographic entry and exit records in the ADIS for lawful permanent residents and non-immigrant aliens, consistent with the SORN.[110]

Since 2004, CBP has collected biometric information in the form of fingerprints and a facial photograph on entry for in-scope travelers (pursuant to 8 CFR 235.1); CBP transmits this information to the DHS OBIM's IDENT, where it is stored.

Under CBP's facial recognition based entry-exit program, CBP's biographic data retention policies remain the same. CBP temporarily retains facial images of non-immigrant aliens and lawful permanent residents for no more than 14 days within ATS–UPAX for confirmation of travelers' identities, evaluation of the technology, assurance of accuracy of the algorithms, and system audits. However, if the TVS matching service determines that a particular traveler is a U.S. citizen, CBP holds the photo in secure CBP systems for no more than 12 hours after identity verification, in case of an extended system outage, and then deletes it.

Photos of all travelers are purged from the TVS cloud matching service within a number of hours, depending on the mode of travel. Photos of in-scope travelers are retained in IDENT for up to 75 years, consistent with existing CBP records that are housed in IDENT in accordance with the BCI SORN.

As discussed in Section III, CBP will begin implementation of the biometric entry-exit system through the TVS. CBP has issued a number of PIAs for the TVS, and earlier traveler verification tests, which outline how CBP will ensure compliance with the DHS Fair Information Practice Principles (FIPPs) as part of the biometric entry-exit system.[111] In November 2018, CBP published a revised comprehensive TVS PIA, which, along with the previous versions, examines the privacy impact and mitigation strategies of TVS as it relates to the Privacy Act and the FIPPs.[112] The FIPPs address how information being collected is maintained, used and protected, particularly to issues such as security, integrity, sharing of data, use limitation and transparency. The comprehensive TVS PIA provides background information on early test deployments. Additionally, it explains how CBP's use of facial recognition technology complies with privacy requirements at both entry and exit operations in all modes of travel where the technology is currently deployed.

[108] *Available at https://www.dhs.gov/system-records-notices-sorns.*

[109] *Id.*

[110] Associated ADIS SORNS are listed at *https://www.dhs.gov/publication/arrival-and-departure-information-system* and available at *https://www.dhs.gov/system-records-notices-sorns.* Last Accessed October 26, 2020.

[111] *See generally* DHS/CBP/PIA–056, Privacy Impact Assessment for the Traveler Verification Service Related PIAs, *https://www.dhs.gov/publication/departure-information-systems-test,* issued Nov. 14, 2018, *available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-november2018_2.pdf.*

[112] *See* DHS/CBP/PIA–056, Privacy Impact Assessment for the Traveler Verification Service, issued Nov. 14, 2018, *available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-november2018_2.pdf.*

As discussed in Section III.E, CBP is conducting a number of biometric exit pilot programs at the land border. CBP will issue PIAs for these pilot programs, which will be made publicly available at: *www.dhs.gov/privacy.*

E. National Environmental Policy Act

DHS Directive (Dir.) 023–01 Rev. 01[1] establishes the procedures that DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500–1508. The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023–01–001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01–001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023–01–001 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023–01–001 Rev. 01 section V.B (1)–(3).

DHS analyzed this action and has concluded that the proposed changes to 8 CFR parts 215 and 235 concerning the collection of biometric data from aliens upon entry and departure falls within DHS's categorical exclusion A.3, which is set forth in DHS Inst. 023–01–001 Rev. 01, Appendix A, Table 1. Categorical exclusion A.3 covers, among other things, the promulgation of rules that interpret or amend an existing regulation without changing its environmental impacts. Although the changes to 8 CFR parts 215 and 235 will mean that DHS/CBP will be collecting more biometric data, it will not fundamentally alter the manner in which DHS/CBP processes travelers within existing facilities.

F. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 215

Administrative practice and procedure, Aliens, Travel restrictions.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

For the reasons discussed in the preamble, DHS proposes to amend 8 CFR chapter I as set forth below:

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES; ELECTRONIC VISA UPDATE SYSTEM

■ 1. The authority section for part 215 is revised to read as follows:

Authority: 6 U.S.C. 202(4), 236; 8 U.S.C. 1101, 1103, 1104, 1184, 1185 (pursuant to Executive Order 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1357, 1365a, 1365a note, 1365b, 1379, 1731–32; and 8 CFR part 2.

■ 2. Amend § 215.8 as follows:
■ a. Revise the section heading;
■ b. Add a heading for paragraph (a);
■ c. Redesignate paragraphs (a)(1) and (2) as paragraphs (a)(2) and (3);
■ d. Add new paragraph (a)(1);
■ e. Revise newly redesignated paragraph (a)(2) and paragraph (a)(3) introductory text;
■ f. In newly redesignated paragraph (a)(3)(ii), remove ''(a)(1)'' and add in its place ''(a)(2) of this section'';
■ g. In paragraph (b), add a heading and revise the first sentence; and
■ h. In paragraph (c), add a heading.

The revisions and additions read as follows:

§ 215.8 Requirements for biometrics from aliens on departure from the United States.

(a) *Photographs and other biometrics*—(1) *Photographs.* DHS may require an alien to be photographed when departing the United States to determine his or her identity or for other lawful purposes.

(2) *Other biometrics.* DHS may require any alien, other than aliens exempted under paragraph (a)(3) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who were not otherwise required to present a visa or have been issued Form I–94 (see § 1.4 of this chapter) or Form I–95 upon arrival at the United States, to provide other biometrics, documentation of immigration status in the United States, as well as such other evidence as may be requested to determine the alien's identity and whether the alien has properly maintained immigration status while in the United States, when departing the United States.

(3) *Exemptions.* The requirements of paragraphs (a)(2) of this section shall not apply to:

* * * * *

(b) *Failure of a non-exempt alien to comply with departure requirements.* An alien who is required to provide biometrics when departing the United States pursuant to paragraph (a)(1) or (2) of this section and who fails to comply with the departure requirements may be found in violation of the terms of his or her admission, parole, or other immigration status. * * *

(c) *Determination of overstay status.* * * *

PART 235—INSPECTIONS OF PERSONS APPLYING FOR ADMISSION

■ 3. The authority citation for part 235 is revised to read as follows:

Authority: 6 U.S.C. 218 and note; 8 U.S.C. 1101 and note, 1103, 1158, 1182, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p.278), 1185 note, 1201, 1224, 1225, 1226, 1228, 1357, 1365a, 1365a note, 1365b, 1379, 1731–32; 48 U.S.C. 1806 and note.

■ 4. Amend § 235.1 as follows:
■ a. In paragraph (f)(1) introductory text, add a heading;
■ b. In paragraph (f)(1)(i), add a heading;
■ c. Redesignate paragraphs (f)(1)(ii), (iii), and (iv) as paragraphs (f)(1)(iii), (v), and (vi), respectively;
■ d. Add new paragraph (f)(1)(ii);
■ e. Revise newly redesignated paragraph (f)(1)(iii);
■ f. Add new paragraph (f)(1)(iv);
■ g. Revise newly redesignated paragraph (f)(1)(v) and paragraph (f)(1)(vi) introductory text; and
■ h. In newly redesignated paragraph (f)(1)(vi)(B), remove ''(d)(1)(ii)'' and add in its place ''(f)(1)(iii) of this section''.

The revisions and additions read as follows:

§ 235.1 Scope of examination.

* * * * *

(f) * * *

(1) *Requirements for admission.* * * *

(i) *Permanent residents.* * * *

(ii) *Photographs.* DHS may require an alien seeking admission to be photographed to determine his or her identity or for other lawful purposes.

(iii) *Other biometrics.* DHS may require any alien, other than aliens exempted under paragraph (f)(1)(vi) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who are not otherwise required to present a visa or be issued Form I–94 (see § 1.4 of this chapter) or Form I–95 for admission or parole into the United States, to provide other biometrics, documentation of immigration status in the United States, as well as such other evidence as may be requested to determine the alien's identity and admissibility and/or whether the alien has properly maintained immigration status while in the United States.

(iv) *Failure to comply with biometric requirements.* The failure of an alien at the time of inspection to comply with paragraph (f)(1)(ii) or (iii) of this section may result in a determination that the alien is inadmissible under section 212(a) of the Immigration and Nationality Act or any other law.

(v) *Biometric requirements upon departure.* Aliens who are required under paragraph (f)(1)(ii) or (iii) of this section to provide biometrics at inspection may also be subject to the departure requirements for biometrics contained in § 215.8 of this chapter, unless otherwise exempted.

(vi) *Exemptions.* The requirements of paragraph (f)(1)(iii) of this section shall not apply to:

* * * * *

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

[FR Doc. 2020–24707 Filed 11–18–20; 8:45 am]

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Part VIII

Department of Homeland Security

8 CFR Parts 106, 241 and 274a

Employment Authorization for Certain Classes of Aliens With Final Orders of Removal; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 106, 241 and 274a

[CIS No. 2653–19; DHS Docket No. USCIS–2019–0024]

RIN 1615–AC40

Employment Authorization for Certain Classes of Aliens With Final Orders of Removal

AGENCY: Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) is proposing to eliminate employment authorization eligibility for aliens who have final orders of removal but are temporarily released from custody on an order of supervision with one narrow exception. DHS proposes to continue to allow employment authorization for aliens for whom DHS has determined that their removal is impracticable because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document and who establish economic necessity. DHS intends for this rule to reduce the incentive for aliens to remain in the United States after receiving a final order of removal and to strengthen protections for U.S. workers.

DHS is also proposing to clarify that aliens who have been granted a deferral of removal based on the United States' obligations under the United Nations (U.N.) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are similarly situated to aliens granted withholding of removal under the Immigration and Nationality Act (INA) and regulations implementing CAT, in that they cannot be removed to the country in question while the order deferring their removal is in place. As such, DHS is proposing to treat aliens granted CAT deferral of removal as employment authorized based upon the grant of deferral of removal.

DATES: Written comments on this proposed rulemaking must be submitted on or before December 21, 2020. Comments on the collection of information (see Paperwork Reduction Act section) must be received on or before January 19, 2021. Comments on both the proposed rulemaking and the collection of information received on or before December 21, 2020 will be considered by DHS and USCIS. Only comments on the collection of information received between December 21, 2020 and January 19, 2021 will be considered by DHS and USCIS. *Note:* Comments received after December 21, 2020 on the proposed rulemaking rather than those specific to the collection of information will not be considered by DHS and USCIS.

ADDRESSES: You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. USCIS–2019–0024, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to COVID–19, USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Michael J. McDermott, Chief, Security and Public Safety Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, MD, Camp Springs 20746; Telephone (240) 721–3000.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

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Table of Abbreviations

AEDPA—Anti-Terrorism and Effective Death Penalty Act
ASC—Application Support Center
BAHA—Buy American and Hire American (Executive Order 13788)
BIA—Board of Immigration Appeals
BLS—Bureau of Labor Statistics
CAT—Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFR—Code of Federal Regulations
DCAT—Deferral of Removal Under the Regulations Implementing the Convention Against Torture
DHS—U.S. Department of Homeland Security
DOJ—U.S. Department of Justice
DOL—U.S. Department of Labor
DOS—Department of State
E.O.—Executive Order
EAD—Employment Authorization Document
EOIR—Executive Office for Immigration Review
E-Verify—Employment Eligibility Verification System
FARRA—Foreign Affairs Reform and Restructuring Act of 1988
FBI—The Federal Bureau of Investigation
Form I–9—Employment Eligibility Verification
Form I–765—Application for Employment Authorization

Form I–765WS—Form I–765, Employment Authorization Worksheet
FY—Fiscal Year
ICE—U.S. Immigration and Customs Enforcement
IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IJ—Immigration Judge
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
LCA—Labor Condition Application
LPR—Lawful Permanent Resident
MOU–Memorandum of Understanding
NAICS—North American Industry Classification System
NEPA—National Environmental Policy Act
OMB—Office of Management and Budget
PRA—Paperwork Reduction Act
RFA—Regulatory Flexibility Act
RFE—Request for Evidence
Secretary—Secretary of Homeland Security
SSA—Social Security Administration
TLC—Temporary Labor Certification
TNC—Tentative Non-Confirmation
U.N.—United Nations
U.S.C.—United States Code
USCIS—U.S. Citizenship and Immigration Services

I. Public Participation

All interested parties are invited to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, legal, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to U.S. Citizenship and Immigration Services (USCIS) in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

Instructions: If you submit a comment, you must include the agency name and the DHS Docket No. USCIS–2019–0024 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice that is available via the link in the footer of *http://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS–2019–0024. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

DHS seeks to align its discretionary authority to grant employment authorization to aliens ordered removed and temporarily released on orders of supervision with its current immigration enforcement priorities, which include the prompt removal of aliens who have received a final order of removal from the United States,[1] and the Administration's efforts to strengthen protections for U.S. workers. DHS is proposing to modify its regulations in the following areas:

• *Employment authorization eligibility for aliens temporarily released on orders of supervision:* DHS proposes to eliminate eligibility for discretionary employment authorization under 8 CFR 274a.12(c)(18) for aliens who have final orders of removal and are temporarily released from custody on orders of supervision pending removal *except* for aliens for whom DHS has determined that their removal is impracticable because all countries from whom DHS requested travel documents have affirmatively declined to issue such documents. DHS intends to require such aliens to establish economic necessity for employment during the period of the order of supervision.[2] Consistent with 8 CFR 274a.12(e), USCIS would use the Federal Poverty Guidelines under Title 45 of the U.S. Code to determine whether there is an economic necessity for employment authorization. Additionally, DHS proposes to expand the current nonexhaustive list of factors it considers when adjudicating an application for employment authorization for aliens temporarily released on an order of supervision to include: (1) The alien's compliance with the order of supervision conditions and (2) the alien's criminal history, including but not limited to any criminal arrests, charges, or convictions subsequent to the alien's release from custody on an order of supervision.

• *Additional requirements for renewal employment authorization for aliens temporarily released on orders of supervision:* DHS further proposes to allow aliens temporarily released on an order of supervision who apply for a renewal of their employment authorization to have it renewed only if the alien: (1) Continues to meet the exception noted above, (2) demonstrates economic necessity, (3) establishes that he or she warrants a favorable exercise of discretion, *and* (4) establishes that he or she is employed by a U.S. employer who is a participant in good standing in DHS's employment eligibility verification system (E-Verify) by providing the U.S. employer's name as listed in E-Verify and the employer's E-Verify Company Identification Number. An alien who fails to establish that he or she is employed by an E-Verify employer would not be eligible for a renewal EAD. DHS will consider an E-Verify employer to be a participant in good standing if, at the time of filing of the application for renewal of employment authorization, the employer: (1) Has enrolled in E-Verify with respect to all hiring sites in the United States that employ an alien temporarily released on an order of supervision who has received employment authorization under this rule; (2) is in compliance with all requirements of E-Verify, including but not limited to verifying the employment eligibility of newly hired employees at such hiring sites; and (3) continues to be a participant in good standing in E-Verify at any time during the employment of the alien temporarily released on an order of supervision who has received employment authorization pursuant to this rule.

• *Limit the Employment Authorization Document (EAD) validity period for aliens temporarily released on orders of supervision:* DHS proposes to limit the validity period for an EAD issued under 8 CFR 274a.12(c)(18) (''(c)(18) EADs'') to one year, regardless of whether the alien seeks an initial or renewal EAD.

• *Biometrics submission by aliens temporarily released on orders of supervision:* DHS proposes to require that biometrics be submitted and a biometric services fee be paid for by aliens seeking discretionary employment authorization under 8 CFR 274a.12(c)(18) (''(c)(18) EAD applicants''). Currently, all (c)(18) EAD

[1] This proposed rule does not affect DHS's authority to release aliens from detention or to remove aliens from the United States pursuant to sections 235, 236, 238, 240, and 241 of the INA, 8 U.S.C. 1225, 1226, 1228, 1229a, and 1231.

[2] Currently, economic necessity is only a discretionary factor. *See* 8 CFR 274a.12(c)(18)(i).

applicants submit biometrics to USCIS [3] to, among other things, assist in identity verification and facilitate (c)(18) EAD card production. This rule proposes to codify that requirement and require that they pay a biometric services fee of $30. *See* proposed 8 CFR 106.2(a)(32)(i)(C).[4] In addition, DHS proposes to use biometrics submitted by (c)(18) EAD applicants to screen for criminal history. *See* proposed 8 CFR 241.4(j)(3).

• *Provide aliens granted deferral of removal under the regulations implementing the CAT employment authorization based on the grant of deferral:* Finally, DHS proposes to amend its regulations at 8 CFR 274a.12(a)(10) to include aliens who have been granted deferral of removal based on the regulations implementing the United States' obligations under the CAT [5] in the category of aliens who are not required to apply for employment authorization to work, but will be recognized as employment authorized based on the grant of deferral of removal.[6] Currently, aliens who are granted withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or CAT under 8 CFR 208.16 and 1208.16, are employment authorized based solely on the grant of withholding. They are not required to apply for employment authorization but may obtain an EAD if they wish to have a document reflecting that they are employment authorized by virtue of the grant of withholding. However, DHS's regulations do not clearly indicate that aliens who are granted CAT deferral of removal [7] fall within the category of aliens who should be employment authorized based on the grant of deferral rather than having to apply for employment authorization like other aliens under 8 CFR 274a.12(c). DHS proposes to amend the regulations to make this clarification.

• *Specify the effective date:* DHS proposes to apply changes made by this rule only to initial and renewal applications filed on or after the effective date of the final rule. DHS proposes to allow aliens temporarily released on an order of supervision who are already employment authorized prior to the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless their employment authorization is terminated or revoked earlier than the expiration date. USCIS would continue processing any pending application for a replacement EAD received prior to the effective date and would continue to receive new applications for replacement EADs because those adjudications are not considered a new grant of employment authorization but a replacement of an EAD based on a previously authorized period of employment prior to the effective date of the final rule.

A. Major Provisions of the Regulatory Action

DHS proposes the following regulatory amendments:

• *8 CFR 106.2, Fees.* DHS proposes to amend 8 CFR 106.2(a)(32)(i) to require that aliens who are subject to a final order of removal and temporarily released on an order of supervision pay a $30 biometric services fee in addition to the filing fee for an application for employment authorization under 8 CFR 274a.12(c)(18).

• *Several provisions in subpart A of part 241.* DHS is amending 8 CFR 241.4, 241.5, and 241.13 to remove obsolete references to former Immigration and Naturalization Service (INS) agency titles and replace them with the appropriate DHS component names. The amendments also update the section to correctly reflect the DHS components with authority over orders of supervision and issuance of EADs. The amendments to 8 CFR 241.4 would also codify requirements for aliens who are applying for initial and renewal employment authorization under the (c)(18) category to submit biometrics at an ASC and pay the associated biometric services fee.

• *8 CFR 274a.12, Classes of aliens authorized to accept employment.* The amendments to this section clarify that 8 CFR 274a.12(a)(10) covers aliens granted withholding of removal either based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or on the regulations implementing U.S. obligations under the CAT. The amendments to this section also add aliens granted deferral of removal based on the regulations implementing CAT to the current regulation at 8 CFR 274a.12(a)(10) as aliens who are employment authorized based solely on the grant of withholding or deferral and are not required to apply for employment authorization. This section also revises 8 CFR 274a.12(c)(18) to reflect that eligibility for employment authorization based on a final order of removal and temporary release from custody on an order of supervision is limited to aliens whose removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents and who establish economic necessity.

• *8 CFR 274a.13, Applications for employment authorization.* This section adds a new paragraph specifically addressing the filing procedures and evidentiary requirements for aliens temporarily released from custody on an order of supervision who are seeking an initial EAD or renewing an EAD, including the new requirements to: (1) Submit the Form I–765WS, Employment Authorization Worksheet (or successor form), (2) establish the alien's economic necessity for employment, (3) provide the E-Verify Company Identification Number for the alien's U.S. employer that participates in E-Verify and the employer's name as listed in E-Verify on the application for employment authorization (renewal applicants only), and (4) submit a copy of their current U.S. Immigration and Customs Enforcement (ICE) Form I–220B, Order of Supervision (or successor form), with a copy of the complete Personal Report Record. The amendments also provide that the validity period for employment authorization under 8 CFR 274a.12(c)(18) will not exceed increments of one year.

B. Summary of Costs, Benefits, and Transfer Payments

This proposed rule is estimated to result in a reduction in the number of aliens on orders of supervision who are eligible for employment authorization, which could result in lost earnings for those no longer eligible. This loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits or third-party organizations to provide for the alien and any dependents. In addition, DHS estimates increased filing burdens associated with the proposed rule for those who remain eligible for employment authorization. Employers

[3] At present, biometrics collection generally refers to the collection of fingerprints, photographs, and signatures. *See https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment* (describing biometrics as including fingerprints, photographs, and digital signature) (last visited May 15, 2020).

[4] *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR 46788 (Aug. 3, 2020) (Fee Rule). The Fee Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this proposed rule as a result of the litigation.

[5] *See* 8 CFR 208.16–208.18 and 1208.16–1208.18.

[6] If the alien wants a document to reflect that he or she is employment authorized pursuant to the grant of deferral, the alien will need to apply for an EAD with USCIS.

[7] CAT deferral of removal is a form of protection from removal similar to withholding under the regulations implementing CAT in that an alien cannot be removed to the country with respect to which a deferral order is in place.

that currently hire workers who would no longer be eligible to renew under this rule could experience new costs due to employee turnover and the need to comply with the proposed E-Verify requirement. Finally, the proposed rule may result in a loss of tax revenue.

Under the proposed rule, DHS anticipates there would be six types of impacts that DHS can estimate and quantify: (1) Potential lost earnings for alien workers temporarily released on orders of supervision who may no longer be eligible for employment authorization; (2) increased time burden for applicants to submit forms; (3) added time and costs for applicants to submit biometrics; (4) labor turnover costs that employers of alien workers with orders of supervision could incur when their employees' EADs expire and are not renewed; (5) costs to employers to enroll in and maintain an E-Verify account as a participant in good standing to retain workers with orders of supervision who are applying for renewal EADs; and (6) potential employment tax losses to the Federal Government.

DHS estimates that some aliens with final removal orders and temporarily released on orders of supervision would be ineligible for discretionary EADs due to this proposed rule. However, DHS cannot estimate with precision what the future eligible population would be because of data constraints and, therefore, relies on a range with an upper and lower bound. The estimated costs of this proposed rule would range from a minimum of about $94,868, (annualized 7%) associated with biometrics and added burdens for relevant filing forms to a maximum of $1,496,016,941 (annualized 7%) should no replacement labor be found for aliens on orders of supervision who would be ineligible for employment authorization under this rule.[8] The ten-year undiscounted costs would range from $940,239 to $14,722,941,163. DHS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

Table 1 provides a summary of the proposed regulatory changes and the estimated impacts of the proposed rule.

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[8] DHS estimates some of the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect understated costs associated with biometrics fees and overstated benefits associated with filing Form I–765.

Table 1: Summary of Impacts and Estimated Cost and Benefits of the Proposed Rule

Provisions	Regulatory Changes	Estimated Impact of Regulatory Change
Amending 8 CFR 241.5	DHS proposes to update the current language of the regulation to reflect that the Secretary of Homeland Security (Secretary) or the Secretary's designee can issue orders of supervision.	This change would give DHS the flexibility to delegate the authorities under the provision without requiring additional rulemaking in the future.
Amending 8 CFR 241.4(j)(3), 8 CFR 241.5(c) and 8 CFR 241.13(h)(1)	DHS proposes to remove language that authorized designated ICE officers to grant employment authorization for aliens temporarily released on orders of supervision. ICE no longer grants employment authorization and USCIS has primary jurisdiction over EAD issuance.	These changes propose to codify current policy and reduce confusion for aliens temporarily released on orders of supervision who apply for employment authorization.
Amending 8 CFR 241.4(j)(3) and 8 CFR 106.2(a)(32)(i)(C)	DHS proposes to add language to codify biometrics collection for (c)(18) applicants. Aliens on orders of supervision applying for initial and renewal (c)(18) employment authorization must submit biometrics at a scheduled biometrics services appointment and pay a $30 fee.	This change would require aliens temporarily released on orders of supervision submit their biometrics to USCIS at an ASC. Quantified Impacts Costs for aliens temporarily released on orders of supervision would range from $83,148 to $552,741 with a primary estimate of $317,945 (annualized 7%). Qualitative Benefits Enables DHS to vet an applicant's biometrics against government databases to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate secure card production.
Amending 8 CFR 274a.12(a)(10)	DHS proposes to revise the (a)(10) employment authorization category, which currently covers those granted withholding of removal under section 241 of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT under 8 CFR 208.16 or 1208.16, to include aliens who are granted CAT deferral of removal as employment authorized based solely on the grant of deferral. Aliens granted withholding of removal under INA sec. 241(b)(3) and the regulations implementing CAT currently are employment authorized by virtue of the grant of withholding.	This change proposes to revise current policy to reduce confusion for aliens who are granted CAT deferral and would ensure consistency in adjudication for this population. Quantified Benefits Aliens granted deferral of removal who do not apply for an EAD card would save time and money ranging from $0 to $105,690 annually.
Amending 8 CFR 274a.12(c)(18)	DHS proposes to: • Eliminate eligibility for employment authorization for aliens with final orders of removal who are released from custody on orders of supervision except for those aliens for whom DHS determines their removal is impracticable because all	Quantified Costs and Transfers • Lost earnings for aliens temporarily released on orders of supervision would range from $614,037,170 to $1,495,358,741 with a primary estimate of $1,054,697,955 (annualized 7%).

	countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document. • Add new discretionary factors USCIS will consider when deciding whether to grant employment authorization including whether: 1. the alien complies with the conditions for release specified in the order of supervision, and 2. the alien has any criminal history, including but not limited to criminal activities subsequent to release from detention; • Add a requirement that the alien be employed with an E-Verify employer in good standing, if the alien is seeking renewal of an EAD issued based on an order of supervision; and • Add a requirement that the alien establish economic necessity for employment when filing an initial and renewal EAD application.	• DHS acknowledges that businesses that have hired (c)(18) workers who are no longer eligible for work authorization due to this proposed rule would incur labor turnover costs earlier than without this rule. • If employers are unable to find replacement workers, reduction in federal employment taxes paid would range from $93,947,687 to $228,789,887, with a primary estimate of $161,368,787 (annualized 7%). • Employer costs related to enrolling in E-Verify and maintaining an account would cost $113.65 for new E-Verify participants in the first year and $53.71 in subsequent years for training with an additional cost of $6.14 per query for every company employee – both citizen and non-citizen. Employer costs related to labor turnover for employers who are not enrolled and opt not to enroll in E-Verify would cost between $7,168 and $15,621 per worker, depending on the wage of their (c)(18) alien worker. DHS emphasizes that the costs of the rule in terms of lost labor earnings will potentially depend on the extent of surplus labor in the labor market. In the current environment with COVID-19-related layoffs and unemployment, there is the potential that the costs of the rule will be lower than they would otherwise have been. <u>Qualitative Costs and Transfers</u> • Those who are currently employment authorized, but who would no longer qualify for employment authorization under the proposed rule could experience other impacts possibly involving personal and family-related hardships and disruptions to the individual, U.S. citizen, or LPR spouses and/or children dependent on the income currently earned by the affected alien. • Additional unquantified Federal, state, and local income tax revenue also could be lost. A loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits, or third-party

		organizations to provide for the alien and any dependents. Qualitative Benefits • The restriction on income opportunities may increase the incentives for aliens with final orders of removal to depart the United States, which could save government resources expended on monitoring and tracking aliens temporarily released on orders of supervision.
8 CFR 274a.13(a)(3)	DHS proposes to: • Add requirements for aliens on orders of supervision seeking initial employment authorization and renewals to include: 1. A copy of the decision by the Immigration Judge (IJ) or DHS of the final order of removal, 2. Form I-765WS to show economic necessity, and 3. A copy of their current Order of Supervision (Form I-220B) with a copy of the complete Personal Report Record reflecting the alien's compliance with the conditions for release from the date of release. • Add a requirement for aliens on orders of supervision seeking renewal of their employment authorization to also submit their U.S. employer's E-Verify Company Identification number and employer's name as listed in E-Verify.	Quantified Costs • Costs to applicants who submit Forms I-765 and I-765WS, would range from $11,721 to $105,459 with a primary estimate of $58,590 (annualized 7%). Qualitative Benefits • Enables DHS to determine if there is an economic necessity for employment authorization and ensures that aliens on orders of supervision who renew their EAD are having their employment authorization verified by their employer.

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The impacts of reducing the number of aliens temporarily released on orders of supervision that are eligible for EADs include both potential distributional impacts (transfers) and costs. USCIS uses the lost compensation to aliens temporarily released on orders of supervision that are no longer eligible for EADs as a measure of the impact of this change—either as distributional impacts (transfers) from these aliens to others or as a proxy for businesses' cost for lost productivity. If all companies are able to easily find reasonable labor substitutes for the positions the aliens temporarily released on orders of supervision would otherwise have filled, DHS estimates a maximum of $1,495,358,741 (annualized at 7%) would be transferred from these workers to others in the labor force (or induced back into the labor force). Under this scenario, there would be no federal employment tax losses. Conversely, if companies are unable to find reasonable labor substitutes for the position the aliens temporarily released on orders of supervision would have filled then a maximum of $1,495,358,741 (annualized 7%) is the estimated monetized cost of this provision, and $0 is the estimated monetized transfers from these aliens to other workers. In addition, under this scenario where jobs would go unfilled, there would be a loss of employment taxes to the Federal Government. USCIS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect employment eligibility for aliens temporarily released on orders of supervision. There are other costs of the rule, including E-Verify, biometrics, labor turnover, and additional form burdens. These costs exist under both scenarios described above, and thus $94,868 is the minimum cost of the rule (annualized 7%).

DHS is aware that the outbreak of COVID–19 will likely impact these estimates in the short run.[9] As discussed above, the analysis presents a range of impacts, depending on if companies are able to find replacement labor for the jobs alien workers temporarily released on orders of supervision would have filled. In September 2020, the unemployment rate

[9] On March 13, 2020, the President declared that the COVID–19 outbreak in the United States constitutes a national emergency. *See* 'Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak,' available at *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/*.

was 7.9 percent.[10] This is an improvement on April's 14.7 percent which marked the highest unemployment rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948).[11] By comparison, the unemployment rate for September 2019 was 3.5%.[12] DHS assumes that during the COVID–19 pandemic, with additional available labor nationally, companies are more likely to find replacement labor for the job the alien on an order of supervision would have filled.[13] Thus, in the short-run during the pandemic and the ensuing economic recovery, the lost compensation to EAD applicants as a result of this rule is likely to mean that the costs of the rule will be lower than they would otherwise have been. DHS notes that although the pandemic is widespread, the severity of its impacts varies by locality. Consequently, it is not clear to what extent the distribution of alien workers temporarily released on orders of supervision overlaps with areas of the country that will be more or less impacted by the COVID–19 pandemic. Accordingly, DHS cannot estimate with confidence to what extent the impacts will be transfers instead of costs.

DHS's assumption that all applicants with an EAD are able to obtain employment (discussed in further detail later in the analysis), also does not reflect impacts from the COVID–19 pandemic. It is not clear what level of reductions the pandemic will have on the ability of EAD holders to find jobs (as jobs are less available), or how DHS would estimate such an impact with any precision given available data. Consequently, the ranges projected in this analysis regarding lost compensation are expected to be an overestimate, especially in the short-run. The range of impacts described by the scenarios above, plus the consideration of the other costs, are summarized in Table 2 below.

[10] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_10022020.pdf.*

[11] In April 2020, the unemployment rate increased by 10.3 percentage points to 14.7 percent. Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_05082020.pdf.*

[12] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2019, Employment Situation Summary Table A. Household data, seasonally adjusted. Available at: *https://www.bls.gov/news.release/archives/empsit_10042019.pdf.*

[13] The Congressional Budget Office estimates the unemployment rate is expected to average close to 14 percent during the second quarter, See: CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021 *https://www.cbo.gov/publication/56335* April 24, 2020.

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Table 2: Summary of Range of Monetized Annualized Impacts						
Table 2(A): Annualized Impacts at 7%						
Category	Description	Scenario: No Replacement Labor found for Aliens Temporarily released on Orders of Supervision		Scenario: All Aliens Temporarily released on Orders of Supervision Replaced with Other Workers		Primary
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$614,037,170	$1,495,358,741	$747,679,371
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,947,687	$228,789,887	$0	$0	$114,394,944
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics)	$83,148	$552,741	$83,148	$552,741	$317,945
Forms	Opportunity cost of time (provisions: additional time for I-765 + Form I-765WS)	$11,721	$105,459	$11,721	$105,459	$58,590
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$614,037,170	$1,495,358,741	$0	$0	$747,679,371
Total Costs		$614,132,038	$1,496,016,941	$94,868	$658,200	$748,055,905

Table 2(B): Annualized Impacts at 3%						
Category	**Description**	**Scenario: No Replacement Labor found for Aliens Temporarily released on Orders of Supervision**		**Scenario: All Aliens Temporarily released on Orders of Supervision Replaced with Other Workers**		**Primary**
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$608,302,571	$1,482,047,682	$741,023,841
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,070,293	$226,753,295	$0	$0	$113,376,648
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics)	$82,732	$549,871	$82,732	$549,871	$316,302
Forms	Opportunity cost of time (provisions: additional time for I-765 + Form I-765WS)	$11,662	$104,912	$11,662	$104,912	$58,287
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$608,302,571	$1,482,047,682	$0	$0	$741,023,841
Total Costs		$608,396,966	$1,482,702,465	$94,395	$654,783	$741,398,430

In addition, Table 3 presents the prepared accounting statement, as required by the Office of Management and Budget (OMB) Circular A–4, showing the costs associated with this proposed regulation. Note that under costs, the primary estimates provided in the accounting statement are calculated based on the minimum cost from the scenario that all aliens temporarily released on orders of supervision are replaced with other workers and the maximum cost from the scenario that no aliens temporarily released on orders of supervision are replaced with other

workers (scenario presented in Tables 2(A) and (B)).

Table 3. OMB A-4 Accounting Statement ($, 2019)
Period of analysis: 2020 – 2029

Category		Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS					
Monetized Benefits		This proposed rule would produce some benefits for aliens who are granted CAT deferral of removal, as this population would no longer need to submit Form I-765 in order to become employment authorized. DHS estimates the total benefits for this population would range from $0 to $105,690 annually.			RIA
Annualized quantified, but un-monetized, benefits		N/A	N/A	N/A	RIA
Unquantified Benefits		This proposed rule may allow U.S. workers to have a better chance of obtaining jobs that some (c)(18) alien workers currently hold. Additionally, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could save government resources expended on enforcing removal orders for such aliens.			RIA
COSTS					
Annualized monetized costs (discount rate in parenthesis)	(7%)	$748,055,905	$94,868	$1,496,016,941	RIA
	(3%)	$741,398,430	$94,395	$1,482,702,465	RIA
Annualized quantified, but un-monetized, costs		N/A	N/A	N/A	RIA
Qualitative (unquantified) costs		In cases where employers cannot find reasonable substitutes for the labor the aliens on orders of supervision would have provided, affected employers could also lose profits from lost productivity. In all cases, employers would incur opportunity costs by having to choose the next best alternative to immediately filling the job the alien who was temporarily released on an order of supervision would have filled. Employers may incur additional opportunity costs such as search costs and costs to enroll and participate in the E-Verify program should they choose to retain their eligible (c)(18) workers.			RIA
TRANSFERS					
Annualized monetized transfers: compensation	(7%)	$747,679,371	$0	$1,495,358,741	RIA
	(3%)	$741,023,841	$0	$1,482,047,682	

From whom to whom?	From employment authorized workers with orders of supervision to other available workers.				RIA
Annualized monetized transfers: taxes	(7%)	$114,394,944	$0	$228,789,887	RIA
	(3%)	$113,376,648	$0	$226,753,295	
From whom to whom?	A reduction in federal employment taxes from employers and employees to the Federal Government. Additional unquantified Federal, state, and local income tax revenue also could be lost.				
Category	***Effects***				***Source Citation (RIA, preamble, etc.)***
Effects on State, local, and/or tribal governments	DHS cannot determine the number of (c)(18) alien workers who could be removed from the labor force due to the proposed rule. Federal, state, and local income tax revenue also may be reduced. For the (c)(18) alien population that will not be able to renew their EAD or obtain an initial EAD, there would likely be an impact in terms of lost income which could pose economic hardships. Members of this population may need to rely on their support networks for financial and social assistance, which could involve, but which may not be limited to, family members and friends, religious and charitable organizations, private non-profit providers, and non-governmental organizations (NGOs).				RIA
Effects on small businesses	This proposed rule could result in indirect costs on entities, some of which could be small entities. DHS acknowledges that changing eligibility criteria for aliens on orders of supervision to obtain employment authorization could result in entities that have hired such workers incurring labor turnover costs. Entities may also incur costs related to using E-Verify.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

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The benefits potentially realized by the proposed rule are both qualitative and quantitative. Under this proposed rule, a U.S. worker may have a better chance of obtaining jobs that some (c)(18) alien workers currently hold, as the proposal would reduce employment authorization eligibility for this population of aliens who have been ordered removed from the country. Second, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could reduce the amount of government resources expended on enforcing removal orders for such aliens as well as monitoring and tracking aliens temporarily released on orders of supervision. Third, DHS clarifies that aliens granted CAT deferral of removal would no longer need to submit Form I–765 in order to become employment authorized after the effective date of the final rule. DHS estimates the total benefits for this population would range from $0 to $105,690 annually. Additional savings could also be accrued in the form of opportunity costs of time if applicants would have spent time submitting evidence under any of the (c)(18) considerations.

III. Purpose of the Proposed Rule

It is the Administration's policy to ensure the prompt removal of aliens who have been issued a final order of removal. In 2017, President Trump issued Executive Order (E.O.) 13768, ''Enhancing Public Safety in the Interior of the United States,'' 82 FR 8799 (Jan. 25, 2017). This E.O. noted that the enforcement of our immigration laws is critically important to the national security and public safety of the United States. The continued presence in the United States of aliens with final orders of removal, many of whom are criminals who have served time in our Federal, State, and local jails and who have been determined in immigration proceedings to be ineligible to remain in the country, is contrary to the national interest. For this reason, the E.O. directed the Secretary of Homeland Security (the Secretary) to prioritize the removal of aliens from the United States who have final orders of removal and to publish new regulations revising or rescinding any regulations inconsistent with this E.O.

It is also the policy of the Administration to administer our immigration laws to create higher wages and employment rates for workers in the United States. *See* Exec. Order No. 13788, ''Buy American and Hire American'' (BAHA), 82 FR 18837 (Apr. 18, 2017). E.O. 13788 directed the Secretary to propose new rules to supersede or revise current rules to protect the interests of U.S. workers in the administration of the immigration system. Given the significant disruptions COVID–19 has caused to the U.S. economy and labor market, the President also issued Proclamation 10052, ''Suspending Entry of Immigrants and Nonimmigrants Who Present a Risk to the U.S. Labor Market During the Economic Recovery following the 2019 Novel Coronavirus Outbreak'' 85 FR 38263 (June 22, 2020). Proclamation 10052, among other things, requires the Secretary to take appropriate steps ''to prevent certain aliens who have final orders of removal; . . . from obtaining eligibility to work in the United States.'' 85 FR at 38266.

Obtaining employment authorization in the United States has long been, and continues to be, a significant incentive for aliens to migrate to (legally and illegally) and remain in the United States. As such, employment authorization must be carefully regulated to maintain the integrity of the U.S. immigration system. Many aliens ordered removed have been released from DHS custody on OSUP because some countries unreasonably delay issuance of travel documents or due to lack of good faith efforts by the alien. In addition, because of the Supreme Court's decision in *Zadvydas,* DHS must release aliens within a presumptively reasonable 6-month period, which in many instances is not sufficient time for DHS to obtain the travel documents needed to remove the alien from the United States. Further, many of these aliens are criminals whose continued presence in the United States is not in the national interest. DHS has identified that providing an ''open market'' employment authorization to aliens with final removal orders exacerbates the challenges in effectuating removal by incentivizing such aliens to remain in the United States and possibly compete for jobs against U.S. workers instead of complying with their removal orders, working with the country of removal to obtain travel documents in a timely manner, and departing the United States.

Through this proposed rule, DHS seeks to promote the integrity of the immigration system by eliminating discretionary employment authorization for those who have a final order of removal and encouraging their efforts to obtain travel documents in timely manner and depart the United States. The proposed rule would also help strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers, especially as the U.S. economy and the labor market recover from the significant disruptions caused by the COVID–19 pandemic.

A. Enforcement Priorities

Enforcement of the nation's immigration laws is essential to the integrity of the immigration system. It ensures that only those who are legally qualified and lawfully in the United States are allowed to avail themselves of any benefits under the INA. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Public Law 104–132, title IV; 110 Stat. 1214 (Apr. 24, 1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, div. C; 110 Stat. 3009 (Sept. 28, 1996). AEDPA and IIRIRA made sweeping changes to U.S. immigration laws focusing on immigration enforcement, detention of aliens, and bars to certain types of relief or protection from removal and grants of legal status. IIRIRA expanded the Attorney General's (now Secretary's) authority [14] to detain aliens, including requiring mandatory detention of aliens convicted of aggravated felony offenses and the detention of aliens pending removal from the United States. It also created an expedited removal process for aliens seeking admission into the United States who do not have proper documents or who make material misrepresentations, and, as designated by the Secretary, aliens who have not been inspected and admitted or paroled into the United States and cannot prove they have been in the United States for at least two years.[15] By passing AEDPA and IIRIRA, Congress made clear that enforcement of the immigration laws is a priority and is critical for purposes of national security, public safety, and the integrity of the U.S. immigration system.

Unfortunately, DHS is not always able to promptly remove aliens with final orders of removal. Sections 241(a)(1) and (2) of the INA, 8 U.S.C. 1231(a)(1), (2), provide for a 90-day removal period in which the Secretary is authorized to detain the alien and within which the Secretary shall remove the alien. However, the removal of aliens from the United States and repatriation [16] to their home countries can be a difficult and time-consuming process that can be further complicated and impeded by a lack of sufficient agency resources or legal constraints. Delays in removal also can occur because some countries unreasonably delay the issuance of travel documents, or unreasonably delay accepting the repatriation of their nationals.[17] Based on data on removals executed by DHS, it may take DHS 6 months or longer to obtain travel documents and remove an alien from the United States. For example, in Fiscal Year (FY) 2017, the average time for DHS to remove an alien who had a final order and was temporarily released on an order of supervision was 321.39 days.[18] However, in FY 2018, the number of days it took DHS to remove an alien who had a final order and was temporarily released on an order of supervision decreased to just over 6 months (average time to remove was 187.19 days).[19]

While DHS has authority to detain aliens with final orders of removal during the removal period, if DHS cannot effectuate an alien's removal in a presumptively reasonable 6-month removal period, DHS must generally release such aliens from detention. *See generally Zadvydas* v. *Davis,* 533 U.S. 678 (2001).[20] Due to the U.S. Supreme Court's decision in *Zadvydas,* DHS has had to release thousands of aliens from detention as illustrated in Table 4, including aliens convicted of aggravated felonies and other serious crimes.

TABLE 4—ALIENS RELEASED FROM ICE CUSTODY ON ORDER OF SUPERVISION *

Category	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Convicted Criminals [21]	3,692	3,179	2,815	4,233	5,269
Pending Criminal Charges	N/A	N/A	N/A	431	993
Other Immigration Violator	3,080	4,381	3,502	7,748	7,504
Total	6,772	7,560	6,317	12,412	13,766

Note: In FY 2018, ICE redefined categorization of immigration violator's criminality. Therefore, the categories changed from ''criminal'' and ''noncriminal'' to ''convicted criminal alien,'' ''pending criminal charges,'' and ''other immigration violators.''

* Data from ICE Enforcement and Removal Operations, Law Enforcement Systems and Analysis (ERO, LESA) (FY 2015 to FY 2019).

[14] On March 1, 2003, the functions of the former Immigration and Naturalization Service related to border security were transferred to the Secretary. The Homeland Security Act, Public Law 107–296, 441(c) (6 U.S.C. 251(2)).

[15] *See, e.g.,* H.R. Conf. Rep. 104–828, title III, subtitle A (1996).

[16] Repatriation includes repatriation of aliens to the country of nationality or citizenship as well as to the country of last habitual residence.

[17] *See* DHS Office of Inspector General Report, ''ICE Faces Barriers in Timely Repatriation of Detained Aliens,'' OIG–19–28 (Mar. 11, 2019).

[18] *Id.*

[19] *Id.*

[20] *See infra* Section IV, paragraph B for additional discussion of the *Zadvydas* decision.

When aliens with final removal orders are released from DHS custody, they are released on orders of supervision. These orders of supervision contain conditions for release, such as requiring aliens to assist with efforts to procure travel documents and present themselves for removal in the event removal can be arranged. Once temporarily released on an order of supervision, an alien may apply for employment authorization under 8 CFR 274a.12(c)(18). Each year, USCIS approves thousands of initial requests for employment authorization and renewals of such authorization for aliens released from DHS custody on orders of supervision as shown in Table 5.

TABLE 5—ALIENS TEMPORARILY RELEASED ON ORDERS OF SUPERVISION GRANTED EMPLOYMENT AUTHORIZATION *

Category	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Initials	8,748	7,499	5,273	3,433	4,071
Renewals	21,236	24,464	21,274	20,151	21,350

* Data obtained from the USCIS Office of Performance and Quality (OPQ).

As noted above, E.O. 13768 made the prompt removal of aliens ordered removed a priority for the Administration and directed the Secretary to publish new regulations revising or rescinding any regulations that are inconsistent with the E.O. As a result of its regulatory review, DHS examined the current regulation at 8 CFR 274a.12(c)(18) governing employment eligibility for aliens with a final removal order and temporarily released on orders of supervision. DHS determined that this regulation is inconsistent with the Administration's enforcement priorities because it allows virtually any alien temporarily released on an order of supervision to qualify for employment authorization and, as such, incentivizes such aliens to remain in the United States instead of complying with their removal order and departing the United States.

The current regulation simply restates the language of INA section 241(a)(7), 8 U.S.C. 1231(a)(7) and does not clearly place the burden on the alien to establish that he or she warrants a favorable exercise of discretion to obtain employment authorization. It also does not require an alien who has a final order of removal and has been temporarily released on an order of supervision to clearly establish on what basis he or she is seeking employment authorization, either under INA section 241(a)(7)(A), because every country designated by the alien or under that section has refused to receive the alien, or under INA section 241(a)(7)(B), because removal is impracticable or against the public interest. The burden is on the alien, not the U.S. Government, to establish that he or she is eligible for a discretionary benefit. Further, the current regulation does not put the public on notice of when DHS will deem the removal of an alien to be impracticable or what DHS has determined to be in the public interest for the purpose of granting employment authorization to aliens with final orders of removal.

As previously stated, the ability to obtain employment authorization provides aliens a significant motivation to remain in the United States. DHS has determined that providing employment authorization to aliens who have final orders of removal, except in very limited circumstances, undermines the removal scheme created by Congress and incentivizes such aliens to remain in the United States instead of complying with their removal orders, working with the country of removal to obtain travel documents in a timely manner, and departing the United States. The revisions under this proposed rule will address these concerns and align the issuance of employment authorization with the Administration's enforcement priorities.

B. Strengthening Protections for U.S. Workers

DHS also wants to ensure that any discretionary grant of employment authorization to aliens is consistent with the Administration's efforts to strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers.

As noted above, E.O. 13788 directed DHS to propose new rules to supersede or revise current rules to protect the interests of U.S. workers [22] in the administration of the immigration system. More recently, the President issued Proclamation 10052, which describes that significant disruptions COVID–19 has caused to the U.S. economy and the detrimental impact of foreign workers on the U.S. labor market during the high domestic unemployment. To address this concern, Proclamation 10052, in addition to suspending the entry of certain immigrants and nonimmigrants into the United States, requires the Secretary to take appropriate steps to prevent certain aliens who have final orders of removal from obtaining eligibility to work in the United States.

This proposed rule aligns with the Administration's goals of protecting U.S. workers in the labor market, particularly as the economy recovers from the extraordinary disruptions resulting from the COVID–19 outbreak. The U.S. unemployment rose to a record high of 14.7 percent in April 2020 [23] but declined to 7.9 percent in September.[24] However, it remains above 3.5%, which was unemployment rate for the same month last year (*i.e.,* September 2019).[25] DHS asserts it is likely that some aliens with final orders of removal and temporarily released on an order of supervision may compete for, and potentially occupy, jobs that U.S. workers might have applied for and been offered, particularly during this period of high unemployment. Aliens temporarily released on an order of supervision who apply for employment authorization under the current regulatory scheme receive an ''open market'' EAD, meaning they may accept employment in any field and may be hired by any U.S. employer without the U.S. employer having to demonstrate that there were no available U.S.

[21] ''Convicted criminal'' means an immigration violator with a criminal conviction entered into ICE's systems of record at the time of the enforcement action.

[22] Section 1(e) of E.O. 13788 refers to the definition for U.S. worker as either an employee who is a citizen or national of the United States; or is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized to be employed by the INA or the Attorney General. INA 212(n)(4)(E), 8 U.S.C. 1182(n)(4)(E).

[23] Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_05082020.pdf.*

[24] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2020. Available at: *https://www.bls.gov/news.release/pdf/empsit.pdf.*

[25] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2019, Available at: *https://www.bls.gov/news.release/archives/empsit_10042019.pdf.*

workers or to guarantee that it will pay the prevailing wage or maintain certain work conditions.

C. Exception to Employment Authorization Bars

DHS recognizes that there are certain times an alien cannot be removed from the United States because DHS is unable to obtain travel documents from a country of removal. Therefore, DHS is proposing to create a narrow exception to the bar to employment authorization. DHS will continue to allow aliens who are subject to a final order of removal to apply for discretionary employment authorization if (1) DHS has determined that their removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents and (2) the aliens establish economic necessity.

DHS anticipates that the number of aliens who are subject to a final order of removal for whom DHS has determined that their removal is impracticable will be relatively small. For example, in FY 2019, only about 4.8 percent (659) of aliens who were temporarily released on an order of supervision (13,766) could not be removed in that fiscal year due to DHS's inability to obtain travel documents during the fiscal year in which the aliens were counted (Table 6).[26] Additionally, the percentage of aliens for whom DHS cannot obtain travel documents has averaged about 5 percent of aliens temporarily released on an order of supervision since FY 2015. DHS believes that the number of aliens who would qualify for this exception will remain small because even after an alien is temporarily released on an order of supervision, DHS continues to work with the foreign governments to obtain travel documents and DHS sometimes receives travel documents for such aliens shortly after their release or within the following fiscal year.

TABLE 6—ALIENS TEMPORARILY RELEASED ON ORDER OF SUPERVISION—UNABLE TO OBTAIN TRAVEL DOCUMENTS

Fiscal year	Total number of aliens temporarily released on an order of supervision	Number of aliens on an order of supervision for whom DHS could not obtain travel docs	Approximate percentage of total (%)
2015	6,772	369	5.4
2016	7,560	411	5.4
2017	6,317	324	5.1
2018	12,412	530	4.3
2019	13,766	659	4.8
Average of During 5-Fiscal Year Period	9,365	459	4.9

* Data from ICE ERO, LESA Statistical Tracking Unit (FY 2015 to FY 2019).

Finally, DHS believes that allowing aliens who fall within the exception to be eligible for employment authorization is consistent with section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7). Section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7), bars employment authorization for aliens who have been ordered removed. No alien subject to a final order of removal has a right to apply for or obtain employment authorization from USCIS under U.S. law. Section 241(a)(7) of the INA, however, gives the Secretary the authority to grant employment authorization if the Secretary determines that: (1) An alien cannot be removed from the United States because all countries of removal as designated by the alien or delineated under section 241 of the INA, 8 U.S.C. 1231, have refused to receive the alien, or (2) the alien's removal is impracticable or contrary to the public interest. INA section 241(a)(7)(A) and (B), 8 U.S.C. 1231(a)(7)(A) and (B). The Secretary is not required to make a finding under either subparagraph (A) or (B) of section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7)(A), (B), nor is the Secretary required to make a specific finding under either clauses of subparagraph (B) (*i.e.* ''otherwise impracticable'' or ''contrary to the public interest''). The Secretary can choose to maintain the permanent bar on employment authorization for *all* aliens subject to a final order of removal without further action.

In this rulemaking, DHS is not making any findings under subparagraph (A). DHS does not believe any findings under subparagraph (A) are necessary or required because, consistent with the Administration's enforcement priorities, all aliens who have a final order of removal will be subject to removal from the United States, either to a country where the alien is a citizen, subject, or national, the alien was born, or the alien has a residence, or to any country that is willing to accept the alien.

DHS also is not making any findings or creating an exception based on the ''public interest'' clause of subparagraph (B) because other avenues for employment eligibility already exist for aliens whom DHS determines that their removal is contrary to the public interest. For example, when an alien with a final order of removal is actively assisting law enforcement entities, and the alien's removal is contrary to the public interest because of such assistance, there are avenues for such aliens to qualify for employment authorization, in part, based on their assistance to law enforcement. Such aliens assisting law enforcement may qualify for employment authorization if they are eligible for T non-immigrant status (trafficking victims),[27] U non-immigrant status (victims of criminal activity),[28] and S non-immigrant status (witnesses in criminal investigations or prosecutions).[29] These existing avenues reflect the public interest in strengthening cooperation with law enforcement and provide DHS with the appropriate framework to assess the nature of the alien's assistance to law enforcement.

Therefore, except for aliens for whom the Secretary has made a finding under the impracticability clause of section 241(a)(7)(B) of the INA, 8 U.S.C. 1231(a)(7)(B), no other alien with a final

[26] In certain instances, DHS was able to obtain travel documents for aliens in the next fiscal year.

[27] *See* INA sec. 101(a)(15)(T) (Eligibility requirements include compliance with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking).

[28] *See* INA sec. 101(a)(15)(U) (Eligibility requirements include helpfulness to law enforcement in the investigation or prosecution of a qualifying crime).

[29] *See* INA sec. 101(a)(15)(S) (Eligibility requirements include providing law enforcement critical, reliable information necessary to the successful investigation or prosecution of a criminal organization).

order of removal who has been temporarily released on an order of supervision will be eligible for employment authorization. This includes aliens who may have previously been eligible for employment authorization based on the public interest clause of section 241(a)(7)(B) of the INA, 8 U.S.C. 1231(a)(7)(B), or based section 241(a)(7)(A) of the INA, 8 U.S.C. 1231(a)(7)(A). Furthermore, for purposes of determining employment eligibility only, DHS further clarifies that an alien's removal is ''otherwise impracticable'' under section 241(a)(7)(B) of the INA when DHS determines that all countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document.

DHS believes that exercising its discretionary authority as provided in this proposed rule promotes the protection of U.S. workers while ensuring the faithful execution and enforcement of the immigration laws.

IV. Background

A. Legal Authority

DHS's authority to detain and release from custody aliens subject to final orders of removal on orders of supervision and to grant employment authorization is found in several statutory provisions. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107–296, 116 Stat. 2135), 6 U.S.C. 112 and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[30] In addition to establishing the Secretary's general authority to administer and enforce immigration laws, section 103 of the INA enumerates various related authorities including the Secretary's authority to establish regulations necessary for carrying out his authority. Section 241 of the INA, 8 U.S.C. 1231, governs the detention, release, and removal of aliens after they have received an administratively final order of removal. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed by statute or in the discretion of the Secretary and the requirements U.S. employers must follow to verify the identity and employment authorization of their employees. The authority to establish and operate E-Verify is found in sections 401–405 of IIRIRA, Public Law 104–208, 110 Stat. 3009–546. The Secretary proposes the changes in this rule under these authorities.

B. Detention and Release of Aliens Ordered Removed

Section 241 of the INA, 8 U.S.C. 1231, governs the detention, release, and removal of aliens who are subject to final orders of removal.[31] When an alien is issued a final order of removal, DHS generally has 90 days after issuance of the final order of removal to remove the alien from the United States.[32] This 90-day removal period can be extended if the alien fails or refuses to make timely application in good faith for travel or other documents necessary for the alien's departure or conspires or acts to prevent removal.[33] Section 241(a)(2) of the INA, 8 U.S.C. 1231(a)(2), requires detention during the removal period and specifically prohibits DHS from releasing an alien who has been found inadmissible under sections 212(a)(2) or 212(a)(3)(B), 8 U.S.C. 1182(a)(2), (a)(3)(B), or deportable under sections 237(a)(2) or 237(a)(4)(B) of the INA, 8 U.S.C. 1227(a)(2), (a)(4)(B).

In certain instances, DHS is not able to remove aliens within the 90-day period after issuance of the final order of removal. In such cases, DHS must comply with the U.S. Supreme Court's decision in *Zadvydas.*[34] In *Zadvydas,* the U.S. Supreme Court held that an alien with a final order of removal cannot be kept in detention (unless special circumstances exist) [35] once it has been determined that there is not a ''significant likelihood of removal in the reasonably foreseeable future.'' [36] The Court established six months as the ''presumptively reasonable period of detention.'' After the six-month period, once the alien provides good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with sufficient evidence to rebut that showing.[37] In the event DHS determines that removal is not likely to occur in the reasonably foreseeable future, the alien must generally be temporarily released on an order of supervision. During this period of release, the alien is required to continue to make efforts (or assist in efforts) towards his or her removal, and DHS will continue to pursue the alien's removal.[38]

If an alien is temporarily released on an order of supervision, the order of supervision will contain conditions for release including requiring the alien to appear periodically before an immigration officer and comply with the conditions prescribed in the order of supervision.[39] INA section 241(a)(3), 8 U.S.C. 1231(a)(3); 8 CFR 241.5(a). If an alien fails to comply with the conditions for release as specified in the order of supervision, DHS can take the alien back into custody and detain the alien until he or she is removed. Aliens who willfully fail to comply with an order of supervision can also be criminally prosecuted under section 243(b) of the INA, 8 U.S.C. 1253(b).

C. Repatriation of Aliens Ordered Removed

Once an alien has been issued a final order of removal, ICE is responsible for effectuating the alien's removal from the United States pursuant to section 241 of the INA, 8 U.S.C. 1231, and 8 CFR 241. Generally, a travel document must be obtained from a foreign government that will allow the alien to depart the United States and be repatriated either to the alien's country of birth, citizenship, nationality, or last habitual residence or to an alternate country that has agreed to accept the alien. As indicated earlier, based on data on removals for FY 2018, it takes DHS an average of a little over 6 months to obtain travel documents and remove an alien from the United States.[40]

However, obtaining travel documents is not always easy. Some countries refuse or unreasonably delay the issuance of the necessary travel documents to aliens who have been issued a final order of removal. Countries that unreasonably delay

[30] Public Law 104–208, div. C, at secs. 401–405.

[31] Aliens subject to an expedited removal order, however, are not subject to release on an order of supervision. INA sec. 235(b)(1)(B)(iii)(IV), 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal under section 235 ''shall be detained pending a final determination of credible fear [ ] and, if found not to have such a fear, until removed).''

[32] INA sec. 241(a)(1)(A), (B)(i), 8 U.S.C. 1231(a)(1)(A), (B)(i).

[33] INA sec. 241(a)(1)(C), 8 U.S.C. 1231(a)(1)(C).

[34] 533 U.S. 678 (2001).

[35] Under 8 CFR 241.14, aliens with ''special circumstances'' are those: (1) That have a highly contagious disease that threatens public safety; (2) whose release would have serious adverse foreign policy implications; (3) who present a significant threat to national security or significant risk of terrorism; or (4) who are specially dangerous.

[36] *Zadvydas,* 533 U.S. at 701.

[37] *Id.; see also* 8 CFR 241.13(d).

[38] *See* 8 CFR 241.5(a).

[39] DHS may also require that an alien temporarily released on an order of supervision to post a bond of a sufficient amount to ensure that the alien complies with the terms for release, including surrendering him or herself to DHS custody for removal. 8 CFR 241.5(b).

[40] Furthermore, it should also be noted that even though the average time to obtain travel documents across all countries was a little over six months, the process for negotiating with foreign governments to obtain travel documents is dynamic. While there may be a period of inactivity by a particular foreign government to cooperate with issuing travel documents, a policy shift can also occur quickly and result in prompt repatriation.

accepting the repatriation of their citizens or nationals impede DHS's ability to remove the alien in a timely manner and interfere with the United States' sovereign interest in enforcing its immigration laws. Under section 243(d) of the INA, 8 U.S.C. 1253(d), the Secretary has the authority to notify the Secretary of State that a specific country is refusing or unreasonably delaying acceptance of its nationals. Upon such notification from the Secretary, the Secretary of State shall order consular officers in that country to discontinue issuing immigrant visas, nonimmigrant visas, or both to citizens and nationals of that country.[41] While DHS and DOS work through various diplomatic channels and avenues to get such countries to comply, and most countries do comply, there are countries that refuse to assist in the repatriation of their citizens and nationals, and as a result, the United States has imposed visa sanctions under section 243(d) of the INA, 8 U.S.C. 1253(d), to get such countries to cooperate.[42]

D. Withholding of Removal Under the INA and Regulations Implementing CAT and Deferral of Removal Under Regulations Implementing CAT

Even if the alien is inadmissible or deportable and has a final order of removal, DHS's ability to remove an alien in certain cases is further restricted by U.S. treaty obligations. The United States is a party to the 1967 Protocol relating to the Status of Refugees (Protocol), which incorporates, *inter alia,* Article 33 of the 1951 Convention relating to the Status of Refugees. 198 U.N.T.S. 137. Article 33 specifically provides that ''[n]o contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.''[43] The United States is also a party to the CAT. Article 3 of the CAT requires that ''[n]o State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.''[44]

Though neither of these treaties is self-executing, the United States has implemented its non-refoulement obligations under them in statute and regulations. With respect to the Protocol, Congress implemented the United States' non-refoulement obligations as part the Refugee Act of 1980, section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). With respect to the CAT, Congress directed the appropriate agencies to publish regulations to implement the United States' obligations under Article 3 of the CAT in the Foreign Affairs Reform and Restructuring Act of 1988 (FARRA), Public Law 105–277, Div. G., § 2442(b) (Oct. 21, 1998). DOJ published regulations in 1999 implementing FARRA § 2442. *See* 64 FR 8478–01 (1999). The regulations governing withholding of removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and CAT are now codified at 8 CFR 208.16 through 208.18 and 8 CFR 1208.16 through 1208.18.

Aliens granted withholding of removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), as well as aliens granted withholding of removal based on the regulations implementing CAT, 8 CFR 208.16(c), are both subject to mandatory bars to withholding if the alien participated in the persecution of others, is a human rights violator, or has been convicted of a particularly serious crime.[45] However, even if an alien is not eligible for withholding under the provisions noted above because he or she is subject to one of the mandatory bars to withholding, DHS still is not permitted to remove an alien from the United States if an IJ or the Board of Immigration Appeals (BIA) has determined that removal would result in the alien being removed to a country where he or she would more likely than not be tortured. 8 CFR 208.17 and 1208.17. In such instances, the IJ or BIA defers removal to that country.

Withholding of deportation or removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT (if the alien is not subject to a mandatory bar) and CAT deferral of removal are mandatory and must be granted if the alien meets the burden of proof. *See* 8 CFR 208.16(c)(4) and 208.17(a). Once an alien has been granted withholding of removal or deferral of removal, DHS cannot remove the alien to the country from which removal has been withheld or deferred unless the alien's case is reopened and withholding is terminated under 8 CFR 208.24 or 1208.24, or deferral is terminated under 8 CFR 208.17 or 1208.17. In most instances an alien granted withholding of removal or deferral of removal under the regulations implementing CAT will be released pursuant to an order of supervision, but such an order does not alter or affect the nondiscretionary nature of the withholding or deferral of removal grant, even if the alien subsequently violates the conditions for release as specified in the order of supervision. Such violations could result in a return of the alien to ICE custody but will not result in the alien's actual removal from the United States unless the alien's case is reopened and withholding is terminated under 8 CFR 208.24 or 1208.24, or deferral is terminated under 8 CFR 208.17 or 1208.17.

E. Employment Authorization

Whether an alien is authorized to work in the United States depends on the alien's status in the United States and whether employment is specifically authorized by statute or only authorized pursuant to the Secretary's discretion. There are very few statutory provisions that require the Secretary to grant employment authorization.[46] While some statutory provisions specifically allow the Secretary to grant employment authorization as a matter of discretion,[47] the Secretary's general authority under section 274A(h)(3) of the INA, 8 U.S.C.

[41] In 2017, DHS and DOS entered into a Memorandum of Understanding (MOU) Concerning the Removal of Aliens, which superseded the 2011 ICE and DOS Bureau of Consular Affairs MOU Concerning Repatriation. The new MOU creates a framework for effectuating repatriations, sets forth tools the agencies will use to encourage countries to accept the return of their nationals, and establishes a target travel document issuance time of 30 days.

[42] Visa sanctions have been previously invoked under INA Section 243(d) against the following countries: Guyana in 2001; The Gambia in 2016; Cambodia, Eritrea, Guinea, and Sierra Leone in 2017; Burma and Laos in 2018; Cuba, Ghana, and Pakistan in 2019; and Burundi and Ethiopia in 2020. Visa sanctions have since been lifted against Guyana, Guinea, and The Gambia. *See* ''Visa Sanctions Against Two Countries Pursuant to Section 243(d) of the Immigration and Nationality Act,'' at *https://www.ice.gov/visasanctions* (Last updated Aug. 13, 2020).

[43] Convention relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 198 U.N.T.S. 137.

[44] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, *ratified* Oct. 21, 1994, 1465 U.N.T.S. 85.

[45] 8 CFR 208.16(d)(2) specifically notes that an application for withholding of removal under CAT shall be denied if the applicant falls within INA section 241(b)(3)(B).

[46] *See, e.g.,* INA sec. 214(c)(2)(E), 8 U.S.C. 1184(c)(2)(E) (requiring spouses of L nonimmigrants to be employment authorized); INA sec. 214(e)(6), 8 U.S.C. 1184(e)(6) (requiring spouses of E treaty traders/investors to be employment authorized; INA sec. 214(p), 8 U.S.C. 1184(p) (requiring U nonimmigrants to be employment authorized).

[47] *See, e.g.,* INA sec. 106(a), 8 U.S.C. 1105a (providing that the Secretary may grant employment authorization to spouses and children of certain nonimmigrants who were battered or subjected to extreme cruelty); INA sec. 214(p)(6), 8 U.S.C. 1182(p)(6) (providing that the Secretary may grant employment authorization to aliens who have filed a bona fide application for U nonimmigrant status).

1324a(h)(3), is used to establish most discretionary employment authorization categories. However, in the context of aliens ordered removed, section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7), specifically prohibits an alien who has been ordered removed from the United States from being eligible to receive employment authorization unless the Secretary determines that the alien cannot be removed because no country, as designated by the alien or delineated under section 241(b) of the INA, 8 U.S.C. 1231(b), will accept the alien *or* the alien's removal is impracticable or contrary to the public interest.

DHS regulations at 8 CFR 274a.12 set forth the categories of aliens who are authorized to work in the United States, including; those aliens who are authorized to work incident to their status (8 CFR 274a.12(a)); aliens who are authorized to work in the United States but only for a specific employer (8 CFR 274a.12(b)); and aliens who fall within a category that the Secretary has determined may be employment authorized as a matter of discretion (8 CFR 274a.12(c)). Aliens seeking employment authorization generally must file an application with USCIS with the appropriate fee (unless waived) and in accordance with the form instructions. *See* 8 CFR 274a.13.

F. Biometric Submission

Current DHS regulations provide general authorities for USCIS to require the submission of biometrics in connection with immigration benefits. *See* 8 CFR 103.2(b)(9). DHS has the authority to require the submission of biometrics from any applicant, petitioner, sponsor, beneficiary, or requestor, or individual filing a request, on a case-by-case basis, through form instructions, or by a **Federal Register** notice. *See* 8 CFR 103.16. Current regulations allow DHS to use the biometric information to conduct background and security checks, adjudicate immigration benefits, and perform other functions related to the administration of the INA. *See id.* DHS is also authorized to charge a biometric services fee associated with the submission of biometric information. *See* 8 CFR 103.17.

V. Discussion of the Proposed Rule

A. Eligibility for Employment Authorization for Aliens on Orders of Supervision

Section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7), specifically prohibits an alien who has been ordered removed from the United States from being eligible to receive employment authorization unless the Secretary, in the Secretary's discretion, determines, under subparagraph (a)(7)(A), that the alien cannot be removed because no country, as designated by the alien or delineated under section 241(b) of the INA, 8 U.S.C. 1231(b), will accept the alien or, under subparagraph (a)(7)(B), 8 U.S.C. 1231(a)(7)(B), the alien's removal is impracticable or contrary to the public interest. Neither the INA nor the regulations mandate issuance of employment authorization for any alien subject to a final order of removal or based on such alien's temporary release from custody on an order of supervision. The statute preserves the Secretary's discretion to decide if employment authorization should be granted and, if yes, to which classes of aliens based upon a finding under subparagraph (A) or (B) of section 241(a)(7) of the Act, 8 U.S.C. 1231(a)(7)(A), (B).

DHS is proposing to amend 8 CFR 274a.12(c)(18) to eliminate eligibility for employment authorization for all aliens who have final orders of removal and are temporarily released from custody on an order of supervision except for aliens for whom DHS has determined that their removal from the United States is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents. *See* proposed 8 CFR 274a.12(c)(18). Providing EADs to aliens who do not fall within this exception undermines the integrity of the immigration system by incentivizing aliens with a final removal order to remain in the United States instead of complying with their removal orders, obtaining travel documents in a timely manner, and departing the United States.

Encouraging aliens who do not fall within the exception provided in this rule to timely depart the United States also promotes the efficient use of DHS's limited resources. Managing the vast number of aliens on OSUP consumes an inordinate amount of DHS resources. Management of aliens temporarily released on OSUP requires tracking and monitoring the status of such aliens, as well as conducting regular check-ins to ensure compliance with the conditions of release. This time intensive process takes away from other enforcement priorities such identifying, detaining, and removing criminal aliens. The proposed rule also aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. It helps strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers, especially as the economy and the labor market recovers from the significant disruptions caused by the COVID–19 pandemic.

DHS has determined that continuing to provide employment authorization to those aliens who fall within the exception provided in this rule is consistent with the impracticability clause of INA section 241(a)(7)(B), 8 U.S.C. 1231(a)(7)(B). Table 7 below shows the number of aliens for whom DHS cannot obtain travel documents annually out of the total number of aliens removed from the United States.

TABLE 7—ALIENS REMOVED FROM THE UNITED STATES AND ALIENS FOR WHOM DHS WAS UNABLE TO OBTAIN TRAVEL DOCUMENTS IN THE REPORTED FISCAL YEAR *

Fiscal year	Total number of aliens removed from the United States	Number of aliens on orders of supervision for whom DHS could not obtain travel docs to execute removal from the United States
2015	235,413	369
2016	240,255	411
2017	226,119	324
2018	256,085	530
2019	267,258	659
Average over 5-Fiscal Year Period	245,026	459

* Data from ICE ERO, LESA Statistical Tracking Unit (FY 2015 to FY 2019).

In some instances, even if DHS is not able to obtain travel documents for an alien in one fiscal year, DHS is able to obtain such documents in a subsequent fiscal year. DHS expects the number of aliens whose removal from the United States is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents will remain very low. As such, DHS has determined that it is not contrary to the INA or the Administration's enforcement priorities to allow such aliens to work while they remain in the United States and until they can be removed.

For aliens whose removal from the United States is impracticable, DHS is proposing to make economic necessity, which is currently only a discretionary factor, a mandatory eligibility requirement, consistent with other discretionary employment authorization categories. *See, e.g.,* 8 CFR 274a.12(c)(14). As such, aliens who are eligible to apply for employment authorization based on the exception created in this proposed rule will need to demonstrate economic necessity for employment during the period they are on an order of supervision. Aliens who are financially able to support themselves during the period prior to their removal from the United States will not be eligible for an EAD. Furthermore, to protect U.S. workers against potential displacement or any disadvantages in the labor market, including during the current economic recovery, DHS wants to ensure that U.S. employers who hire aliens who are temporarily released on an order of supervision are complying with our immigration laws and not employing unauthorized workers. For this reason, DHS is proposing to require aliens on an order of supervision who are seeking a renewal of their employment authorization be employed by a U.S. employer who is a participant in good standing in the E-Verify program.

DHS proposes to limit the validity period for employment authorization under 8 CFR 274a.12(c)(18), whether the alien seeks an initial or renewal EAD, to a period not to exceed increments of one year.

B. USCIS Evidentiary Requirements

DHS proposes to require aliens temporarily released on orders of supervision who are eligible to apply for employment authorization under the new criteria and who are seeking initial employment authorization or a renewal to submit an Application for Employment Authorization, (Form I–765) with the appropriate fee, including the biometric services fee, and in accordance with the form instructions. *See* proposed 8 CFR 274a.13(a)(3). DHS also proposes to require such aliens to submit the following additional documents: (1) A copy of a decision by an IJ or the BIA, or an administrative removal order issued by DHS demonstrating that the alien is subject to a final order of removal or deportation; (2) a completed Employment Authorization Worksheet (Form I–765WS) to show economic necessity;[48] and (3) a copy of the current and complete Order of Supervision (Form I–220B), including a copy of the complete Personal Report Record which reflects compliance with the conditions for release.

Given that ICE is the primary DHS component with jurisdiction over the detention and removal of aliens with a final removal order, ICE will make the appropriate determination as to whether the alien's removal is impracticable at the time of the alien's initial temporary release on an order of supervision and thereafter when the alien is required to report to ICE consistent with the conditions of release. If ICE determines all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents, ICE officers will annotate the Form I–220B to indicate that the alien's removal is currently impracticable because of the reasons stated above. Aliens with final removal orders who are temporarily released on an order of supervision and who are seeking employment authorization based on this exception would not be eligible to apply for employment unless ICE has made such a determination and annotated the Form I–220B to indicate the alien's removal is impracticable because of the reasons stated above.

In addition to the above, DHS proposes to require aliens on orders of supervision who apply for initial employment authorization after the effective date of the final rule and who subsequently seek renewal of their employment authorization to: (1) Show that they meet the exception, (2) demonstrate economic necessity by submitting a completed Employment Authorization Worksheet (Form I–765WS), and (3) show that they are employed by a U.S. employer who is a participant in good standing in E-Verify (renewals only) by providing their U.S. employer's E-Verify Company Identification Number and the employer's name as listed in E-Verify on their application for employment authorization. *Id.* An alien who fails to establish that he or she is employed by an E-Verify employer at the time of filing or adjudication of the application to renew his or her employment authorization is ineligible for an EAD. Furthermore, for both initial and renewal EAD applications, DHS will determine if the alien warrants a favorable exercise of discretion to grant employment authorization. To this end, aliens may include supporting documentation of favorable factors as part of the EAD application.

C. Biometric Submission and Criminal History

Currently, all (c)(18) applicants receive an appointment notice from USCIS to submit their biometrics so USCIS can use them for identity verification and EAD production. DHS proposes to codify this biometric submission and associated biometric services fee for aliens seeking discretionary employment authorization under the (c)(18) category. *See* proposed 8 CFR 241.4(j)(3).

In addition, DHS also proposes to use the (c)(18) applicant's biometrics to screen for criminal history. DHS has a strong interest in ensuring public safety and preventing aliens with significant criminal histories from obtaining a discretionary benefit. As such, for aliens who fall within the exception provided in this proposed rule and meet the economic necessity requirement, DHS is proposing to consider a (c)(18) applicant's criminal history in determining whether DHS will favorably exercise its discretion to grant an employment authorization. Where criminal history is a factor in the adjudication of an immigration benefit, DHS typically conducts biometric-based screening to independently identify and verify criminal history in addition to reviewing any evidence submitted by the applicant regarding his or her criminal history.[49] As such, DHS would also use the (c)(18) applicant's biometrics to screen against government databases (for example, FBI databases) to determine if he or she matched any criminal activity on file. USCIS will continue to notify applicants of the proper date, time, and location to submit their biometrics after the application for employment authorization has been filed.

Furthermore, DHS proposes to require a biometric services fee of $30 for (c)(18)

[48] *See also* 8 CFR 274a.12(e) which provides that the Federal Poverty Guidelines under Title 45 of the U.S. Code should be used as the criteria to establish eligibility for employment authorization when economic necessity is a factor.

[49] *See* ''DHS/USCIS–018 Immigration Biometric and Background Check System of Records,'' 83 FR 36950 (July 31, 2018).

EAD applicants. *See* proposed 8 CFR 106.2(a)(32(i)(C). DHS requires a biometric services fee of $30 to be collected where the underlying immigration benefit fee does not capture or incorporate biometric service costs.[50] *See* 8 CFR 103.17 & 106.2(a)(32)(i)(A), (B). DHS did not require a biometric services fee for (c)(18) EAD applicants in the 2020 USCIS fee rule because this proposed rule and the USCIS fee rule were under development simultaneously, yet independently of one another. *See* 84 FR 62280–62371 (Nov. 14, 2019). Additionally, (c)(18) EAD applicants do not have an underlying immigration benefit application or petition that they must file into which associated biometric submission and processing costs can be incorporated. Therefore, to recover the cost of biometrics services for (c)(18) EAD applications, DHS must require a biometrics fee for a (c)(18) EAD applicant. Thus, DHS proposes to require a $30 biometric services fee with the Form I–765 for (c)(18) EAD applicants. *See* proposed 8 CFR 106.2(a)(32)(i)(C).

D. Aliens Granted Deferral of Removal Under the Regulations Implementing CAT

Once an alien has been granted withholding or deferral of removal, DHS cannot remove the alien to the country from which removal has been withheld or deferred unless withholding or deferral are terminated under applicable regulatory procedures set out in 8 CFR 208.24, 1208.24, 208.17, 1208.17, or 1208.18(c). The average number of aliens granted CAT deferral of removal over a 5-fiscal-year period was 147, and these numbers have not changed significantly over the last decade.[51] As reflected in Table 8 below, the number of aliens granted CAT deferral from FY 2014 through FY 2018, remains low.

TABLE 8—FY 2014 THROUGH FY 2018 CAT CASES GRANTED *

Fiscal year	CAT deferral of removal
2014	121
2015	121
2016	140
2017	175
2018	177
5-Year Average	147

* U.S. Department of Justice, Executive Office for Immigration Review, Statistical Yearbooks for FY 2014–FY 2018.

Currently, aliens who are not going to be removed because they are granted withholding of removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT are employment authorized based on the grant of withholding. *See* 8 CFR 274a.12(a)(10). However, DHS's regulations do not clearly indicate the basis for withholding of removal (INA section 241(b)(3) or CAT). DHS has determined that aliens who receive CAT deferral of removal should also be included in the regulatory category governing employment authorization for aliens granted withholding of removal. Aliens granted deferral of removal will be employment authorized based on the grant of deferral, until deferral is terminated under applicable regulations. DHS proposes to amend the regulations to make these clarifications.

E. Effective Date of the Final Rule

With the exception of aliens whose removal DHS has determined is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents, DHS proposes to apply changes made by this rule only to initial and renewal applications under 8 CFR 274a.12(c)(18) filed on or after the effective date of the final rule. DHS proposes to allow aliens temporarily released on orders of supervision who are already employment authorized prior to the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless the card is revoked under 8 CFR 274a.14. USCIS would continue processing any pending application for a replacement EAD received before the effective date and receiving new applications for replacement EADs because those adjudications are not considered a new grant of employment authorization but a replacement of an EAD based on a previously authorized period.

DHS further proposes to allow aliens temporarily released on orders of supervision who are granted discretionary employment authorization after the effective date of the final rule to have their employment authorization renewed only if: (1) DHS determines the alien's removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents, (2) the alien shows economic necessity for employment, (3) the alien is employed by a U.S. employer who is a participant in good standing in E-Verify (renewals only), and (4) the alien establishes that he or she warrants a favorable exercise of discretion to obtain employment authorization. DHS is proposing in this rule that it will consider an E-Verify employer to be a participant in good standing if the employer: (1) Has enrolled in E-Verify with respect to all hiring sites in the United States that employ an alien temporarily released on an order of supervision who has received employment authorization under this rule as of the time of filing of the alien's application for employment authorization, (2) is in compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees at those hiring sites, and (3) continues to be a participant in good standing in E-Verify at any time during which the employer employs an alien temporarily released on an order of supervision who has received employment authorization under this rule.

F. Additional Amendments

Finally, DHS is updating the regulations at 8 CFR 241.4(j)(3), 241.5(a), 241.5(c), and 241.13(h)(1) to remove references to obsolete titles of officials of the former INS, to refer generally to ICE as the DHS component with authority to issue orders of supervision, to reflect USCIS as the agency that grants employment authorization, and include appropriate references. This proposed change gives the Secretary and the Director of ICE the flexibility to delegate authorities within ICE to appropriate component heads, notwithstanding the particular titles that may be assigned to a particular position in the future.[52] *See* proposed 8 CFR

[50] 84 FR 62280, 62302–62303 (Nov. 14, 2019). Explaining how USCIS calculated the biometric services fee of $30 that will be required for certain forms for which it performs biometrics services.

[51] U.S. Department of Justice, Executive Office for Immigration Review, Statistical Yearbooks, FY 2014 through FY 2018 at *https://www.justice.gov/eoir/statistical-year-book.*

[52] After the functions of the former Immigration and Naturalization Service were transferred to the Secretary pursuant to the Homeland Security Act, Public Law 107–296, 441(c) (6 U.S.C. 251(2)), the functions were further delegated to component heads. ICE now has primary authority over all enforcement actions and USCIS has authority over adjudications of immigration benefits, including issuance of employment authorization documents. *See* DHS Delegation No. 7030.2, ''Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement,'' (Nov. 13, 2004); DHS Delegation No. 0150.1, ''Delegation to

Continued

241.4(j)(3), 241.5(a), 241.5(c), and 241.13(h)(1). Additionally, DHS is updating 8 CFR 241.5(a) to include a cross-reference to 8 CFR 241.13(h). This cross reference will clarify that aliens temporarily released on an order of supervision under 8 CFR 241.13(h) are subject to the conditions of release provided in 8 CFR 241.5 and close the loop with the concomitant reference to 8 CFR 241.5 contained within 8 CFR 241.13(h). *See* proposed 8 CFR 241.5(a). DHS will update all of 8 CFR 241 in a future rulemaking to remove additional references to obsolete INS titles consistent with the proposed change made under section 8 CFR 241.5(a).

VI. Statutory and Regulatory Requirements

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

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a ''significant regulatory action'' that is economically significant since it is estimated the proposed rule likely would have an annual effect on the economy of $100 million or more, under section 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this proposed regulation.

1. Summary

This proposed rule is estimated to result in a reduction in the number of aliens on orders of supervision who are eligible for employment authorization, which could result in lost earnings for those no longer eligible. This loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits or third-party organizations to provide for the alien and any dependents. In addition, DHS estimates increased filing burdens associated with the proposed rule for those who remain eligible for employment authorization. Employers that currently hire alien workers who would no longer be eligible to renew under this rule could experience new costs due to employee turnover or complying with the proposed E-Verify requirement. Finally, the proposed rule may result in a loss of tax revenue.

Under the proposed rule, DHS anticipates there would be six types of economic impacts that DHS can estimate and quantify: (1) Potential lost earnings for alien workers on orders of supervision who may no longer be eligible for employment authorization; (2) increased time burden for applicants to submit forms; (3) added time and costs for applicants to submit biometrics; (4) labor turnover costs that employers of alien workers on orders of supervision could incur when their employees' EADs expire and are not renewed; (5) costs to employers to enroll in and maintain an E-Verify account as a participant in good standing to retain alien workers on orders of supervision applying for renewal EADs; and (6) potential employment tax losses to the Federal Government.

DHS estimates that some aliens with final removal orders and temporarily released on orders of supervision would be ineligible for discretionary EADs due to this proposed rule. However, DHS cannot estimate with precision what the future eligible population would be because of data constraints and, therefore, relies on a range with an upper and lower bound. The estimated costs of this proposed rule would range from a minimum of about $94,868, associated with biometrics and added burdens for relevant filing forms to a maximum of $1,496,016,941 (annualized 7%) should no replacement labor be found for aliens on orders of supervision who would be ineligible for employment authorization under this rule.[53] The ten-year undiscounted costs would range from $940,239 to $14,722,941,163. DHS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

Table 9 provides a summary of the proposed regulatory changes and the estimated impacts of the proposed rule.

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the Bureau of Citizenship and Immigration Services,'' (June 5, 2003).

[53] DHS estimates some of the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect understated costs associated with biometrics fees and overstated benefits associated with filing Form I–765.

Table 9: Summary of Impacts and Estimated Cost and Benefits of the Proposed Rule

Provisions	Regulatory Changes	Estimated Impact of Regulatory Change
Amending 8 CFR 241.5	DHS proposes to update the current language of the regulation to reflect that the Secretary of Homeland Security (Secretary) or the Secretary's designee can issue orders of supervision.	This change would give DHS the flexibility to delegate the authorities under the provision without requiring additional rulemaking in the future.
Amending 8 CFR 241.4(j)(3), 8 CFR 241.5(c) and 8 CFR 241.13(h)(1)	DHS proposes to remove language that authorized designated ICE officers to grant employment authorization for aliens temporarily released on orders of supervision. ICE no longer grants employment authorization and USCIS has primary jurisdiction over EAD issuance. DHS proposes to add language regarding the existing requirement for biometrics submission from (c)(18) applicants.	These changes propose to codify current policy and reduce confusion for aliens temporarily released on orders of supervision who apply for employment authorization.
Amending 8 CFR 241.4(j)(3) and 8 CFR 106.2(a)(32)(i)(C)	DHS proposes to add language to codify biometrics submission from (c)(18) applicants. Aliens on orders of supervision applying for initial and renewal (c)(18) employment authorization must submit biometrics at a scheduled biometrics services appointment and pay a $30 fee.	This change would require aliens temporarily released on orders of supervision to submit their biometrics at an ASC. Quantified Impacts Costs for aliens temporarily released on orders of supervision would range from $83,148 to $552,741 with a primary estimate of $317,945 (annualized 7%). Qualitative Benefits Enables DHS to vet an applicant's biometrics against government databases to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production.
Amending 8 CFR 274a.12(a)(10)	DHS proposes to revise the (a)(10) employment authorization category, which currently covers those granted withholding of removal under section 241) of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT under 8 CFR 208.16 or 1208.16, to include aliens who are granted CAT deferral of removal as employment authorized based solely on the grant of deferral. Aliens granted withholding of removal under INA sec. 241(b)(3) and the regulations implementing CAT currently are employment authorized by virtue of the grant of withholding.	This change proposes to revise current policy to reduce confusion for aliens who are granted CAT and would ensure consistency in adjudication for this population. Quantified Benefits Aliens granted CAT deferral of removal who do not apply for an EAD card would save time and money ranging from $0 to $105,690 annually.
Amending 8 CFR 274a.12(c)(18)	DHS proposes to: • Eliminate eligibility for employment authorization for aliens with final orders of removal who are released from custody on orders of supervision except for those aliens for whom DHS determines their removal is impracticable	Quantified Costs and Transfers • Lost earnings for aliens temporarily released on orders of supervision would range from $614,037,170 to $1,495,358,741 with a primary estimate of $1,054,697,955 (annualized 7%).

	because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents. • Add new discretionary factors USCIS will consider when deciding whether to grant employment authorization including whether: 1. the alien complies with the conditions for release specified in the order of supervision, and 2. the alien has any criminal history, including but not limited to criminal activities subsequent to release from detention; • Add a requirement that alien be employed with an E-Verify employer in good standing, if the alien is seeking renewal of an EAD issued based on an order of supervision; and • Add a requirement that an alien establish economic necessity for employment when filing an initial and renewal EAD application.	• DHS acknowledges that businesses that have hired (c)(18) workers who are no longer eligible for work authorization due to this proposed rule would incur labor turnover costs earlier than without this rule. • If employers are unable to find replacement workers, reduction in federal employment taxes paid would range from $93,947,687 to $228,789,887, with a primary estimate of $161,368,787 (annualized 7%). • Employer costs related to enrolling in E-Verify and maintaining an account would cost $113.65 for new E-Verify participants in the first year and $53.71 in subsequent years with an additional cost of $6.14 per query for every company employee – both citizen and non-citizen. Employer costs related to labor turnover for employers who are not enrolled and opt not to enroll in E-Verify would cost between $7,168 and $15,621 per worker, depending on the wage of their (c)(18) alien worker. DHS emphasizes that the costs of the rule in terms of lost or deferred labor earnings will potentially depend on the extent of surplus labor in the labor market. In the current environment with COVID-19-related layoffs and unemployment, there is the potential that the costs of the rule will be lower than they would otherwise have been. <u>Qualitative Costs and Transfers</u> • Those who are currently employment authorized, but who would no longer qualify for employment authorization under the proposed rule could experience other impacts possibly involving personal and family-related hardships and disruptions to the individual, U.S. citizen, or LPR spouses and/or children dependent on the income currently earned by the affected alien. • Additional unquantified Federal, state, and local income tax revenue also could be lost. • A loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits, or third-party organizations to provide for the alien and any dependents. <u>Qualitative Benefits</u> • The restriction on income opportunities may increase the incentives for aliens with final orders of removal to depart the United States, which could save government resources expended on enforcing removal orders for aliens as well as monitoring and tracking aliens temporarily released on orders of supervision.

8 CFR 274a.13(a)(3)	DHS proposes to: • Add requirements for aliens on orders of supervision seeking initial employment authorization and renewals to include: 1. A copy of the decision by the IJ or DHS of the final order of removal, 2. Form I-765WS to show economic necessity, 3. A copy of their current Order of Supervision, (Form I-220B) with a copy of the complete the Personal Report Record reflecting the alien's compliance with the conditions for release from the date of release. • Add a requirement for aliens on orders of supervision seeking renewal of their employment authorization to also submit their U.S. employer's E-Verify Company Identification number and employer's name as listed in E-Verify.	Quantified Costs • Costs to applicants who submit Forms I-765 and I-765WS, would range from $11,721 to $105,459 with a primary estimate of $58,590 (annualized 7%). Qualitative Benefits • Enables DHS to determine if there is an economic necessity for employment authorization and ensures that aliens on orders of supervision who renew their EAD are having their employment authorization verified by their employer.

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The impacts of reducing the number of aliens temporarily released on orders of supervision that are eligible for EADs include both potential distributional impacts (transfers) and costs. USCIS uses the lost compensation to aliens temporarily released on orders of supervision that are no longer eligible for EADs as a measure of the impact of this change—either as distributional impacts (transfers) from these aliens to others or as a proxy for businesses' cost for lost productivity. If all companies are able to easily find reasonable labor substitutes for the positions the aliens temporarily released on orders of supervision would have otherwise filled, DHS estimates a maximum of $1,495,358,741 (annualized at 7%) would be transferred from these workers to others in the labor force (or induced back into the labor force). Under this scenario, there would be no federal employment tax losses. Conversely, if companies are unable to find reasonable labor substitutes for the position the aliens temporarily released on orders of supervision would have filled then a maximum of $1,495,358,741 (annualized 7%) is the estimated monetized cost of this provision, and $0 is the estimated monetized transfers from these aliens to other workers. In addition, under this scenario where jobs would go unfilled, there would be a loss of employment taxes to the Federal Government. USCIS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect employment eligibility for aliens temporarily released on orders of supervision. There are other costs of the rule, including E-Verify, biometrics, labor turnover, and additional form burdens. These costs exist under both scenarios described above, and thus $94,868 is the minimum cost of the rule (annualized 7%).

DHS is aware that the outbreak of COVID–19 will likely impact these estimates in the short run.[54] As discussed above, the analysis presents a range of impacts, depending on if companies are able to find replacement labor for the jobs alien workers temporarily released on orders of supervision would have filled. In September 2020, the unemployment rate was 7.9 percent.[55] This is an improvement on April's 14.7 percent which marked the highest rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948).[56] By comparison, the unemployment rate for September 2019 was 3.5%.[57] DHS assumes that during the COVID–19 pandemic, with additional available labor nationally, companies are more likely to find replacement labor for the job the alien on an order of supervision would have filled.[58] Thus, in the short-run during the pandemic and the ensuing economic recovery, the lost compensation to EAD applicants as a result of this rule is likely to mean that the costs of the rule will be lower than they would otherwise have been. DHS notes that although the pandemic is widespread, the severity of its impacts varies by locality. Consequently, it is not clear to what extent the distribution of alien workers temporarily released on orders of supervision overlaps with areas of the country that will be more or less impacted by the COVID–19 pandemic. Accordingly, DHS cannot estimate with

[54] On March 13, 2020, the President declared that the COVID–19 outbreak in the United States constitutes a national emergency. *See* "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak," available at *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.*

[55] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_10022020.pdf.*

[56] In April 2020, the unemployment rate increased by 10.3 percentage points to 14.7 percent. Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_05082020.pdf.*

[57] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2019, Employment Situation Summary Table A. Household data, seasonally adjusted. Available at: *https://www.bls.gov/news.release/archives/empsit_10042019.pdf.*

[58] The Congressional Budget Office estimates the unemployment rate is expected to average close to 14 percent during the second quarter, See: CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021 *https://www.cbo.gov/publication/56335* April 24, 2020.

confidence to what extent the impacts will be transfers instead of costs.

DHS's assumption that all applicants with an EAD are able to obtain employment (discussed in further detail later in the analysis), also does not reflect impacts from the COVID–19 pandemic. It is not clear what level of reductions the pandemic will have on the ability of EAD holders to find jobs (as jobs are less available), or how DHS would estimate such an impact with any precision given available data. Consequently, the ranges projected in this analysis regarding lost compensation are expected to be an overestimate, especially in the short-run. The range of impacts described by the scenarios above, plus the consideration of the other costs, are summarized in Table 10.

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Table 10: Summary of Range of Monetized Annualized Impacts						
Table 10(A): Annualized Impacts at 7%						
Category	**Description**	**Scenario: No Replacement Labor found for Aliens Temporarily Released on Orders of Supervision**		**Scenario: All Aliens Temporarily Released on Orders of Supervision Replaced with Other Workers**		**Primary**
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$614,037,170	$1,495,358,741	$747,679,371
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,947,687	$228,789,887	$0	$0	$114,394,944
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics)	$83,148	$552,741	$83,148	$552,741	$317,945
Forms	Opportunity cost of time (provision: additional time for I-765WS)	$11,721	$105,459	$11,721	$105,459	$58,590
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$614,037,170	$1,495,358,741	$0	$0	$747,679,371
Total Costs		$614,132,038	$1,496,016,941	$94,868	$658,200	$748,055,905

Table 10(B): Annualized Impacts at 3%						
Category	**Description**	**Scenario: No Replacement Labor found for Aliens Temporarily Released on Orders of Supervision**		**Scenario: All Aliens Temporarily Released on Orders of Supervision Replaced with Other Workers**	**Primary**	
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$608,302,571	$1,482,047,682	$741,023,841
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,070,293	$226,753,295	$0	$0	$113,376,648
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics submission)	$82,732	$549,871	$82,732	$549,871	$316,302
Forms	Opportunity cost of time (provisions: additional time for I-765 + Form I-765WS)	$11,662	$104,912	$11,662	$104,912	$58,287
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$608,302,571	$1,482,047,682	$0	$0	$741,023,841
Total Costs		$608,396,966	$1,482,702,465	$94,395	$654,783	$741,398,430

In addition, Table 11 presents the prepared accounting statement, as required by the Office of Management and Budget (OMB) Circular A–4, showing the costs associated with this proposed regulation. Note that under costs, the primary estimates provided in the accounting statement are calculated based the minimum cost from the scenario that all aliens temporarily released on orders of supervision are replaced with other workers and the maximum cost from the scenario that no aliens temporarily released on orders of supervision are replaced with other workers (scenario presented in Tables 10(A) and (B)).

Table 11. OMB A-4 Accounting Statement ($, 2020)
Period of analysis: 2020 – 2029

Category	Primary Estimate		Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS					
Monetized Benefits	This proposed rule would produce some benefits for aliens who are granted CAT deferral of removal, as this population would no longer need to submit Form I-765 in order to become employment authorized. DHS estimates the total benefits for this population would range from $0 to $105,690 annually.				RIA
Annualized quantified, but un-monetized, benefits	N/A		N/A	N/A	RIA
Unquantified Benefits	This proposed rule may allow U.S. workers to have a better chance of obtaining jobs that some (c)(18) alien workers currently hold. Additionally, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could save government resources expended on enforcing removal orders for such aliens.				RIA
COSTS					
Annualized monetized costs (discount rate in parenthesis)	(7%)	$748,055,905	$94,868	$1,496,016,941	RIA
	(3%)	$741,398,430	$94,395	$1,482,702,465	RIA
Annualized quantified, but un-monetized, costs	N/A		N/A	N/A	RIA
Qualitative (unquantified) costs	In cases where employers cannot find reasonable substitutes for the labor the aliens on orders of supervision would have provided, affected employers could also lose profits from lost productivity. In all cases, employers would incur opportunity costs by having to choose the next best alternative to immediately filling the job the alien who was temporarily released on an order of supervision would have filled. Employers may incur additional opportunity costs such as search costs and costs to enroll and participate in the E-Verify program should they choose to retain their eligible (c)(18) workers.				RIA
TRANSFERS					
Annualized monetized transfers: compensation	(7%)	$747,679,371	$0	$1,495,358,741	RIA
	(3%)	$741,023,841	$0	$1,482,047,682	
From whom to whom?	From employment authorized workers with orders of supervision to other available workers.				RIA

Annualized monetized transfers: "off-budget"	(7%)	$114,394,944	$0	$228,789,887	RIA
	(3%)	$113,376,648	$0	$226,753,295	
From whom to whom?	A reduction in federal employment taxes from employers and employees to the Federal Government. Additional unquantified Federal, state, and local income tax revenue also could be lost.				
Category	***Effects***				***Source Citation (RIA, preamble, etc.)***
Effects on State, local, and/or tribal governments	DHS cannot determine the number of (c)(18) alien workers who could be removed from the labor force due to the proposed rule. Federal, state, and local income tax revenue also may be reduced. For the (c)(18) alien population that will not be able to renew their EAD or obtain an initial EAD, there would likely be an impact in terms of lost income which could pose economic hardships. Members of this population may need to rely on their support networks for financial and social assistance, which could involve, but which may not be limited to, family members and friends, religious and charitable organizations, private non-profit providers, and non-governmental organizations (NGOs).				RIA
Effects on small businesses	This proposed rule could result in indirect costs on entities, some of which could be small entities. DHS acknowledges that changing eligibility criteria for aliens on orders of supervision to obtain employment authorization could result in entities that have hired such workers incurring labor turnover costs. Entities may also incur costs related to using E-Verify.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

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The benefits potentially realized by the proposed rule are both qualitative and quantitative. Under this proposed rule, a U.S. worker may have a better chance of obtaining jobs that some (c)(18) alien workers currently hold, as the proposal would reduce employment authorization eligibility for this population of aliens who have been ordered removed from the country. Second, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could reduce the amount of government resources expended on enforcing removal orders for such aliens as well as monitoring and tracking aliens temporarily released on orders of supervision. Third, DHS clarifies that aliens granted CAT deferral of removal would no longer need to submit Form I–765 in order to become employment authorized after the effective date of the final rule. DHS estimates the total benefits for this population would range from $0 to $105,690 annually. Additional savings could also be accrued in the form of opportunity costs of time if applicants would have spent time submitting evidence under any of the (c)(18) considerations.

2. Background and Purpose of the Proposed Rule

ICE works to remove aliens subject to a final order of removal from the United States promptly. Removal operations require integrated coordination, management, and facilitation efforts. The removal of aliens subject to final orders of removal is a national security priority for the United States, highlighted by E.O. 13768, "Enhancing Public Safety in the Interior of the United States" (Jan. 25, 2017).

By law, DHS is required to remove or release a detained alien ordered removed within a period of 90 days ("removal period") after the issuance of a final order of removal.[59] Furthermore, the law expressly prohibits DHS from releasing an alien during the removal period if the alien was ordered removed based on criminal grounds and/or terrorist activities.[60]

For aliens detained beyond the removal period, DHS must comply with the U.S. Supreme Court's decision in *Zadvydas*[61] which held that an alien with a final order of removal cannot be kept in detention (unless special circumstances exist) once it has been determined that there is not a "significant likelihood of removal in the reasonably foreseeable future."[62] The Court established 6 months as the "presumptively reasonable period of detention." After the 6-month period, "once the alien provides good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the Government must have sufficient evidence to rebut that showing."[63]

Aliens with final orders of removal who are released from ICE custody under INA section 241(a)(3) are subject to supervision.[64] The supervision is

[59] INA sec. 241(a)(1). The 90-day period is extended if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent removal.

[60] INA sec. 241(a)(2).

[61] 533 U.S. 678 (2001).

[62] *Id.*

[63] *Id.* at 701; *see also* 8 CFR 241.13(d).

[64] INA sec. 241(a)(3). When releasing an alien ordered removed on an order of supervision, ICE is not necessarily making a determination that all applicable foreign countries are refusing to accept the alien. ICE's efforts to repatriate are always ongoing and even after an alien is temporarily released on an order of supervision the foreign government could very well comply with repatriation efforts which would allow ICE to immediately take the alien back into custody and remove the alien from the United States.

effectuated through ICE Form I–220B, Order of Supervision. Conditions for release typically include regular check-ins with ICE, making good faith efforts to obtain travel documents and travel arrangements, not associating with gangs, criminals, or engaging in criminal activity, and participating in requisite rehabilitative treatment programs.

DHS currently extends eligibility for employment authorization to aliens, also known as the (c)(18) category, who have been ordered removed and have been temporarily released from custody under INA section 241(a)(3), 8 U.S.C. 1231(a)(3), on an order of supervision. *See* 8 CFR 241.5(c), 274a.12(c)(18). In order for such aliens to obtain employment authorization, they must file a Form I–765 accompanied by required documentation and the proper fee. Required documentation for Form I–765 includes a copy of the order of removal and the order of supervision. USCIS would require aliens temporarily released on an order of supervision to submit biometrics and pay the associated $85 fee as part of their initial or renewal EAD application. If USCIS approves the alien's Form I–765 under the (c)(18) category, it is valid for 1 year,[65] and USCIS mails an EAD according to the mailing preferences indicated by the applicant. To renew an alien's employment authorization under the (c)(18) category, an alien must file Form I–765, accompanied by required documentation, biometrics and the proper fees, to demonstrate that they remain on an order of supervision and continue to comply with it. USCIS may, at discretion, deny an application regardless of eligibility. If USCIS denies the Form I–765 application, the agency sends a written notice to the applicant explaining the basis for denial.

As explained in detail in the preamble, DHS has determined that employment authorization should be limited to a subset of aliens ordered removed and temporarily released on orders of supervision to better align with the DHS enforcement mission and the Administration's current immigration enforcement priorities, including those outlined in E.O. 13768, and efforts to strengthen protections of U.S. workers. Therefore, DHS proposes to amend 8 CFR 274a.12(c)(18) to eliminate eligibility for employment authorization for aliens temporarily released on orders of supervision unless DHS has determined that the alien's removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document.

Further, DHS intends to require aliens who qualify under this exception to establish an economic necessity for employment during the period they are on orders of supervision and expand the current lists of factors it considers as a matter of discretion when adjudicating an application for employment authorization from aliens on orders of supervision to include the alien's compliance with the conditions for release, and the alien's criminal history, including but not limited to any criminal arrests, charges, or convictions subsequent to the alien's release on an order of supervision.

Meanwhile, under proposed 8 CFR 274a.12(a)(10), aliens who have received a grant of CAT deferral of removal, as described in 8 CFR 208.17 and 1208.17, would be eligible for an EAD based solely on the grant of deferral, similar to aliens who are granted withholding of removal based on INA 241(b)(3), 8 U.S.C. 1231(b)(3), or the regulations implementing CAT. Aliens who fall under the 8 CFR 274a.12(a)(10) are not subject to requirements to apply to DHS to obtain employment authorization before they can begin work. However, the alien is required to apply (*i.e.,* submit Form I–765) in order to receive a physical EAD if they want a document evidencing their employment authorization pursuant to their grant of withholding or deferral. Currently, aliens granted CAT deferral of removal are required to apply for an EAD under the (c)(18) category. Upon the effective date of the final rule, these aliens would no longer be required to meet the requirements of the (c)(18) category or pay the initial $410 application fee for employment authorization since they would be able to apply for an EAD under the (a)(10) category, which is fee exempt for initial applicants. However, if these aliens want a physical EAD card as evidence of their employment authorization they would need to submit Form I–765.

Additionally, USCIS proposes to amend regulations at 8 CFR 274a.12(c)(18) and 274a.13(a) to require renewal applicants be employed by an E-Verify employer, to clarify the application and evidentiary requirements for such aliens seeking initial and renewal employment authorization under the (c)(18) category, and to codify the validity period of a (c)(18) EAD. *See* proposed 8 CFR 274a.12(c)(18)(iii) and 274a.13(a)(3)(ii). Under the proposed rule, a renewal EAD would only be granted to those applicants eligible for an EAD under the proposed exception and who establish that they are employed by a U.S. employer that is a participant in good standing in DHS's employment eligibility verification system (E-Verify) by providing their U.S. employer's E-Verify Company Identification Number and employer's name as listed in E-Verify. Renewal applications for aliens who cannot establish that they are employed by an E-Verify employer would be denied and fees would not be returned.

DHS proposes to apply changes made by this rule only to initial and renewal applications under 8 CFR 274a.12(c)(18) filed on or after the effective date of the final rule. DHS proposes to allow aliens temporarily released on orders of supervision who are already employment authorized prior to the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless the card is revoked under 8 CFR 274a.14. USCIS would continue processing any pending application for a replacement EAD received before the effective date and receiving new applications for replacement EADs because such adjudications are not considered a new grant of employment authorization but a replacement of an EAD based on a previously authorized period.

3. Population

The populations that could be affected by this proposed rule consist of work-authorized aliens who have final orders of removal but who are temporarily released from custody on an order of supervision and aliens granted CAT deferral of removal. DHS estimates the affected population based on historical data for FY 2010 to FY 2019.

Eligibility for Employment Authorization for Aliens on Orders of Supervision

Table 12 shows the annual receipts and approvals for initial and renewal applications of employment authorization for aliens temporarily released on an order of supervision using Form I–765 for FY 2010 to FY 2019.[66]

[65] All initial and renewal EADs issued under the (c)(18) category are currently valid for one year upon issuance. Replacement EAD cards are issued for the same dates as the previous card which would have had a validity period of one year.

[66] This data was provided by the USCIS Office of Performance and Quality (OPQ) and can be found online at *https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-19.pdf.* Note that replacement filings and pending counts are not presented because they would not be impacted by the proposed rule and are thus immaterial to the analysis.

TABLE 12—TOTAL ANNUAL FORM I–765 RECEIPTS AND APPROVALS FOR ALIENS TEMPORARILY RELEASED ON ORDERS OF SUPERVISION, FY 2010 TO FY 2019

Fiscal year	Initial		Renewal	
	Receipts	Approvals	Receipts	Approvals
2010	6,420	5,559	9,328	8,297
2011	6,827	5,906	12,361	11,765
2012	8,446	7,719	14,242	13,730
2013	9,163	7,091	17,316	15,119
2014	10,658	8,681	19,427	17,441
2015	9,628	8,748	22,801	21,236
2016	8,665	7,499	26,102	24,464
2017	6,235	5,273	26,332	21,274
2018	4,408	3,433	20,640	20,151
2019	5,697	4,071	19,306	*21,350

*The number of approved applications for renewal EADs in FY 2019 exceed the number of receipts since some renewal EAD applications were received in a previous fiscal year.

The number of initial approved employment authorizations increased from 5,559 in FY 2010 to 8,748 in FY 2015, then declined to 3,433 in FY 2018 before increasing to 4,071 in FY 2019. The number of renewal approvals increased from 8,297 in FY 2010 to 24,464 in FY 2016 before decreasing to about 21,000 renewal approvals annually from FY 2017 to FY 2019. Although DHS estimates this proposed rule would reduce the number of aliens eligible for employment authorization and anticipates a decline in (c)(18) receipts and approvals for both initial and renewals, DHS is unable to determine the magnitude of decline for reasons discussed further in this analysis.

In order to project future growth in the number of initial receipts and approvals, this analysis uses the 10-year annual percentage growth rates of −1.2 percent for initial receipts (Table 13).[67] DHS recognizes that the 5-year annual percentage growth rate also shows a decline (−10.0 percent).[68] For this analysis, DHS chooses the more conservative projection of initial receipts by using the 10-year annual percentage growth rate (−1.2 percent). By choosing the 10-year annual percentage growth rate, the projection (or baseline) will be higher for initial receipts which will lead to a greater range of potential cost estimates.

TABLE 13—ANNUAL PERCENTAGE GROWTH RATES OF RECEIPTS

Fiscal years	Initial	Renewal
2015–2019	−10.0	−3.3
2010–2019	−1.2	7.5

Source: USCIS analysis.

To project the number of renewal receipts, DHS also considered the 5- and 10-year annual percentage growth rates. Table 13 shows the 5-year annual percentage growth rate in the number of renewal receipts is −3.3 percent and the 10-year annual percentage growth rate is 7.5 percent.[69] Similar to the growth rates for the initial receipts, renewal receipts have a negative annual percentage growth rates over the 5-year period.

To project renewal receipts going forward, DHS acknowledges that aliens temporarily released on orders of supervision have removal orders and are continually being deported from the United States on an ongoing basis. Additionally, the declining growth rates for initial receipts would, at some point, result in either a plateau or a decrease for renewal receipts. Therefore, we do not find it reasonable to use the 10-year annual percentage growth rate of 7.5 percent to project renewal receipts. Therefore, this analysis uses the 5-year annual percentage growth rate of −3.3 percent to project a decline in the number of renewal receipts.

In order to estimate initial and renewal approvals, DHS recognizes that approvals have generally moved in line with receipts.[70] DHS recognizes that the number of approvals could occasionally differ from or lag receipts, but over time we would expect approvals to mostly move in line with receipts. Over the 10-year period from FY 2010 to FY 2019, the average initial approval rate was approximately 84 percent of initial receipts and the average renewal approval rate was approximately 93 percent of renewal receipts.[71]

To project FY 2020 initial receipts, the 10-year annual percentage growth rate of −1.2 percent (Table 13) is multiplied by the number of initial receipts from FY 2019, 5,697 (Table 12), which equals −68 (rounded). Subtracting 68 from 5,697 equals 5,629 (Table 14). The FY 2020 initial approvals are calculated by multiplying the 10-year average initial approval rate of 84 percent by the estimated number

[67] Calculation: (((FY 2019 Initial Receipts 5,697/FY 2010 Initial Receipts 6,420) ∧ (1/10)) − 1) * 100 = −1.2 percent.

[68] Calculation: (((FY 2019 Initial Receipts 5,697/FY 2015 Initial Receipts 9,628) ∧ (⅕)) − 1) * 100 = −10.0 percent.

[69] Calculations:

(((FY 2019 Renewal Receipts 19,306/FY 2015 Renewal Receipts 22,801) ∧ (⅕)) − 1) * 100 = −3.3 percent.

(((FY 2019 Renewal Receipts 19,306/FY 2010 Renewal Receipts 9,328) ∧ (1/10)) − 1) * 100 = 7.5 percent.

[70] Exceptions for initials include FY 2013 when initial approvals declined while initial receipts increased; exceptions for renewals include FY 2017 when renewal receipts increased slightly while renewal approvals declined and FY 2019 when the number of renewal approvals exceeded the number of renewal receipts received.

[71] Calculations:

(6,398 (initial approvals 10-year average)/7,615 (initial receipts 10-year average)) × 100 = 84 percent (rounded).

(17,483 (renewal approvals 10-year average)/18,786 (renewal receipts 10-year average)) × 100 = 93 percent (rounded).

of initial receipts from FY 2020, 5,629, which equals 4,728 (rounded).[72] The FY 2019 renewal receipts, 19,306, is multiplied by the 5-year annual percentage growth rate of −3.3 to get −637 (rounded).[73] Subtracting 637 from the FY 2019 renewal receipts equals 18,669. The 18,669 is then multiplied by the 10-year average renewal approval rate of 93 percent, which equals 17,362 (rounded) to get the FY 2020 renewal approvals.[74] To project receipts for FY 2021, the same process was repeated using the calculated FY 2020 numbers in place of those from FY 2019. Approvals were then calculated based on the projected receipts for FY 2021. The process was then repeated for subsequent years. These projections are shown in Table 14 and are used as the baseline for this rule.

TABLE 14—PROJECTED TOTAL ANNUAL FORM I–765 RECEIPTS AND APPROVALS FOR ALIENS TEMPORARILY RELEASED ON ORDERS OF SUPERVISION, FYS 2020 TO 2029

Fiscal year	Initial		Renewal	
	Receipts	Approvals	Receipts	Approvals
2020	5,629	4,728	18,669	17,362
2021	5,561	4,671	18,053	16,789
2022	5,494	4,615	17,457	16,235
2023	5,428	4,560	16,881	15,699
2024	5,363	4,505	16,324	15,181
2025	5,299	4,451	15,785	14,680
2026	5,235	4,398	15,264	14,196
2027	5,173	4,345	14,761	13,727
2028	5,110	4,293	14,274	13,274
2029	5,049	4,241	13,802	12,836

Source: USCIS analysis.

This proposed rule would eliminate the eligibility for employment authorization for aliens temporarily released on orders of supervision with one exception. The exception is for aliens for whom DHS has determined removal is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents. In order to estimate the number of aliens whose removal is impracticable for the reason stated, USCIS obtained data from ICE on the number of aliens released from custody who have been unable to obtain travel documents over the last 5 fiscal years. Table 15 shows the number of aliens temporarily released on orders of supervision denied a travel document in the corresponding fiscal year. DHS estimates this proposed rule would result in fewer aliens temporarily released on orders of supervision who are eligible for employment authorization and would result in a maximum of 459 aliens remaining eligible for an employment authorization under the exception.

TABLE 15—ALIENS RELEASED FROM ICE CUSTODY, UNABLE TO OBTAIN TRAVEL DOCUMENTS, FY 2015 TO FY 2019

Fiscal year	Total
2015	369
2016	411
2017	324
2018	530
2019	659
5-year Average	459

Source: DHS–ICE ERO, LESA Statistical Tracking Unit.

As noted in the preamble, DHS is proposing to consider the alien's criminal history, including but not limited to criminal activities subsequent to his or her release on an order of supervision in determining whether the alien warrants DHS's favorable exercise of discretion to obtain an EAD. While there are aliens with an order of supervision who are known convicted criminals, DHS is unable to precisely estimate the number of aliens that could potentially be denied an EAD as a matter of discretion should this proposed rule be promulgated as a final rule. DHS is proposing to expressly consider the alien's criminal history as a factor in determining whether the alien warrants a favorable exercise of discretion in granting an EAD. The discretionary analysis is case specific and typically assessed after an officer has determined that the alien meets all applicable threshold eligibility requirements. It involves the review of all relevant, specific facts and circumstances in an individual case and weighing all the positive factors present in a particular case against any negative factors in the totality of the record. Further, DHS does not know the number of excepted aliens that would be denied as a matter of discretion because of subsequent criminal convictions. For these reasons, we cannot estimate how many aliens would be denied as a matter of discretion based on criminal history.

Aliens Granted CAT Deferral of Removal

DHS also proposes to revise the (a)(10) employment authorization category to include aliens who are granted CAT deferral of removal as employment authorized based solely on the grant of deferral. Table 16 shows the number of CAT cases granted deferral of removal for FY 2014 to FY 2018.[75] Since FY 2015, the number of CAT cases granted deferral of removal has trended upward reaching a high of 177 cases in FY 2018. The 5-year average number of cases is approximately 147.

[72] Calculation: 5,629 (FY 2020 estimated initial receipts) × 84 percent = 4,728 estimated FY 2020 initial approvals.

[73] Calculation: FY 2019 renewal receipts 19,306 × 5-year annual percentage growth rate −0.033 = −637.

[74] Calculation: 18,669 (FY 2020 estimated renewal receipts) × 93 percent = 17,362 estimated FY 2020 renewal approvals.

[75] The Department of Justice Statistics Yearbook website was last updated on August 30, 2019 with FY 2018 data. The analysis will be updated with FY 2019 when it becomes available.

TABLE 16—CASES GRANTED CAT DEFERRAL OF REMOVAL, FY 2014–FY 2018

Fiscal year	Cases
2014	121
2015	121
2016	140
2017	175
2018	177
5-year average	147

Source: Department of Justice Statistics Yearbook, *https://www.justice.gov/eoir/statistical-year-book.*

The population of aliens who have been granted deferral of removal based on the regulations implementing CAT are currently regulated to apply for employment authorization under the (c)(18) category. Currently, USCIS does not have a breakout for the number of aliens who have been granted CAT deferral of removal who have applied or been approved for an initial or renewal EAD. Under the proposed rule, this population would be employment authorized based solely on such a grant and would only need to apply for the physical EAD card under the (a)(10) category if they want a document evidencing their employment authorization pursuant to the grant of deferral of removal.

Estimated Eligible Employment Authorizations

Based on the exception (459) and the grant of CAT deferral of removal exception (147), DHS estimates an upper bound estimate for initial (c)(18) EAD approvals that would remain eligible for employment authorization under this rule in the future is 606 annually. DHS recognizes this upper bound estimate does not take into account the number of aliens who would no longer be eligible due to subsequent convictions. DHS also does not know how many of these aliens would be eligible or ineligible under the economic necessity requirement or the number that would apply for or be denied for other considerations, such as the alien's compliance with their order of supervision conditions, and the alien's criminal history, including but not limited to any criminal arrests, charges, or convictions subsequent to the alien's release from custody on an order of supervision. DHS recognizes that if any of the 459 potential approvals who may fall under the exception do not apply for work authorization or are denied employment authorization that the upper bound of 606 would be an overestimate. Thus, we use an upper bound estimate of 606 assuming 100 percent of aliens temporarily released on orders of supervision who have been unable to obtain travel documents would remain employment eligible under this rule, because choosing any other upper bound would be speculative (Table 17(B) column A). We use a lower bound estimate of 147 (Table 17(A) column A) since all aliens who are granted CAT deferral of removal would continue to be employment authorized. These upper and lower bound initial receipts estimates are applied, unchanged, into the future. Although initial receipts overall have been declining (Table 12), the upper and lower bounds depend on the average number of aliens released from ICE custody who are unable to obtain travel documents and aliens granted CAT deferral of removal, both of which have experienced periods of stability and growth over their respective five-year periods of analysis (Tables 15 and 16). For this analysis, DHS relies on the five-year averages for these populations as there are various factors outside of this rulemaking may result in a decline or rise of in the number of aliens identified as unable to obtain travel documents or granted CAT deferral of removal. However, DHS cannot predict with certainty at this time if the trend in the size of these populations would increase, decrease, or remain stable. Therefore, DHS uses the respective 5-year averages for this analysis.

DHS estimates that the lower bound share of initial EADs under the baseline that would continue to be eligible for renewal under this proposed rule ranges from 3.1 percent in FY 2020 to 3.5 percent in FY 2029 (Table 17(A) column C).[76] Under the assumption that the same share of initial approvals would be eligible as renewals, we multiply the renewal receipt and approval populations by these percentages to obtain the corresponding lower bound renewal EAD estimates for each fiscal year (Table 17(A) columns E and G). Further, the upper bound is also estimated assuming that the same share of initial approvals would be eligible as renewals. Table 17(B) repeats the estimates for the upper bound populations for initials and renewals.

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[76] Calculations: For example, for FY2020—(147 estimated lower bound/4,728 projected number of initial approvals) × 100 = 3.1 percent (rounded). 147 estimated upper bound/4,241 projected number of initial approvals) × 100 = 3.5 percent (rounded).

Table 17: Number of Eligible Employment Authorizations under Orders of Supervision Under this Proposed Rule, FYs 2020 to 2029

Table 17(A): Lower Bound

Fiscal Year	Initial			Renewal			
	Estimated Approvals Under this Rule	Projected Approvals Under the Baseline	Share (%)	Projected Receipts Under the Baseline	Estimated Receipts Under this Rule	Projected Approvals Under the Baseline	Estimated Approvals Under this Rule
	A	B	C = A / B	D	E = C x D	F	G = C x F
2020	147	4,728	3.1%	18,669	579	17,362	538
2021	147	4,671	3.1%	18,053	560	16,789	520
2022	147	4,615	3.2%	17,457	559	16,235	520
2023	147	4,560	3.2%	16,881	540	15,699	502
2024	147	4,505	3.3%	16,324	539	15,181	501
2025	147	4,451	3.3%	15,785	521	14,680	484
2026	147	4,398	3.3%	15,264	504	14,196	468
2027	147	4,345	3.4%	14,761	502	13,727	467
2028	147	4,293	3.4%	14,274	485	13,274	451
2029	147	4,241	3.5%	13,802	483	12,836	449

Table 17(B): Upper Bound

Fiscal Year	Initial			Renewal			
	Estimated Approvals Under this Rule	Projected Approvals Under the Baseline	Share (%)	Projected Receipts Under the Baseline	Estimated Receipts Under this Rule	Projected Approvals Under the Baseline	Estimated Approvals Under this Rule
	A	B	C = A / B	D	E = C x D	F	G = C x F
2020	606	4,728	12.8%	18,669	2,390	17,362	2,222
2021	606	4,671	13.0%	18,053	2,347	16,789	2,183
2022	606	4,615	13.1%	17,457	2,287	16,235	2,127
2023	606	4,560	13.3%	16,881	2,245	15,699	2,088
2024	606	4,505	13.5%	16,324	2,204	15,181	2,049
2025	606	4,451	13.6%	15,785	2,147	14,680	1,996
2026	606	4,398	13.8%	15,264	2,106	14,196	1,959
2027	606	4,345	13.9%	14,761	2,052	13,727	1,908
2028	606	4,293	14.1%	14,274	2,013	13,274	1,872
2029	606	4,241	14.3%	13,802	1,974	12,836	1,836

Source: USCIS Analysis

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DHS recognizes that the projected lower bound range of 449 to 538 for renewal approvals may not fully account for the number of aliens who would no longer be eligible for employment authorization due to the proposed E-Verify requirement if their employers are not enrolled and opt not to enroll in E-Verify, and if they are unable to find alternative employment with an E-Verify employer. Some renewal applicants may also not be currently employed and therefore would not meet the new requirements for renewal. Additionally, DHS does not know how many of these aliens would be eligible under the economic necessity requirement or determined not to warrant employment authorization as a matter of discretion due to subsequent convictions. DHS recognizes that if any of the estimated range of 449 to 538 renewal receipts do not apply for employment authorization or are denied employment authorization that this lower bound could be even lower.

Renewal Applicants for Employment Authorization—E-Verify

DHS proposes to allow aliens on orders of supervision who are granted employment authorization after the effective date of the final rule to have their employment authorization renewed only if they meet the exception and they establish that they are employed by a U.S. employer who is a participant in good standing in DHS's employment eligibility verification system (E-Verify) by providing their U.S. employer's E-Verify Company Identification Number and the employer's name as listed in E-Verify.

Since this rule proposes to eliminate eligibility for employment authorization for aliens temporarily released on orders of supervision, the impact on the renewal population would depend on which aliens remain eligible and if the alien's employer already participates in E-Verify or would be willing to enroll and participate in E-Verify if the employer is not enrolled. Because of the uncertainty regarding eligibility, DHS is unable to estimate a range for the renewal population that would be impacted by this provision and attempting to do so would be speculative. However, DHS acknowledges there would be renewal applicants who would be impacted by this provision.

Employer Population

DHS recognizes that this proposed rule would impact employers who currently, or will in the future, employ (c)(18) alien workers. However, DHS cannot precisely estimate the number of employers that could incur costs because (c)(18) employment authorization is considered to be ''open market,'' where alien workers are not tied to a specific employer. Such employment also does not require a Labor Condition Application (LCA) or a Temporary Labor Certification (TLC) from the U.S. Department of Labor (DOL), or other employer data at any point in the EAD process (initial, renewal, or replacement stage). DHS recognizes that many factors influence whether an employer participates in the E-Verify program. While E-Verify is a free, voluntary program, some employers are required to enroll in the program as a condition of federal contracting, or as a requirement of state legislation or other applicable laws. However, DHS cannot predict the number of employers who would use E-Verify or how many would experience labor turnover due to this proposed rule. Further, DHS does not know the number of employers that would choose to enroll in E-Verify to retain their (c)(18) renewal alien employees or the overall number of employees for whom these entities would create an E-Verify case, should they enroll. DHS is also unable to determine the number of employers whose (c)(18) alien employees would remain employment eligible as a result of this proposed rule. DHS welcomes public comment or data on employers who enroll in the E-Verify program to retain (c)(18) alien renewal employees as well as the overall number of employees for whom employers would create E-Verify cases, should they enroll employees. DHS notes that this provision may act as a barrier to a company hiring or continuing to employ a (c)(18) employment authorized alien should the company make the choice to not enroll in E-Verify. Such barriers contribute to the cost calculation of this rule by increasing the potential for turnover costs incurred by U.S. businesses—even in situations where a (c)(18) employee remains employment authorized.

4. Transfers, Costs and Benefits of the Proposed Rule

Transfers and Costs

This section presents the costs and benefits associated with the proposed rule. The impacts of the proposed provisions are estimated in comparison with a baseline that assumes no proposed action will be implemented.

Proposal Regarding EAD Eligibility

DHS anticipates that revising eligibility and introducing new evidentiary requirements for (c)(18) EADs could have several impacts, including potential lost earnings to alien workers temporarily released on an order of supervision after receiving a final order of removal, the cost associated with an increase of a 30 minute time burden to complete Form I–765, as well as the costs of filing an additional form (Form I–765WS) and submitting biometrics.

The proposed rule is estimated to result in a reduction in the number of aliens temporarily released from custody on an order of supervision that are eligible for EADs. The impacts of reducing the number of aliens temporarily released on orders of supervision that are eligible for EADs include both potential distributional impacts (transfers) and costs. USCIS uses lost compensation to aliens temporarily released on an order of supervision that are no longer eligible for EADs as a measure of the impact of this change—either as distributional impacts (transfers) from these aliens to others or as a proxy for businesses' cost for lost productivity.

Companies may incur opportunity costs by having to choose the next best alternative to filling a job an alien temporarily released on orders of supervision would have filled. DHS is unable to determine what an employer's next best alternative may be for those companies. As a result, DHS does not know the portion of overall impacts of this rule that are transfers or costs. If companies can find replacement labor for the positions the aliens temporarily released on orders of supervision would have filled, removing EAD eligibility for these aliens would result in primarily distributional effects in the form of transfers from aliens temporarily released on orders of supervision to others that are currently in the U.S. labor force (or workers induced to return to the labor market), possibly in the form of additional work hours or overtime pay. DHS acknowledges that there may be additional opportunity costs to employers such as additional costs associated with searching for new employees. If companies cannot find reasonable substitutes for the labor the aliens temporarily released on orders of supervision would have provided, removing EAD eligibility for these aliens would primarily result in costs to those companies through lost productivity and profits.

DHS has no information on wages or occupations of alien workers temporarily released on orders of supervision, at the initial or renewal stage, since these alien workers obtain an open-market EAD that does not include or require any data on their employment.

The federal minimum wage is currently $7.25.[77] The use of the federal minimum wage is grounded in the notion that most of the relevant EAD holders would not have been in the labor force long and would thus not be expected to earn relatively high wages. However, in this proposed rulemaking, we rely on the ''effective'' minimum wage of $11.80. As is reported by The New York Times ''[t]wenty-nine states and the District of Columbia have state-level minimum hourly wages higher than the federal [minimum wage],'' as do many city and county governments. This analysis in The New York Times estimates that ''the effective minimum

[77] *See* 29 U.S.C. 206—Minimum wage, *available at https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8-sec206.htm* (accessed May 19, 2020). *See also* U.S. Department of Labor, Wage and Hour Division. The minimum wage in effect as of May 19, 2020. Available at *https://www.dol.gov/general/topic/wages/minimumwage.*

wage in the United States . . . [was] $11.80 an hour in 2019.'' [78] DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent DOL, Bureau of Labor Statistics (BLS) report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.[79] Although the federal minimum wage could be considered a lower bound income for the population of interest, DHS calculates the total rate of compensation for the effective minimum hourly wage is $17.23, which is 62.7 percent higher than the federal minimum wage.[80]

DHS does not rule out the possibility that some portion of the population might earn the average wage for all occupations, but without empirical information, DHS believes that including a range with the lower bound relying on the effective minimum wage is justifiable. Therefore, this analysis uses both the effective minimum hourly wage rate of $11.80 to estimate a lower bound and an average wage rate for all occupations of $25.72 as an upper bound in consideration of the variance in average wages across states.[81] Therefore, DHS calculates the average total rate of compensation for all occupations as $37.55 per hour, where the mean hourly wage is $25.72 per hour worked and average benefits are $11.83 per hour.[82] All of the quantified estimates of costs and transfer payments in this analysis incorporate lower and upper bound ranges based on the effective minimum hourly wage and the average hourly wage across all occupations.

Estimated impacts in this analysis include lost potential earnings to applicants. Since the current validity period of a (c)(18) EAD is up to one year, DHS multiplied the total rate of compensation using the average effective minimum hourly wage rate of $17.23 and the average hourly wage rate across all occupations of $37.55 by 2,080 hours, the typical annual number of work hours, to estimate the annual earnings of $35,838 and $78,106, respectively, for each applicant.[83] Table 18 shows the two population ranges for initial and renewal approvals for the two ranges of wage estimates for aliens temporarily released on orders of supervision and the corresponding potential lost earnings. Table 18(A) shows cost estimates for the lower and upper bound range of initial EAD approvals based on the lower bound wage annual earnings of $35,838. The total earnings for each population under the rule based on the projections developed in the ''Population'' section are reported in Columns B, D and F. Columns G and H present the potential lost earnings, by subtracting, from the current baseline (column F), the potential earnings from rule populations (columns B and D). Similarly, Table 18(B) repeats the estimates for the lower and upper bound range of initial EAD approvals based on the upper bound (average) wage annual earnings of $78,106. Tables 18(C) and 18(D) repeat the estimates from Table 18(A) and 18(B) for the lower and upper bound ranges of renewal EAD approvals based on the lower and upper bound wage annual earnings, respectively.

[78] ''Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)'' Ernie Tedeschi, The New York Times, April 24, 2019. Accessed at *https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html* (last visited August 21, 2020).

[79] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $37.10/$25.47 = 1.458 = 1.46 (rounded). See Economic News Release, *Employer Cost for Employee Compensation (March 2020),* U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. March 19, 2020, available at *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (last visited March 24, 2020).

[80] Calculations (1) for effective minimum wage: $11.80 hourly wage × benefits burden of 1.46 = $17.23; (2) (($17.23 wage − $10.59 wage)/$10.59)) wage = 0.627, which rounded and multiplied by 100 = 62.7 percent.

[81] The average wage for all occupations is found Department of Labor, Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates. The data is found at: *https://www.bls.gov/oes/2019/may/oes_nat.htm#00-0000* (last visited March 19, 2020).

[82] The calculation of the weighted mean hourly wage for applicants: $25.72 per hour × 1.46 = $37.5512 = $37.55 (rounded) per hour.

[83] Calculations: 2,080 typical annual work hours × $17.23 the total rate of compensation using the average state minimum wage = $35,838 (rounded). 2,080 typical annual work hours × $37.55 the total rate of compensation using the average wage = $78,106 (rounded).

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Table 18: Wage Estimates for Aliens on Orders of Supervision and Potential Lost Earnings, FYs 2020 to 2029

Table 18(A): Initial Approvals, Lower Bound Wage

Fiscal Year	Lower Bound Number of Filers* A	Total Annual Lower Bound Earnings B = A x $35,838	Upper Bound Number of Filers* C	Total Upper Bound Earnings D = C x $35,838	Projected Form I-765 Filers Without Rule (Baseline) E	Estimated Annual Earnings Without Rule (Baseline) F = E x $35,838	Lost Lower Bound Earnings as a Result of this Rule G = F - B	Lost Upper Bound Earnings as a Result of this Rule H = F - D
2020	147	$5,268,186	606	$21,717,828	4,728	$169,442,064	$164,173,878	$147,724,236
2021					4,671	$167,399,298	$162,131,112	$145,681,470
2022					4,615	$165,392,370	$160,124,184	$143,674,542
2023					4,560	$163,421,280	$158,153,094	$141,703,452
2024					4,505	$161,450,190	$156,182,004	$139,732,362
2025					4,451	$159,514,938	$154,246,752	$137,797,110
2026					4,398	$157,615,524	$152,347,338	$135,897,696
2027					4,345	$155,716,110	$150,447,924	$133,998,282
2028					4,293	$153,852,534	$148,584,348	$132,134,706
2029					4,241	$151,988,958	$146,720,772	$130,271,130
10-year Total							$1,553,111,406	$1,388,614,986

Table 18(B): Initial Approvals, Upper Bound Wage

Fiscal Year	Lower Bound Number of Filers* A	Total Annual Lower Bound Earnings B = A x $78,106	Upper Bound Number of Filers* C	Total Upper Bound Earnings D = C x $78,106	Projected Form I-765 Filers Without Rule (Baseline) E	Estimated Annual Earnings Without Rule (Baseline) F = E x $78,106	Lost Lower Bound Earnings as a Result of this Rule G = F - B	Lost Upper Bound Earnings as a Result of this Rule II = F - D
2020	147	$11,481,582	606	$47,332,236	4,728	$369,285,168	$357,803,586	$321,952,932
2021					4,671	$364,833,126	$353,351,544	$317,500,890
2022					4,615	$360,459,190	$348,977,608	$313,126,954
2023					4,560	$356,163,360	$344,681,778	$308,831,124
2024					4,505	$351,867,530	$340,385,948	$304,535,294
2025					4,451	$347,649,806	$336,168,224	$300,317,570
2026					4,398	$343,510,188	$332,028,606	$296,177,952
2027					4,345	$339,370,570	$327,888,988	$292,038,334
2028					4,293	$335,309,058	$323,827,476	$287,976,822
2029					4,241	$331,247,546	$319,765,964	$283,915,310
10-year Total							$3,384,879,722	$3,026,373,182

Table 18(C): Renewal Approvals, Lower Bound Wage

Fiscal Year	Lower Bound Number of Filers*	Total Annual Lower Bound Earnings	Upper Bound Number of Filers*	Total Upper Bound Earnings	Projected Form I-765 Filers Without Rule (Baseline)	Estimated Annual Earnings Without Rule (Baseline)	Lost Lower Bound Earnings as a Result of this Rule	Lost Upper Bound Earnings as a Result of this Rule

	A	B = A x $35,838	C	D = C x $35,838	E	F = E x $35,838	G = F - B	H = F - D
2020	538	$19,280,844	2,222	$79,632,036	17,362	$622,219,356	$602,938,512	$542,587,320
2021	520	$18,635,760	2,183	$78,234,354	16,789	$601,684,182	$583,048,422	$523,449,828
2022	520	$18,635,760	2,127	$76,227,426	16,235	$581,829,930	$563,194,170	$505,602,504
2023	502	$17,990,676	2,088	$74,829,744	15,699	$562,620,762	$544,630,086	$487,791,018
2024	501	$17,954,838	2,049	$73,432,062	15,181	$544,056,678	$526,101,840	$470,624,616
2025	484	$17,345,592	1,996	$71,532,648	14,680	$526,101,840	$508,756,248	$454,569,192
2026	468	$16,772,184	1,959	$70,206,642	14,196	$508,756,248	$491,984,064	$438,549,606
2027	467	$16,736,346	1,908	$68,378,904	13,727	$491,948,226	$475,211,880	$423,569,322
2028	451	$16,162,938	1,872	$67,088,736	13,274	$475,713,612	$459,550,674	$408,624,876
2029	449	$16,091,262	1,836	$65,798,568	12,836	$460,016,568	$443,925,306	$394,218,000
10-year Total							$5,199,341,202	$4,649,586,282

Table 18(D): Renewal Approvals, Upper Bound Wage

Fiscal Year	Lower Bound Number of Filers* A	Total Annual Lower Bound Earnings B = A x $78,106	Upper Bound Number of Filers* C	Total Upper Bound Earnings D = C x $78,106	Projected Form I-765 Filers Without Rule (Baseline) E	Estimated Annual Earnings Without Rule (Baseline) F = E x $78,106	Lost Lower Bound Earnings as a Result of this Rule G = F - B	Lost Upper Bound Earnings as a Result of this Rule H = F - D
2020	538	$42,021,028	2,222	$173,551,532	17,362	$1,356,076,372	$1,314,055,344	$1,182,524,840
2021	520	$40,615,120	2,183	$170,505,398	16,789	$1,311,321,634	$1,270,706,514	$1,140,816,236
2022	520	$40,615,120	2,127	$166,131,462	16,235	$1,268,050,910	$1,227,435,790	$1,101,919,448
2023	502	$39,209,212	2,088	$163,085,328	15,699	$1,226,186,094	$1,186,976,882	$1,063,100,766
2024	501	$39,131,106	2,049	$160,039,194	15,181	$1,185,727,186	$1,146,596,080	$1,025,687,992
2025	484	$37,803,304	1,996	$155,899,576	14,680	$1,146,596,080	$1,108,792,776	$990,696,504
2026	468	$36,553,608	1,959	$153,009,654	14,196	$1,108,792,776	$1,072,239,168	$955,783,122
2027	467	$36,475,502	1,908	$149,026,248	13,727	$1,072,161,062	$1,035,685,560	$923,134,814
2028	451	$35,225,806	1,872	$146,214,432	13,274	$1,036,779,044	$1,001,553,238	$890,564,612
2029	449	$35,069,594	1,836	$143,402,616	12,836	$1,002,568,616	$967,499,022	$859,166,000
10-year Total							$11,331,540,374	$10,133,394,334

*As discussed in the analysis, since the number of eligible filers under this proposed rule is unknown, USCIS provides ranges of potentially eligible filers for both the initial and renewal populations.

Source: USCIS Analysis

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DHS uses the lost compensation to aliens temporarily released on orders of supervision as a measure of the overall impact of removing eligibility for a (c)(18) EAD—either as distributional impacts (transfers) or as a proxy for businesses' cost for lost productivity. It does not include additional costs to businesses for lost profits and opportunity costs or the distributional impacts for those in an applicant's support network. As shown in Table 18, the potential lost earnings depend on the number of aliens released temporarily on orders of supervision who remain eligible for an EAD and continue to work, as well as their wage rate. Over the 10-year period from FY 2020 to FY 2029, the total lost earnings would range from $6,038,201,268 to $14,716,520,096.[84] Annualized at 7 percent, lost earnings for initial and renewal EAD holders would range from $614,037,170 to $ 1,495,358,741 (Table 22).[85]

[84] Calculations: $1,388,614,986 (10-year total initial upper bound costs) + $4,649,586,282 (10-year total renewal upper bound costs) = $6,038,201,268 (minimum 10-year total lower bound costs); $3,384,879,722 (10-year total initial upper bound costs) + $11,331,540,374 (10-year total renewal upper bound costs) = $14,716,420,096 (maximum 10-year total upper bound costs).

[85] An important assumption relied upon in this analysis is that each holder of an approved EAD has entered the labor force and is working (when the rule becomes effective). DHS relies on this assumption on the grounds that individuals would not have expended the direct filing and time-related opportunity costs of applying for an EAD if they did not intend to recoup an economic benefit from doing so. In reality, some EAD holders may not be employed for any number of reasons—including normal labor market frictions—that have nothing to do with this rule. In addition, DHS has received information that some individuals seek an EAD for purposes of paper documentation and may not intend to work.

EAD holders who would no longer be eligible to renew their employment authorization under the proposed eligibility criteria in this rule would incur lost earnings. Additionally, DHS acknowledges the potential for additional lost compensation to renewal applicants if their employers are not currently enrolled in E-Verify and opt not to enroll in the E-Verify program. In such cases, renewal applicants could lose earnings if they are unable to find employment with an employer who participates in E-Verify.

DHS recognizes that, excluding the effects of inflation, earnings generally rise over time and the earnings of EAD holders could be larger in the future than estimated in this analysis. Moreover, since EAD renewals, by necessity of order, follow in time after an initial EAD approval, wages and, hence, total compensation, earned could be higher for renewals. Accordingly, this effect could bias the estimate of earnings losses downward. However, we see no tractable way at present to incorporate this possibility into the quantified estimates.

DHS welcomes public comments and data concerning the appropriateness of using the effective minimum wage rate as a lower bound and the average wage rate as an upper bound for (c)(18) workers and the resulting impacts presented.

In addition to the above quantified impacts, there could be qualitative impacts for aliens on orders of supervision who would no longer be eligible for employment authorization. For the (c)(18) population that will not be able to renew their EAD or obtain an initial EAD, there would likely be an impact in terms of lost income which could pose economic hardships. Members of this population may need to rely on their support networks for financial and social assistance, which could involve, but may not be limited to, family members and friends, religious and charitable organizations, private non-profit providers, state and local governments, and NGOs. DHS believes that the immediate indirect impact of this rule to an applicant's support network is likely not significantly more than the wages and benefits the applicant would have earned without this rule.

Costs to Applicants To Submit Biometrics

This rule proposes to codify a biometrics requirement for aliens who file for an EAD under the (c)(18) category. Currently, all (c)(18) applicants receive an appointment notice from USCIS to submit their biometrics [86] at an Application Support Center (ASC) to, among other things, assist in identity verification and facilitate (c)(18) EAD card production. They are also required to pay the $85 biometric services fee.[87] This rule would codify the requirement for aliens to submit biometrics and pay the proposed $30 biometric services fee. The biometrics requirement would apply to (c)(18) Form I–765 filers, for both initial and renewal EAD applications. In addition, DHS proposes to use the biometrics submitted by (c)(18) EAD applicants to screen for criminal history.

The submission of biometrics requires that aliens travel to an ASC for the biometric services appointment. In past rulemakings, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.[88] The cost of travel also includes a mileage charge based on the estimated 50 mile round trip at the 2020 General Services Administration (GSA) rate of $0.58 per mile.[89] Because an individual alien would spend 1 hour and 10 minutes (1.17 hours) at an ASC to submit biometrics, summing the ASC time and travel time yields 3.67 hours.[90] At the lower and upper wage bounds, the opportunity costs of time to submit biometrics services are $63.23 and $137.81.[91] The travel cost is $29, which is the per mileage reimbursement rate of $0.58 multiplied by 50-mile travel distance. Summing the time-related and travel costs generates a per person biometrics submission cost of $92.23 at the lower bound wage and $166.81 at the upper bound wage.[92] Combining these costs with the biometric services fee totals a per person biometrics submission cost of $122.23 and $196.81 at the respective lower and upper wage rates.[93]

Table 19 shows the two population ranges for initial and renewal receipts for the two ranges of wage estimates for aliens on orders of supervision and the corresponding total cost to submit biometrics. Table 19(A) shows cost estimates for the lower and upper bound range of initial EAD receipts at the lower bound submission cost of $122.23. The total costs for Columns C and E provide the range of undiscounted costs for the lower bound. Similarly, Table 19(B) repeats the estimates for the lower and upper bound range of initial EAD receipts based on the upper bound submission cost of $196.81. Tables 19(C) and 19(D) repeat these estimates for the lower and upper bound ranges of renewal EAD receipts based on the lower and upper bound submission costs, respectively.

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[86] At present, biometrics collection generally refers to the collection of fingerprints, photographs, and signatures. *See https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment* (describing biometrics as including fingerprints, photographs, and digital signature) (last visited May 15, 2020).

[87] USCIS was previously authorized to collect an $85 biometric services fee. However, the recently promulgated fee rule incorporated the biometric services costs into the underlying immigration benefit request fees for which biometric services are applicable in the recent fee rule and maintained a separate $30 biometric services fees for certain benefit requests. *See* DHS, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR 46788 (Aug. 3, 2020) (Fee Rule).

[88] *See* ''Employment Authorization for Certain H–4 Dependent Spouses; Final rule,'' 80 FR 10284 (25 Feb. 2015); and ''Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule,'' 78 FR 536, 572 (3 Jan. 2013).

[89] The General Services Administration mileage rate of $0.58, effective January 1, 2020, available at: *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates* (last visited May 7, 2020).

[90] Source for biometric time burden estimate: Paperwork Reduction Act (PRA) Supporting Statement for Form I–485 (OMB control number 1615–0023). The PRA Supporting Statement can be found at Question 12 on *Reginfo.gov* at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201706-1615-001.*

[91] Calculations: 3.67 (total time in hours to submit biometrics) × $12.05 (prevailing wage for 1 hour of work) = $44.22; 3.67 (total time in hours to submit biometrics) × $37.55 (average wage for 1 hour of work) = $137.81.

[92] Calculations: $29 (cost of travel) + $63.23 (time-related costs at lower bound wage) = $92.23; $29 (cost of travel) + $137.81 (time-related costs at upper bound wage) = $166.81.

[93] Calculations: $92.23 (total time-related cost at lower bound wage) + $30 (biometrics fee) = $122.23; $166.81 total (time-related costs at upper bound wage) + $30 (biometrics fee) = $196.81.

Table 19: Cost Estimates for Aliens Temporarily Released on Orders of Supervision to Submit Biometrics, FYs 2020 to 2029 (Undiscounted)

Table 19(A): Initial Receipts, Lower Bound Wage

Fiscal Year	Submission Cost	Lower Bound Projected Receipts	Total Lower Bound Costs	Upper Bound Projected Receipts	Total Upper Bound Costs
	A	B	C = A x B	D	E = A x D
2020	$122.23	147	$17,968	606	$74,071
2021			$17,968		$74,071
2022			$17,968		$74,071
2023			$17,968		$74,071
2024			$17,968		$74,071
2025			$17,968		$74,071
2026			$17,968		$74,071
2027			$17,968		$74,071
2028			$17,968		$74,071
2029			$17,968		$74,071
10-year Total			$179,678		$740,714

Table 19(B): Initial Receipts, Upper Bound Wage

Fiscal Year	Submission Cost	Lower Bound Projected Receipts	Total Lower Bound Costs	Upper Bound Projected Receipts	Total Upper Bound Costs
	A	B	C = A x B	D	E = A x D
2020	$196.81	147	$28,931	606	$119,267
2021			$28,931		$119,267
2022			$28,931		$119,267
2023			$28,931		$119,267
2024			$28,931		$119,267
2025			$28,931		$119,267
2026			$28,931		$119,267
2027			$28,931		$119,267
2028			$28,931		$119,267
2029			$28,931		$119,267

10-year Total			$289,311		$1,192,669
Table 19(C): Renewal Receipts, Lower Bound Wage					
Fiscal Year	**Submission Cost**	**Lower Bound Projected Receipts**	**Total Lower Bound Costs**	**Upper Bound Projected Receipts**	**Total Upper Bound Costs**
	A	**B**	**C = A x B**	**D**	**E = A x D**
2020	$122.23	579	$70,771	2,390	$292,130
2021		560	$68,449	2,347	$286,874
2022		559	$68,327	2,287	$279,540
2023		540	$66,004	2,245	$274,406
2024		539	$65,882	2,204	$269,395
2025		521	$63,682	2,147	$262,428
2026		504	$61,604	2,106	$257,416
2027		502	$61,359	2,052	$250,816
2028		485	$59,282	2,013	$246,049
2029		483	$59,037	1,974	$241,282
10-year Total			$644,397		$2,660,336
Table 19(D): Renewal Receipts, Upper Bound Wage					
Fiscal Year	**Submission Cost**	**Lower Bound Projected Receipts**	**Total Lower Bound Costs**	**Upper Bound Projected Receipts**	**Total Upper Bound Costs**
	A	**B**	**C = A x B**	**D**	**E = A x D**
2020	$196.81	579	$113,953	2,390	$470,376
2021		560	$110,214	2,347	$461,913
2022		559	$110,017	2,287	$450,104
2023		540	$106,277	2,245	$441,838
2024		539	$106,081	2,204	$433,769
2025		521	$102,538	2,147	$422,551
2026		504	$99,192	2,106	$414,482
2027		502	$98,799	2,052	$403,854
2028		485	$95,453	2,013	$396,179
2029		483	$95,059	1,974	$388,503
10-year Total			$1,037,582		$4,283,570
Source: USCIS Analysis					

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As shown in Table 19, the cost to submit biometrics depends on the number of aliens temporarily released on orders of supervision who apply for an EAD and their wage rate. Over the 10-year period from FY 2020 to FY 2029, the total cost to submit biometrics would range from $824,075 to $5,476,238.[94] Annualized at 7 percent, the estimated costs to submit biometrics would range from $83,148 to $552,741 (Table 22).

[94] Calculations: $179,678 (10-year total initial lower bound costs) + $644,397 (10-year total renewal lower bound costs) = $824,075 (minimum 10-year total lower bound costs); $1,192,669 (10-year total initial upper bound costs) + $4,283,570 (10-year total renewal upper bound costs) = $5,476,238 (maximum 10-year total upper bound costs).

Cost of Forms

For those aliens who remain eligible to be employment authorized, the proposed rule would increase the time burden on the population of applicants applying for employment authorization. This rule also proposes to add filing

procedures and evidentiary requirements for aliens on orders of supervision who are seeking an initial EAD or renewing an EAD. The proposed new requirements include submitting a Form I–765WS, to establish the alien's economic necessity for employment and, for renewal applicants only, the name of the alien's U.S. employer as listed in E-Verify and that employer's E-Verify Company Identification Number.

Currently, DHS estimates the time burden for completing Form I–765 is 4 hours and 30 minutes (4.5 hours).[95] For aliens on orders of supervision who continue to be eligible and apply for employment authorization after this rule is final, this proposed rule would increase the time burden of Form I–765 by 30 minutes (0.5 hours) for a total of 5 hours.[96] This change would increase the opportunity cost of time for each application by approximately $8.62 based on the effective minimum hourly wage and by about $18.78 based on the average wage for all occupations.[97]

This proposed rule would also make it a requirement to submit Form I–765WS for aliens applying for employment authorization under the (c)(18) category. Currently, proving the existence of economic necessity to be employed is listed as a discretionary factor for consideration, but it is not a requirement. In this proposed rule, DHS now makes this a mandatory requirement. DHS estimates the current time burden for completing Form I–765WS is 30 minutes (0.5 hours).[98] For aliens temporarily released on orders of supervision who continue to be eligible and apply for employment authorization after the rule is final, the proposed rule would increase the opportunity cost of time for each applicant by $8.62 based on the effective minimum hourly wage and $18.78 based on the average wage for all occupations.[99] Combining the new costs of the I–765 and I–765WS, the total per person increased time burden would add costs of $17.23 and $37.55 at the respective lower and upper bound wage rates.

Table 20 shows the additional filing time burden-costs for Forms I–765 and I–765WS for the two population ranges for initial and renewal receipts. Table 20(A) shows cost estimates for the lower and upper bound range of initial EAD receipts based on the lower bound additional time burden cost of $12.05. The total costs for Columns C and E provide the range of undiscounted costs for the lower bound wage. Similarly, Table 20(B) repeats the estimates for the lower and upper bound range of initial EAD receipts based on the upper bound additional time burden cost of $37.55. Tables 20(C) and 20(D) repeat these estimates for the lower and upper bound ranges of renewal EAD receipts based on the lower and upper bound wage time burden costs, respectively.

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[95] *See* Instructions for Form I–765, December 26, 2019, available at *https://www.uscis.gov/i-765* (last visited April 21, 2020).

[96] The additional 30 minutes is an average estimate across all respondents completing Form I–765 to review additional language in the instructions and gather required supporting documentation.

[97] Calculations: 0.5 (burden hours) × $17.23 (effective minimum hourly wage for 1 hour of work) = $8.62 (rounded). 0.5 (burden hours) × $37.55 (average wage for all occupations for 1 hour of work) = $18.78 (rounded).

[98] *See* Instructions for Form I–765, December 26, 2019, available at *https://www.uscis.gov/i-765* (last visited April 21, 2020). Calculation: 0.5 hours (added time to file I–765) × $17.23 (effective minimum hourly wage for 1 hour of work) = $8.62 (rounded).

[99] Calculations: 0.5 hours (time to file I–765WS) × $17.23 (effective minimum hourly wage for 1 hour of work) = $8.62 (rounded). 0.5 hours (time to file I–765WS) × $37.55 (average wage for all occupations for 1 hour of work) = $18.78 (rounded).

Table 20: New Cost Estimates Related to Increased Time Burden to Complete and Submit Forms I-765 and I-765WS for Aliens Temporarily Released on Orders of Supervision, FYs 2020 to 2029 (Undiscounted)

Table 20(A): Initial Receipts, Lower Bound Wage

Fiscal Year	Additional Time Burden Cost A	Lower Bound Projected Receipts B	Total Lower Bound Costs C = A x B	Upper Bound Projected Receipts D	Total Upper Bound Costs E = A x D
2020	$17.23	147	$2,533	606	$10,441
2021			$2,533		$10,441
2022			$2,533		$10,441
2023			$2,533		$10,441
2024			$2,533		$10,441
2025			$2,533		$10,441
2026			$2,533		$10,441
2027			$2,533		$10,441
2028			$2,533		$10,441
2029			$2,533		$10,441
10-year Total			$25,328		$104,414

Table 20(B): Initial Receipts, Upper Bound Wage

Fiscal Year	Additional Time Burden Cost A	Lower Bound Projected Receipts B	Total Lower Bound Costs C = A x B	Upper Bound Projected Receipts D	Total Upper Bound Costs E = A x D
2020	$37.55	147	$5,520	606	$22,755
2021			$5,520		$22,755
2022			$5,520		$22,755
2023			$5,520		$22,755
2024			$5,520		$22,755
2025			$5,520		$22,755
2026			$5,520		$22,755
2027			$5,520		$22,755
2028			$5,520		$22,755
2029			$5,520		$22,755
10-year Total			$55,199		$227,553

Table 20(C): Renewal Receipts, Lower Bound Wage

Fiscal Year	Additional Time Burden Cost A	Lower Bound Projected Receipts B	Total Lower Bound Costs C = A x B	Upper Bound Projected Receipts D	Total Upper Bound Costs E = A x D
2020	$17.23	579	$9,976	2,390	$41,180
2021		560	$9,649	2,347	$40,439
2022		559	$9,632	2,287	$39,405
2023		540	$9,304	2,245	$38,681

2024		539	$9,287	2,204	$37,975
2025		521	$8,977	2,147	$36,993
2026		504	$8,684	2,106	$36,286
2027		502	$8,649	2,052	$35,356
2028		485	$8,357	2,013	$34,684
2029		483	$8,322	1,974	$34,012
10-year Total			$90,837		$375,011
Table 20(D): Renewal Receipts, Upper Bound Wage					
Fiscal Year	**Additional Time Burden Cost A**	**Lower Bound Projected Receipts B**	**Total Lower Bound Cost C = A x B**	**Upper Bound Projected Receipts D**	**Total Upper Bound Cost E = A x D**
2020	$37.55	579	$21,741	2,390	$89,745
2021		560	$21,028	2,347	$88,130
2022		559	$20,990	2,287	$85,877
2023		540	$20,277	2,245	$84,300
2024		539	$20,239	2,204	$82,760
2025		521	$19,564	2,147	$80,620
2026		504	$18,925	2,106	$79,080
2027		502	$18,850	2,052	$77,053
2028		485	$18,212	2,013	$75,588
2029		483	$18,137	1,974	$74,124
10-year Total			$197,964		$817,276
Source: USCIS Analysis					

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As indicated in the table, the estimated total opportunity costs of time incurred as a result of increased time burden for completing the forms over the 10-year period from FY 2020 to FY 2029 would range from about $116,165 to $1,044,829.[100] There would be no change in the estimated time burden for aliens temporarily released on orders of supervision for ICE Form I–220B. ICE completes Form I–220B and it is currently already submitted during the employment authorization application process.

Costs to Employers

DHS anticipates that revising eligibility for aliens temporarily released on orders of supervision could lead to a loss of employment resulting in turnover costs for employers. Additionally, the proposed E-Verify requirement for renewal applicants would also result in costs to employers who are not currently enrolled in the E-Verify program and would seek to retain their (c)(18) worker(s). The population that could involve costs to employers involves specifically the renewal population, and the development of such impacts embodies two different provisions: (i) The provisions regarding eligibility in general, and (ii) the E-Verify requirement for aliens seeking to renew an EAD.

I. Unquantified Turnover Costs

Some aliens who have final orders of removal but are temporarily released from custody on orders of supervision would eventually be out of the labor force even in the absence of this proposed rule. Since these aliens have been ordered removed, the federal government makes efforts to remove them from the United States on an ongoing basis regardless of employment authorization. For aliens who would no longer be eligible for employment authorization under this rule because they do not meet the proposed exception—DHS has not determined that the removal of such aliens is impracticable because ICE has not identified them as unable to obtain travel documents—this rule would affect the timing of when such alien workers would be removed from the labor force, which could vary. This proposed rule would result in employers incurring labor turnover costs earlier in comparison to the state of affairs in the absence of the proposed rule. Since the timing of when alien workers would be removed from the labor force is variable regardless of whether this proposed rule becomes final or not, DHS is unable to establish a baseline estimate of the labor turnover costs employers currently incur. In addition, DHS cannot quantify the labor turnover costs that employers would incur earlier than they would otherwise due to the proposed rule because there

[100] Calculations: $25,328 (10-year total initial lower bound costs) + $90,837 (10-year total renewal lower bound costs) = $116,165 (minimum 10-year total lower bound costs); $227,553 (10-year total initial upper bound costs) + $817,276 (10-year total renewal upper bound costs) = $1,044,829 (maximum 10-year total upper bound costs).

is no way to know the timing for when aliens would be removed.

II. Employer Costs of E-Verify Requirement for Renewal Applicants

For renewal applicants, employment authorization would only be granted to applicants who continue to meet the exception, demonstrate economic necessity, do not have subsequent criminal convictions, are employed by a U.S. employer who is a participant in good standing in the E-Verify program, and establish that they warrant a favorable exercise of discretion. The E-Verify program is a DHS web-based system that allows enrolled employers to confirm the identity and eligibility of their employees to work in the United States by electronically matching information provided by employees on the Employment Eligibility Verification (Form I–9) against records available to DHS and the Social Security Administration (SSA).[101] DHS does not charge a fee for employers to participate in the E-Verify Program and create cases to confirm the identity and employment eligibility of newly hired employees. EAD renewal applications would be denied for those aliens who cannot establish that they are employed by an E-Verify employer and their $410 filing fee would not be refunded. DHS does not know the number of renewal applicants who would incur this cost once the rule is final.

Although there is no fee to use E-Verify, this proposed requirement would result in costs to newly enrolling employers. Employers who would newly enroll in the E-Verify program would incur startup enrollment or program initiation costs as well as additional opportunity costs of time for ongoing annual training for the E-Verify program. DHS assumes that employers who are currently participating in the E-Verify program would not incur these costs since they previously incurred enrollment costs and would continue to participate in ongoing annual training regardless of this proposed rule.[102] Additionally, DHS expects that only newly enrolled employers would incur new costs for verifying the identity and work authorization of all of their newly hired employees, including any new (c)(18) workers as a result of this proposed rule. For employers currently enrolled in E-Verify who choose to hire a (c)(18) alien worker, the proposed rule would not cause such employers to incur new costs since they already must use E-Verify for all newly hired employees as of the date they signed the E-Verify Memorandum of Understanding (MOU).[103] Therefore, with or without the proposed rule, an employer already enrolled in the E-Verify program that chooses to hire a (c)(18) alien worker would incur the opportunity cost of time to verify any newly hired employees.

Data show that some employers currently use E-Verify to confirm the identity and employment eligibility of (c)(18) alien workers. Further, the requirement to participate in the E-Verify program is not new as certain employers are required to enroll in the program as a condition of Federal contracting, or as a condition of business licensing under state legislation or other applicable law or regulation.[104]

To renew an EAD, the proposed rule would require that (c)(18) alien workers be employed by employers enrolled in E-Verify and in good standing. Therefore, the proposed rule would result in additional costs for employers that hire (c)(18) alien workers only if such employers are not currently enrolled in the E-Verify program and who choose to retain their (c)(18) workers.

For employers that have hired or intend to hire (c)(18) alien workers but are not enrolled in the E-Verify program, such employers would incur opportunity costs of time to enroll. Participating in the E-Verify program and remaining in good standing requires employers to enroll in the program online,[105] electronically sign the associated MOU with DHS that sets the terms and conditions of participation in the program, and create E-Verify cases for all newly hired employees. The MOU requires employers to abide by lawful hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of E-Verify.[106] If an employer violates the terms of this agreement, it is grounds for immediate termination from the program.[107] Additionally, employers are required to designate and register at least one person that serves as an E-Verify administrator on their behalf.

For this analysis, DHS assumes that each employer participating in the E-Verify program designates one HR specialist to manage the program on its behalf. Based on the most recent Paperwork Reduction Act (PRA) Information Collection Package for E-Verify, DHS estimates the time burden for an HR specialist to undertake the tasks associated with the E-Verify program. DHS estimates the time burden for an HR specialist to complete the enrollment process is 2 hours 16 minutes (2.26 hours), on average, to provide basic company information, review and sign the MOU, take a new user training, and review the user guides.[108] Once enrolled in the E-Verify program, DHS estimates the time burden is 1 hour to complete ongoing annual training on new features and system updates.[109]

Once enrolled in the E-Verify program, the employer is responsible for ensuring that the employment verification process adheres to the requirements of the MOU and the employer verifies that all newly hired employees are employment authorized. After completing the Form I–9, the employer must enter the newly hired employee's information in E-Verify where it is checked against records available to SSA and DHS. After checking an employee's information against these records, E-Verify returns the case processing results, which could either automatically confirm the employee as employment authorized or return a tentative non-confirmation (TNC). Receiving a TNC does not mean an employee is not authorized to work in the United States; rather, it indicates there is an initial system mismatch between the information the employer entered in E-Verify from the employee's Form I–9 and the records available to DHS or SSA. Employees receiving a TNC have the option to contest (take action) or not contest (not take action)

[101] *See* E-Verify, available at *https://www.e-verify.gov/* (last visited May 29, 2019).

[102] Employers already participating in E-Verify likely already complete ongoing annual training because they voluntarily chose to enroll or because of rules or regulations beyond the scope of this proposed rule. DHS anticipates that such employers would continue to use E-Verify regardless of their decision to hire (c)(18) workers or not.

[103] *See* About E-Verify, Questions and Answers, April 9, 2014 *https://www.e-verify.gov/about-e-verify/questions-and-answers?tid=All&page=0* (last visited April 16, 2020).

[104] Certain states (for example Alabama, Arizona, Mississippi, and South Carolina) and certain Federal contracts subject to the Federal Acquisition Regulation found at 48 CFR, Subpart 22.18 require the use of E-Verify.

[105] *See* The Enrollment Process at *https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process* (last visited February 12, 2019).

[106] An employer that discriminates in its use of E-Verify based on an individual's citizenship status or national origin may also violate the INA's anti-discrimination provision, at 8 U.S.C. 1324b.

[107] *See* USCIS, The E-Verify Memorandum of Understanding for Employers, available at *http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.*

[108] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See PRA E-Verify Program (OMB control number 1615–0092), May 24, 2016. The PRA Supporting Statement can be found under Question 12 at *https://www.regulations.gov/document?D=USCIS-2007-0023-0081* (last visited May 29, 2019).

[109] *Id.*

to resolve the DHS and/or SSA TNC case result. E-Verify requires employers to promptly inform the employee about the TNC and provide instructions for contesting it. The E-Verify website also provides detailed information about contesting the TNC.[110]

In the absence of specific population data on which entities would continue to hire (c)(18) alien workers, it is only possible to calculate an estimated average unit cost for an employer not currently participating in E-Verify to hire one (c)(18) renewal alien worker. In this analysis, DHS uses an hourly compensation rate for estimating the opportunity cost of time for an HR specialist. DHS uses this occupation as a proxy for those who might prepare and complete the verification for an employer. DHS notes that not all employers may have an HR specialist, but rather some equivalent occupation may prepare and complete the verification and create the E-Verify case.

According to BLS data, the average hourly wage rate for HR specialists is $32.58.[111] DHS estimates the hourly compensation rates by adjusting the average hourly wage rates by a benefit-to-wage multiplier to account for the full cost of benefits such as paid leave, insurance, and retirement. Based on the most recent report by the BLS on the average employers' costs for employee compensation for all civilian workers in major occupational groups and industries, DHS estimates that the benefits-to-wage multiplier is 1.46.[112] Therefore, DHS calculates an average hourly compensation rate of $47.57 for HR specialists.[113] Applying this average hourly compensation rate to the estimated time burden of 2.26 hours for the enrollment process, DHS estimates an average opportunity cost of time for a new employer to enroll in E-Verify is $107.51.[114] DHS assumes the estimated opportunity cost of time to enroll in the E-Verify program is a one-time cost to employers. In addition, DHS estimates the opportunity cost of time associated with 1 hour of ongoing annual training for newly-enrolled entities would be $47.57 annually in the years following enrollment.

Newly-enrolled employers would also incur opportunity costs of time to enter employee information into the E-Verify system to confirm their identity and work authorization. DHS estimates the time burden for an HR specialist to submit a case in E-Verify is 7.74 minutes (or 0.129 hours).[115] Therefore, DHS estimates the opportunity cost of time would be approximately $6.14 per case.[116]

DHS estimates the total first year cost for a new employer to enroll in E-Verify and create a single E-Verify case in the E-Verify system would be approximately $113.65.[117] In subsequent years, DHS estimates newly-enrolled employers would incur costs of $53.71, at minimum, to maintain their account and create one new E-Verify case for their (c)(18) worker.[118] DHS recognizes that the actual cost to newly-enrolled employers of using E-Verify would be higher since case submissions would also include all newly hired employees, not just (c)(18) workers. However, since DHS cannot predict how many employees each employer would hire in the future, DHS cannot estimate how many additional E-Verify cases an employer may expect to create. Employers already enrolled in the E-Verify program who choose to hire (c)(18) workers in subsequent years would incur costs even in the absence of this proposed rule.

Employers that are not participating in E-Verify face the binary choice of participating in or not participating in the program. If the employer who had hired a (c)(18) alien worker does not participate, the employer faces the potential for labor turnover costs. If the employer does participate, the employer incurs the cost of enrolling and participating in the program and implementing the program requirements. On one hand, since the EADs last only a year, there might be some disincentive not to participate in E-Verify. However, as discussed in the population section, DHS cannot make reliable estimates of the number of employers that would enroll and participate in E-Verify, and as such, cannot estimate total costs germane to this implementation.

III. Turnover Costs to Employers Who Currently Hire (c)(18) EAD Holders

In order to properly account for costs involving employers who have hired aliens temporarily released on orders of supervision who are EAD holders, DHS introduces the costs applicable to discuss labor turnover and E-Verify in separate segments.

DHS anticipates this proposed rule would impose labor-related turnover costs on U.S. employers who employ (c)(18) alien workers who would remain eligible under this rule but are not enrolled in E-Verify and opt not to enroll. Employers would incur labor turnover costs because these alien workers would remain eligible for an initial EAD under this rule but would not be eligible for a renewal EAD since they would be unable to establish that they are employed by an E-Verify employer. As a result, alien workers would no longer be able to work and presumably employers would need to find a replacement worker. For aliens who would remain eligible for an EAD under this rule, the duration of time to remove aliens on orders of supervision from the U.S. would likely be longer than average as DHS has determined that removal for these aliens is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents. Therefore, employers who do not use or are enrolled in E-Verify would incur turnover costs in cases where their (c)(18) alien workers would remain eligible for an EAD under this rule. However, U.S. employers who are not enrolled in E-Verify could avoid turnover costs by choosing to enroll in the program. If an employer chooses to

[110] See the following for more detailed information *https://www.e-verify.gov/employees/tentative-nonconfirmation-overview/how-to-correct-a-tentative-nonconfirmation* (last visited May 29, 2019).

[111] *See* U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2019, Human Resources Specialist (SOC #13–1071): *https://www.bls.gov/oes/2019/may/oes131071.htm* (last visited May 7, 2020).

[112] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $37.10/$25.47 = 1.457 = 1.46 (rounded). See Economic News Release, ''Employer Cost for Employee Compensation— December 2019,'' (March 2020), U.S. Department of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. March 19, 2020, available at *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (last visited March 24, 2020).

[113] Hourly compensation of $47.57 = $32.58 average hourly wage rate for HR specialists × 1.46 benefits-to-wage multiplier.

[114] Calculation: 2.26 hours for the enrollment process × $47.57 total compensation wage rate for an HR specialist = $107.51.

[115] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See Paperwork Reduction Act (PRA) E-Verify Program (OMB control number 1615–0092), May 24, 2016. The PRA Supporting Statement can be found under Question 12 at *https://www.regulations.gov/document?D=USCIS-2007-0023-0081* (last visited May 29, 2019).

[116] Calculation: 0.129 hours to submit a query * $47.57 total compensation wage rate for an HR specialist = $6.14.

[117] Calculation: $107.51 opportunity cost for a new entity to enroll in E-Verify + $6.14 cost to submit a query into E-Verify = $113.65.

[118] Calculation: $47.57 one hour of annual training + $6.14 cost to submit a query into E-Verify = $53.71. E-Verify has a Work Authorization Docs Expiring case alert that notifies employers that an employee's EAD or Arrival-Departure Record (Form I–94) document is expiring. The alert is a reminder for the employer to reverify the employee. *See* About E-Verify Questions and Answers, Creating and Managing Cases, page 2 (04/30/2018) at *https://www.e-verify.gov/about-e-verify/questions-and-answers* (last viewed Jul. 15, 2020).

enroll in E-Verify, the employer would instead incur the associated costs to enroll in the system, submit cases (for all newly hired employees, not just (c)(18) workers), and maintain their account.

Employee turnover may cause employers to incur various direct and indirect turnover costs. Direct turnover cost employers could incur include those that involve separation and replacement costs. Separation costs include exit interviews, severance pay, and assigning other employees to temporarily cover the departing employee's duties and functions, which may require overtime or temporary staffing. Replacement costs typically include those related to advertising positions, search and agency fees, screening applicants, interviewing, background verification, employment testing, hiring bonuses, and possible travel and relocation costs. Once hired, employers may incur additional costs for training, orientation, and assessments. Additionally, other direct costs may include loss of productivity and possible reduced profitability due to operational and production disruptions. Moreover, employers may incur indirect costs, including loss of institutional knowledge, networking, and impacts to morale and interpersonal work relationships. These indirect costs are more difficult to measure.

DHS has reviewed recent research and literature on turnover costs. While peer-reviewed research on turnover costs is not extensive, there are several studies available which are cited repeatedly across various reports focusing on specific locations and occupations, and measure turnover costs in different ways. For example, a 2012 report published by the Center for American Progress (''2012 CAP Survey'') reviewed several dozen studies that considered both direct and indirect costs.[119] This survey found that turnover costs per employee ranged from 10 to 30 percent of the salary for most salaried workers with an average mid-point of about 20 percent of the worker's salary in total labor turnover costs.

In the absence of specific data on which employers hire (c)(18) alien workers and use, or would enroll in, E-Verify, it is only possible to calculate an estimated range of average per employee turnover costs an employer not currently participating in E-Verify could incur. In order to estimate labor turnover costs, DHS uses estimated employee annual earnings of $35,838 based on the effective minimum wage as a lower bound and $78,106 based on the average wage developed previously in this analysis (see ''Proposal Regarding EAD Eligibility'' section) and an upper bound. DHS multiplied each of these estimated employee annual earnings by 20 percent in accordance with the 2012 CAP Survey. Using annual earnings based on the effective minimum wage (lower bound), DHS estimates labor turnover costs would be approximately $7,168 per worker and using the annual earnings based on the average wage (upper bound), DHS estimates labor turnover costs would be approximately $15,621 per worker.[120] Turnover costs would be higher if a U.S. employer that does not use or enroll in E-Verify employs more than one (c)(18) alien worker who would remain eligible under this rule. DHS recognizes that turnover costs would occur in the year an EAD expires and, depending on the effective date of this rule should it become finalized, employers who incur turnover costs may incur them in up to two consecutive fiscal years.

DHS is unable to predict how many employers would actually participate in E-Verify in order to retain their (c)(18) alien workers or the total number of employment authorizations they would confirm through E-Verify should they choose to participate. DHS assumes that employers would make a cost-benefit decision between incurring labor turnover costs and incurring the current and future costs to enroll and participate in E-Verify. DHS recognizes that an employer that enrolls and participates in E-Verify would confirm employment authorization for all new hires, not only their (c)(18) alien workers. Unlike the development of the costs germane to forgone earnings, in which DHS could at least deduce a range for the population based on some limited data, doing so here would be completely speculative, and we do not endeavor to rely on a range here.

I. Government Transfers

This proposed rule could reduce taxes paid to the federal government (a transfer payment) in the short term. During the period of vacancy for a job formerly held by the (c)(18) alien worker, the federal government would not be collecting taxes.

In addition, in instances where an employer cannot hire replacement labor for a position an alien on an order of supervision had or would have filled, this proposed rule may result in a reduction in taxes paid to the federal government. It is difficult to quantify income tax losses because individual tax situations vary widely.[121] However, DHS estimates the potential reduction in tax revenue generated through employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[122] DHS notes that the total estimated reduction in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent since both the employee and employer would not pay their respective portions of Medicare and Social Security taxes when a position remains unfilled by an alien on an order of supervision who held or would have filled the position.[123]

To estimate the range of employment tax losses, we take the estimated lost earnings for the range of initial and renewal projected filers at the prevailing and average wage rates from Table 18, columns G and H, and multiply each year by 15.3 percent. These calculations are shown in Table 21.

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[119] *See* ''There Are Significant Business Costs to Replacing Employees,'' By Heather Boushey and Sarah Jane Glynn (2012), Center for American Progress, at: *https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/* (last visited Apr. 15, 2020).

[120] Calculations: $35,838 × 20% = $7,168; $78,106 × 20% = $15,621.

[121] More than 44 percent of workers pay no federal income tax (Sept. 16, 2018) available at *https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16.*

[122] The various employment taxes are discussed in more detail at *https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes. See IRS Publication 15, Circular E, Employer's Tax Guide for specific information on employment tax rates. https://www.irs.gov/pub/irs-pdf/p15_18.pdf. See* More than 44 percent of Americans pay no federal income tax (Sep. 16, 2018) available at: *https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16.* (last visited Sep. 16, 2018)

[123] Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

Table 21: Lost Earnings and Corresponding Estimated Tax Losses, FYs 2020 to 2029

Table 21(A): Initial Approvals on the Lower Bound Wage

Fiscal Year	Lost Lower Bound Earnings A	Employment Tax Losses B = A x 15.3%	Lost Upper Bound Earnings C	Employment Tax Losses D = C x 15.3%
2020	$164,173,878	$25,118,603	$147,724,236	$22,601,808
2021	$162,131,112	$24,806,060	$145,681,470	$22,289,265
2022	$160,124,184	$24,499,000	$143,674,542	$21,982,205
2023	$158,153,094	$24,197,423	$141,703,452	$21,680,628
2024	$156,182,004	$23,895,847	$139,732,362	$21,379,051
2025	$154,246,752	$23,599,753	$137,797,110	$21,082,958
2026	$152,347,338	$23,309,143	$135,897,696	$20,792,347
2027	$150,447,924	$23,018,532	$133,998,282	$20,501,737
2028	$148,584,348	$22,733,405	$132,134,706	$20,216,610
2029	$146,720,772	$22,448,278	$130,271,130	$19,931,483
10-year Total	$1,553,111,406	$237,626,045	$1,388,614,986	$212,458,093

Table 21(B): Initial Approvals on the Upper Bound Wage

Fiscal Year	Lost Lower Bound Earnings A	Employment Tax Losses B = A x 15.3%	Lost Upper Bound Earnings C	Employment Tax Losses D = C x 15.3%
2020	$357,803,586	$54,743,949	$321,952,932	$49,258,799
2021	$353,351,544	$54,062,786	$317,500,890	$48,577,636
2022	$348,977,608	$53,393,574	$313,126,954	$47,908,424
2023	$344,681,778	$52,736,312	$308,831,124	$47,251,162
2024	$340,385,948	$52,079,050	$304,535,294	$46,593,900
2025	$336,168,224	$51,433,738	$300,317,570	$45,948,588
2026	$332,028,606	$50,800,377	$296,177,952	$45,315,227
2027	$327,888,988	$50,167,015	$292,038,334	$44,681,865
2028	$323,827,476	$49,545,604	$287,976,822	$44,060,454
2029	$319,765,964	$48,924,192	$283,915,310	$43,439,042

10-year Total	$3,384,879,722	$517,886,597	$3,026,373,182	$463,035,097
Table 21(C): Renewal Approvals on the Lower Bound Wage				
Fiscal Year	**Lost Lower Bound Earnings A**	**Employment Tax Losses B = A x 15.3%**	**Lost Upper Bound Earnings C**	**Employment Tax Losses D = C x 15.3%**
2020	$602,938,512	$92,249,592	$542,587,320	$83,015,860
2021	$583,048,422	$89,206,409	$523,449,828	$80,087,824
2022	$563,194,170	$86,168,708	$505,602,504	$77,357,183
2023	$544,630,086	$83,328,403	$487,791,018	$74,632,026
2024	$526,101,840	$80,493,582	$470,624,616	$72,005,566
2025	$508,756,248	$77,839,706	$454,569,192	$69,549,086
2026	$491,984,064	$75,273,562	$438,549,606	$67,098,090
2027	$475,211,880	$72,707,418	$423,569,322	$64,806,106
2028	$459,550,674	$70,311,253	$408,624,876	$62,519,606
2029	$443,925,306	$67,920,572	$394,218,000	$60,315,354
10-year Total	$5,199,341,202	$795,499,204	$4,649,586,282	$711,386,701
Table 21(D): Renewal Approvals on the Upper Bound Wage				
Fiscal Year	**Lost Lower Bound Earnings A**	**Employment Tax Losses B = A x 15.3%**	**Lost Upper Bound Earnings C**	**Employment Tax Losses D = C x 15.3%**
2020	$1,314,055,344	$201,050,468	$1,182,524,840	$180,926,301
2021	$1,270,706,514	$194,418,097	$1,140,816,236	$174,544,884
2022	$1,227,435,790	$187,797,676	$1,101,919,448	$168,593,676
2023	$1,186,976,882	$181,607,463	$1,063,100,766	$162,654,417
2024	$1,146,596,080	$175,429,200	$1,025,687,992	$156,930,263
2025	$1,108,792,776	$169,645,295	$990,696,504	$151,576,565
2026	$1,072,239,168	$164,052,593	$955,783,122	$146,234,818
2027	$1,035,685,560	$158,459,891	$923,134,814	$141,239,627
2028	$1,001,553,238	$153,237,645	$890,564,612	$136,256,386
2029	$967,499,022	$148,027,350	$859,166,000	$131,452,398
10-year Total	$11,331,540,374	$1,733,725,677	$10,133,394,334	$1,550,409,333
Source: USCIS Analysis				

Lost earnings, which DHS estimates could range between $6,038,201,268 and $14,716,520,096 [124] over the 10-year period from FY 2020 to FY 2029, would result in corresponding employment tax losses ranging between $923,844,794 and $2,251,612,274.[125] Annualized at 7 percent, employment tax losses would range from approximately $93,947,687 to $228,789,887 (Table 22). Again, depending on the circumstances of the employee, there could be additional federal income tax losses not estimated here. There may also be state and local income tax losses that would vary according to the jurisdiction, but which DHS is unable to quantify. It is noted that the potential decrease in tax transfers only applies to the compensation impacts, not to labor turnover costs, costs associated with the forms' burdens, or implementation and usage of E-Verify.

[124] Calculations (data from Table 18): $1,388,614,986 (10-year total initial upper bound costs) + $4,649,586,282 (10-year total renewal upper bound costs) = $6,038,201,268 (minimum 10-year total lower bound costs); $3,384,879,722 (10-year total initial upper bound costs) + $11,331,540,374 (10-year total renewal upper bound costs) = $14,716,420,096 (maximum 10-year total upper bound costs).

[125] Calculations: $212,458,093 (10-year total initial lower bound costs) + $711,386,701 (10-year total renewal lower bound costs) = $923,844,794 (minimum 10-year total lower bound costs); $517,886,597 (10-year total initial upper bound costs) + $1,733,725,677 (10-year total renewal upper bound costs) = $2,251,612,274 (maximum 10-year total upper bound costs).

II. Total Costs of the Rule

In the previous sections we presented monetized estimates of the impacts of the proposed rule germane to lost labor earnings, biometrics submission, increased time burdens for completing forms, and labor turnover costs for renewals. We estimated the per employer cost associated with enrolling in and participating in the E-Verify program, but not the total costs for businesses. In the development of costs associated with lost labor earnings, our inability to refine the population that could be impacted drove reliance on a lower and upper bound.

The total impacts are aggregated by summing the total initial and renewal impacts from Tables 18 through 21 in terms of the maximum and minimum estimates. Therefore, Table 22 shows the range of estimated monetized costs of the proposed rule, where Table 22(A) presents the maximum estimates, and Table 22(B) presents the minimum estimates. For each sub-table the ten-year totals are provided in undiscounted 10-year total values, as well as the present value costs and annualized costs discounted at 7 percent and 3 percent.

Table 22: Monetized Impacts of the Proposed Rule, FY 2020 to 2029

Table 22(A): Maximum Estimates

Fiscal Year	Lost Labor Earnings (Costs or Transfers)	Biometrics (Costs)	Time Burden to Complete Forms (Costs)	Taxes (Transfers)
2020	$1,671,858,930	$589,643	$112,500	$255,794,416
2021	$1,624,058,058	$581,180	$110,885	$248,480,883
2022	$1,576,413,398	$569,371	$108,632	$241,191,250
2023	$1,531,658,660	$561,105	$107,055	$234,343,775
2024	$1,486,982,028	$553,036	$105,516	$227,508,250
2025	$1,444,961,000	$541,818	$103,375	$221,079,033
2026	$1,404,267,774	$533,749	$101,836	$214,852,969
2027	$1,363,574,548	$523,121	$99,808	$208,626,906
2028	$1,325,380,714	$515,445	$98,343	$202,783,249
2029	$1,287,264,986	$507,770	$96,879	$196,951,543
Undiscounted 10-year Total	$14,716,420,096	$5,476,238	$1,044,829	$2,251,612,274
PV 7%	$10,502,774,047	$3,882,223	$740,702	$1,606,924,429
PV 3%	$12,642,167,340	$4,690,512	$894,918	$1,934,251,602
Annualized 7%	$1,495,358,741	$552,741	$105,459	$228,789,887
Annualized 3%	$1,482,047,682	$549,871	$104,912	$226,753,295

Table 22(B): Minimum Estimates

Fiscal Year	Lost Labor Earnings (Costs or Transfers)	Biometrics (Costs)	Time Burden to Complete Forms (Costs)	Taxes (Transfers)
2020	$690,311,556	$88,739	$12,509	$105,617,668
2021	$669,131,298	$86,417	$12,182	$102,377,089
2022	$649,277,046	$86,294	$12,164	$99,339,388
2023	$629,494,470	$83,972	$11,837	$96,312,654
2024	$610,356,978	$83,850	$11,820	$93,384,618
2025	$592,366,302	$81,650	$11,510	$90,632,044
2026	$574,447,302	$79,572	$11,217	$87,890,437
2027	$557,567,604	$79,327	$11,182	$85,307,843
2028	$540,759,582	$77,249	$10,889	$82,736,216
2029	$524,489,130	$77,005	$10,855	$80,246,837
Undiscounted 10-year Total	$6,038,201,268	$824,075	$116,165	$923,844,794
PV 7%	$4,312,740,129	$583,994	$82,322	$659,849,240
PV 3%	$5,188,944,320	$705,725	$99,482	$793,908,481
Annualized 7%	$614,037,170	$83,148	$11,721	$93,947,687
Annualized 3%	$608,302,571	$82,732	$11,662	$93,070,293

Source: USCIS Analysis

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As table 22 shows, the projected 10-year monetized undiscounted costs of the proposed rule for the period fiscal year 2020 to 2029 could be as high as about $14.72 billion with a minimum cost estimate of $6.04 billion under the assumptions relied on.[126] The majority of the costs of this rule would result from lost labor earnings, if companies are unable to find reasonable labor substitutes for the position the aliens temporarily released on orders of supervision would have filled. DHS notes there are unquantified costs not reflected in the estimates above.

Benefits

The benefits potentially realized by the proposed rule are both qualitative and quantitative. DHS has provided estimates of monetized benefits, where possible. DHS estimates that U.S. workers could have a better chance of obtaining jobs that some (c)(18) alien workers currently hold, as the proposed rule would reduce employment authorization eligibility for the (c)(18) alien worker population.

In addition, the restriction on the ability to obtain work authorization may increase incentives for aliens with final orders of removal to depart the United States, which could decrease the amount of time aliens are in this status and could save government resources expended while aliens are temporarily released on orders of supervision and pending repatriation. ICE oversees the monitoring and tracking of aliens on orders of supervision as well as effectuates their removal from the United States.[127] Managing aliens temporarily released on orders of supervision consumes DHS resources. Specifically, ICE must devote resources to track and monitor the status of these aliens. This includes conducting regular check-ins to ensure compliance with conditions of release. These cases absorb scarce enforcement resources that could be diverted to, among other things, identifying and detaining criminal aliens. If fewer aliens with final orders of removal on orders of supervision remain in the United States for an extended period of time because this rule increases the incentives for them to depart, then ICE is likely to spend fewer resources on monitoring and tracking aliens on orders of supervision. Monetizing this benefit is not possible at this time. Although the federal government makes efforts to remove these aliens from the United States on an ongoing basis regardless of employment authorization, there is no way to know the timing of when aliens would be removed, if an alien would be motivated to self-deport or, ultimately, who would execute the removal.

The proposal to revise the (a)(10) employment authorization category could provide aliens who are granted CAT deferral of removal with monetary benefits that can be quantified. Currently, this population is regulated to apply for an EAD under the (c)(18) category. In practice, DHS acknowledges that some aliens who are granted CAT deferral of removal have applied under the (a)(10) Form I–765 category and adjudication of these applications has been inconsistent. This proposed revision would thus reduce confusion for aliens who are granted CAT deferral of removal applying for an EAD and would lead to consistent Form I–765 adjudication for this population.

For those who currently apply under the (c)(18) category, Form I–765 must be accompanied by the filing fee and a copy of the DOJ Executive Office for Immigration Review (EOIR) immigration judge's order of removal. As stated in the Form I–765 instructions, three additional factors may also be considered under the (c)(18) category, including the existence of a dependent spouse and/or children in the United States who rely on the alien for support; existence of economic necessity to be employed; and the anticipated length of time before the alien can be removed from the United States. If supporting evidence is requested, DHS recognizes that there would be associated opportunity costs of time for those aliens.

Aliens under the (a)(10) category are not required to apply to DHS to obtain employment authorization before they can begin work. However, (a)(10) aliens are required to apply (*i.e.,* submit Form I–765) in order to receive a physical EAD card if they want a document evidencing their employment authorization pursuant to their grant of withholding or deferral. Under the (a)(10) category, aliens file Form I–765 with a copy of the EOIR immigration judge's signed order granting withholding of removal. There are no additional factors for consideration. DHS is not able to determine the number of aliens who are granted CAT deferral of removal who apply under the (c)(18) category, submit evidence for the additional factors, or who may opt to not apply for a physical EAD card. Therefore, since DHS cannot separate out the number of applicants who may benefit from this proposed provision, we consider a ''best-case'' scenario. In the best-case scenario, none of the 147 (the 5-year average number of cases, Table 16) aliens who are granted CAT deferral of removal would apply for a physical EAD card after the effective date of this rule since they would not need to obtain an EAD in order to begin work. Under this scenario, benefits would accrue from not paying filing fees and not spending time filing Form I–765. The filing fee for aliens applying for employment authorization is $550.[128] DHS estimates this population could save a maximum $80,850 in filing fees in the first year of the rule becoming effective.[129] The other benefit would be accrued in the form of opportunity costs since these aliens would not spend time preparing and submitting Form I–765 and any other evidence that would have been required under the (c)(18) considerations. DHS is able to quantify the savings that would result from not submitting Form I–765, which has an estimated time burden of 4 hours and 30 minutes.[130] Using the lower and upper bound wage rates, the opportunity cost of time savings would range from about $77.54 to $168.98 per alien in the first year.[131] For the 147 aliens who are granted CAT deferral of removal, the opportunity cost of time savings would range from $11,398 to $24,840 under this scenario.[132] Per alien, benefits for this population would range from approximately $627.54 to $718.98 per alien, with a total benefit ranging from $92,248 to $105,690 annually.[133] Additional savings could

[126] Calculations: $6,038,201,268 (lost labor earnings costs) + $824,075 (biometrics costs) + $116,165 (time burden to complete forms costs) = $6,039,141,507 minimum undiscounted 10-year total; $14,716,420,096 (lost labor earnings costs) + $5,476,238 (biometrics costs) + $1,044,829 (time burden to complete forms costs) = $14,722,941,163 maximum undiscounted 10-year total.

[127] *See* Immigration Enforcement, Removal *https://www.ice.gov/removal* and Enforcement and Removal Operations, ERO Overview *https://www.ice.gov/ero.*

[128] USCIS was previously authorized to collect a $410 Form I–765 filing fee. However, the recently promulgated fee rule updated the fee for Form I–765 to $550. The final fee rule is expected to take effect on October 3, 2020. *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR 46788 (Aug. 3, 2020).

[129] $550 (filing fee to apply for an initial EAD under the (c)(18) category) × 147 (average number of cases granted CAT deferral of removal) = $80,850.

[130] *See* Instructions for Form I–765 (05/31/2020) at *https://www.uscis.gov/i-765.*

[131] Calculations: 4.5 hours (time burden for Form I–765) × $17.23 (one hour of work at prevailing wage) = $77.54; 4.5 hours (time burden for Form I–765) × $37.55 (one hour of work at average wage for all occupations) = $168.98.

[132] Calculations: $77.54 × 147 (the average number of cases granted CAT deferral of removal) = $11,398; $168.98 × 147 (the average number of cases granted CAT deferral of removal) = $24,840.

[133] Calculation: $77.54 (lower bound opportunity cost of time) + $550 (filing fee) = $627.54; $168.98 (upper bound opportunity cost of time) + $550

Continued

also be accrued in the form of opportunity costs if applicants would have spent time submitting evidence under any of the (c)(18) considerations.

The scenario presented here is an extreme to best estimate the maximum savings of this proposed provision. It is likely that some aliens who are granted CAT deferral of removal would continue to submit Form I–765 and pay the $550 filing fee in order to obtain a physical EAD card. Therefore, the overall benefit of this proposed provision is presented using a range from $0 to $105,690 annually.

DHS welcomes any data or public comments on the benefits of removing the eligibility of employment authorizations to certain (c)(18) workers. DHS is particularly interested in public comments about the benefits to U.S. workers of removing the eligibility of employment authorization for (c)(18) workers. DHS is also interested in receiving comments on the increased employment opportunities for U.S. workers due to this rule. DHS welcomes any overall public feedback or data that could assist DHS in quantifying the benefits of the proposed rule.

Labor Market Overview

As discussed in the population section of this analysis, USCIS anticipates approving somewhere between 17,077 and 22,090 Form I–765 applications annually from aliens with final orders of removal in the absence of this proposed rule.[134] The U.S. labor force consists of a total of 160,143,000 workers, according to recent data (September 2020).[135] Therefore, the maximum population affected by this proposed rule (about 22,090) represents 0.01 percent of the U.S. labor force, suggesting that the number of potential workers no longer eligible for an EAD make up a very small percentage of the U.S. labor market.[136]

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.[137]

This proposed rule would eliminate eligibility for employment authorization for aliens who have final orders of removal and are temporarily released on orders of supervision except in cases where the alien meets the exception under this proposed rule (*i.e.* removal is impracticable because all countries from whom DHS requested travel documents have affirmatively declined to issue such documents). DHS has estimated that the rule would cover an upper bound population of about 22,090 aliens. As previously explained, the provision being proposed may result in forgone labor earnings for aliens temporarily released on order of supervision. This rule directly regulates and impacts aliens temporarily released on orders of supervision and individuals are not considered a small entity under the Regulatory Flexibility Act. Some entities (including employers) could be indirectly impacted by labor turnover costs or the costs of implementing and utilizing E-Verify by this proposed rule because they employ an affected alien. DHS has prepared an initial regulatory flexibility analysis (IRFA) to accompany this proposed rule.

i. A Description of the Reasons Why the Action by the Agency is Being Considered

DHS has determined that the current employment authorization regulations governing discretionary employment authorization do not adequately reflect DHS's enforcement mission and priorities. As discussed more fully in the preamble, DHS's enforcement goals are not consistent with allowing aliens to work when they have an order of removal from the United States.

DHS is proposing through this rulemaking to align its discretionary authority to grant employment authorization with its immigration enforcement mission and priorities. Enforcement is essential to the integrity of the immigration system.

ii. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

DHS's authority to detain and release aliens ordered removed from custody on orders of supervision and to grant employment authorization is found in several statutory provisions. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107–296, 116 Stat. 2135), 6 U.S.C. 112 and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[138] In addition to establishing the Secretary's general authority to administer and enforce immigration laws, section 103 of the INA, 8 U.S.C. 1103, enumerates various related authorities including the Secretary's authority to establish regulations as are necessary for carrying out his authority. Section 241 of the INA, 8 U.S.C. 1231, governs the detention, release, and removal of aliens after they have received an administratively final order of removal. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed by statute or in the discretion of the Secretary and the requirements U.S. employers must follow to verify the identity and employment authorization of their employees. The authority to establish and operate E-Verify is found in sections 401–405 of IIRIRA, Public Law 104–208, 110 Stat. 3009–546. The Secretary proposes the changes in this rule under these authorities.

iii. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

This rule directly regulates and impacts aliens temporarily released on orders of supervision and individuals are not considered a small entity under the Regulatory Flexibility Act. Since some small entities may be indirectly impacted by this proposed rule by employing an affected alien, DHS has developed this IRFA to evaluate the potential impact on small entities. Small entities could incur costs due to the proposed rule if they employ EAD holders who are affected by the new requirements of the proposed rule. However, DHS does not currently require information on the employer or employment status of the EAD holder and thus is unable to determine how many entities could be impacted by the

(filing fee) = $718.98; $627.54 × 147 = $92,248 (lower bound total benefit); $718.98 × 147 = $105,690 (upper bound total benefit).

[134] Calculations: 4,241 (projected initial approvals FY 2029) + 12,836 (projected renewal approvals FY 2029) = 17,077 minimum projected annual approvals; 4,728 (projected initial approvals FY 2020) + 17,362 (projected renewal approvals FY 2020) = 22,090 maximum projected annual approvals.

[135] The BLS labor force data are found in Table A–1. Employment status of the civilian population by sex and age, seasonally adjusted, from the Current Population Survey October 2020 News Release: *https://www.bls.gov/news.release/archives/empsit_10022020.pdf.* (last visited October 8, 2020).

[136] Calculation: (22,090 maximum projected annual (c)(18) alien worker approvals/160,143,000 workers) *100 = 0.01 percent (rounded).

[137] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

[138] Public Law 104–208, div. C, at secs. 401–405.

proposed rule or whether the entities impacted would be considered small entities. This is because these EADs are open market EADs,[139] and therefore DHS does not currently collect information on the employer or the employment status of the EAD holder. This proposed rule may cause some existing EAD holders to be ineligible to renew their EADs. In such cases, small entities may incur opportunity costs associated with having to choose the next best alternative to immediately filling a job an EAD holder would have filled in situations where eligibility for the EAD is not met. If entities cannot find reasonable substitutes for the labor the aliens temporarily released on orders of supervision would have provided, removing EAD eligibility for these aliens would result primarily in costs to those entities through lost productivity and lost profits. DHS expects that this type of turnover would be incurred in the first two years after the effective date of this rule.[140] Small entities, that do not currently participate in E-Verify would incur costs to implement and use the program in order to retain aliens temporarily released on orders of supervision in order for the alien to be eligible for a renewal EAD under this rule. DHS estimates the total first year cost for a new entity to enroll in the E-Verify program and create a single E-Verify case would be approximately $113.65. In subsequent years, DHS estimates newly enrolled entities would incur a minimal annual cost of $53.71 to maintain their account and create one new case for their (c)(18) worker. DHS recognizes that the actual cost to newly-enrolled entities of using E-Verify would be higher since case submissions would also include all newly hired employees, not just (c)(18) workers. However, since DHS cannot predict how many employees each entity would hire in the future, DHS cannot estimate how many additional E-Verify cases an entity may expect to create. Entities already enrolled in the E-Verify program who choose to hire (c)(18) workers in subsequent years would incur costs even in the absence of this proposed rule.

Small entities that are not participating in E-Verify face the binary choice of participating in or not participating in the program. If an entity who had hired a (c)(18) alien worker does not participate, the entity faces the potential for labor turnover costs. If the entity does participate, the entity incurs the cost of enrolling and participating in the E-Verify program and implementing the program requirements. On one hand, since the EADs last only a year, there might be some disincentive not to participate in E-Verify. However, as discussed in the population section, DHS cannot make reliable estimates of the number of entities that would enroll and participate in E-Verify, and as such, cannot estimate total costs germane to this implementation.

If a small entity who employs (c)(18) alien workers who would remain eligible under this rule is not enrolled in E-Verify and opts not to enroll, the entity would incur labor related turnover costs. Entities would incur labor turnover costs because these alien workers would remain eligible for an initial EAD under this rule, but would not be eligible for a renewal EAD since they would be unable to establish that they are employed by an entity enrolled in E-Verify. As a result, alien workers would no longer be able to work and presumably entities would need to find a replacement worker. For aliens who would remain eligible for an EAD under this rule, the duration of time to remove aliens on orders of supervision from the U.S. would likely be longer than average as DHS has determined that removal for these aliens is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents. Therefore, entities who do not use or are enrolled in E-Verify would incur turnover costs in cases where their (c)(18) alien workers would remain eligible for an EAD under this rule.

Using annual earnings based on the effective minimum wage (lower bound), DHS estimates labor turnover costs would be approximately $7,168 per worker and using the annual earnings based on the average wage (upper bound), DHS estimates labor turnover costs would be approximately $15,621 per worker.[141] Turnover costs would be higher if a U.S. employer that does not use or enroll in E-Verify employ more than one (c)(18) alien worker who would remain eligible under this rule. DHS recognizes that turnover costs would occur in the year an EAD expires and, depending on the effective date of this rule should it become finalized, employers who incur turnover costs may incur them in up to two consecutive fiscal years.

DHS is unable to predict how many entities would actually participate in E-Verify in order to retain their (c)(18) alien workers or the total number of employment authorizations they would confirm through E-Verify should they choose to participate. DHS assumes that entities would make a cost-benefit decision between incurring labor turnover costs and incurring the current and future costs to enroll and participate in E-Verify. DHS recognizes that an entity that enrolls and participates in E-Verify would confirm employment authorization for all new hires, not only their (c)(18) alien workers.

DHS has no way to predict how many small entities would adopt the E-Verify system and how many workers they would vet. Since this rule proposes to eliminate eligibility for employment authorization for aliens temporarily released on orders of supervision, the impact on the renewal population would depend on which aliens remain eligible and if the alien's employer already participates in E-Verify or would be willing to enroll and participate in E-Verify if the employer is not enrolled. DHS cannot rule out that some employers would incur labor turnover costs as a result of choosing to not enroll and participate in E-Verify. Because of the uncertainty regarding eligibility, DHS is unable to estimate a range for the renewal population that would be impacted by this provision and attempting to do so would be completely speculative. However, DHS acknowledges there could be renewal applicants who would be impacted by this provision, which could, in turn, affect employers, some of which could be small entities. DHS seeks comments from the public on the impacts to small entities from enrolling and participating in the E-Verify program. DHS also seeks public comment on the number of small businesses that may be affected as well as compliance costs to those small businesses as a result of this proposed rule.

[139] Open market EADs allow aliens to work in any occupation or industry. The alien is not required to work for a specific employer or in any specific industry or occupation, and the U.S. employer is not required to test the labor market to ensure that there are no U.S. workers available and that the hiring of the (c)(18) alien will not adversely affect the wages and working conditions for similarly situated U.S. workers.

[140] We do not attribute turnover costs from ineligibility in other years because we operate under the assumption that if an initial EAD is approved, then the renewal would also be approved under the proposed criteria of this rule. DHS recognizes that in some cases, a renewal filing could be denied even in the wake of an approved initial EAD in future years, but the number of instances this would occur is unknown. Estimation of these cases would be speculative at this time.

[141] Calculations: $35,838 × 20% = $7,168; $78,106 × 20% = $15,621.

iv. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report Record

This rule would not directly impose any reporting, recordkeeping, or other compliance requirements on small entities.

v. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

DHS is unaware of any relevant federal rule that may duplicate, overlap, or conflict with the proposed rule.

vi. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

This rule directly regulates and impacts aliens temporarily released on orders of supervision and individuals are not considered a small entity under the Regulatory Flexibility Act. Accordingly, DHS is not aware of any alternatives to the proposed rule that accomplish the stated objectives and that would minimize the economic impact of the proposed rule on small entities as this rule already imposes no direct costs on small entities. DHS requests comments and seeks alternatives from the public that will accomplish the same objectives.

C. Congressional Review Act

This proposed rule is a major rule as defined by 5 U.S.C. 804, also known as the Congressional Review Act (CRA) as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the CRA, or 60 days after the final rule's publication, whichever is later.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100 million in 1995, adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U), is $168 million.[142] While this rule may result in the expenditure of more than $100 million annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes. Therefore, no actions were deemed necessary under the provisions of the UMRA.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this proposed rule would impose substantial direct compliance costs on State and local governments or preempt state law. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

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

This proposed rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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.

H. Family Assessment

DHS has reviewed this proposed rule in line with the requirements of section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277. DHS has systematically reviewed the criteria specified in section 654(c)(1). DHS has determined that the proposed rule may adversely cause personal and family-related hardships, including causing disruptions to the alien, U.S. citizen, or LPR spouses and/or children dependent on the income currently earned by the affected alien and may decrease disposable income and increase the poverty of certain family members. However, DHS notes that an alien with a final order of removal will eventually be removed from the country and such families should ultimately expect to experience such hardships. Thus, this proposed rule could result in families experiencing such hardships earlier in comparison to the state of affairs in the absence of the proposed rule. DHS has also determined that the proposed rule neither strengthens or erodes the authority and rights of parents in the education, nurture and supervision of their children; nor affects the ability for a family to perform its functions, or substitutes governmental activity or function; this is not an action that can be carried out by State or local government or by the family, nor does the action establish an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. For the reasons stated elsewhere in this preamble, however, DHS has determined that the benefits of the action justify the financial impact on the family. As described in the Purpose, Background, and Discussion sections of this rule, DHS has compelling legal and policy reasons for the proposed regulatory action, including the enforcement of the general prohibition against providing alien's ordered removed with employment authorization and encouraging those aliens with final orders of removal to depart the United States.

I. National Environmental Policy Act

DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01 establish the policies and procedures DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ)

[142] U.S. Bureau of Labor Statistics, Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, available at *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202001.pdf* (last visited Feb. 19, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019 – Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657 – 152.383)/152.383] * 100 = (103.274/152.383) *100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions''), which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1507.3(b)(2)(ii), 1508.4. For an action to be categorically excluded, the Instruction Manual requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

This proposed rule would amend regulatory criteria for determining eligibility for employment authorization for aliens temporarily released from custody on an order of supervision by amending two existing regulations. First, it would amend 8 CFR 274a.12 to limit employment authorization eligibility to aliens whose removal DHS has determined is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents and who establish economic necessity. Second, this proposed rule would amend the application process in 8 CFR 274a.13 for aliens seeking initial employment authorization by making certain changes to the supporting documentation submitted with the application. The proposed amendments clearly fit within categorical exclusion A3(a) ''Promulgation of rules of a strictly administrative or procedural nature'' and A3(d) ''Promulgation of rules . . . that interpret or amend an existing regulation without changing its environmental effect.'' Instruction Manual, Appendix A, Table 1. Furthermore, the proposed amendments are not part of a larger action and do not present extraordinary circumstances creating the potential for significant environmental impacts. Therefore, the proposed amendments are categorically excluded from further NEPA review.

J. Paperwork Reduction Act

DHS is submitting the information collection requirements in this rule to OMB for review and approval in accordance with requirements of the PRA of 1995, 44 U.S.C. 3501–3512. Table 23 shows a summary of the forms that are part of this rulemaking.

TABLE 23

Form	Form name	New or updated form	General purpose of form	General categories filing	Applicability to employment authorization
I–765	Application for Employment Authorization.	Update—revises and adds instructions and questions for aliens seeking employment authorization who are subject to a final order of removal and have been temporarily released from custody on an order of supervision and for aliens who are recipients of deferral of removal under the regulations implementing the CAT.	Applicants use this form to request employment authorization from USCIS.	• Aliens temporarily released on orders of supervision. • Aliens granted deferral of removal under the regulations implementing the CAT.	USCIS will require aliens seeking employment authorization based on an order of supervision or DCAT to file an application to receive an EAD.
I–765WS	Form I–765 Worksheet.	Update—updates instructions to include aliens temporarily released on orders of supervision in the list of aliens who must complete the Form I–765WS to show economic necessity for employment authorization.	Applicants for employment authorization use this form to provide financial information demonstrating an economic need for employment authorization and an explanation of the circumstances resulting in the need for an EAD.	• Aliens temporarily released on orders of supervision.	USCIS will require aliens seeking employment authorization based on an order of supervision to submit Form I–765WS to establish economic need for an EAD.

USCIS Form I–765 and I–765WS

DHS invites comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

1. Evaluate whether the collection of the 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 collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Application for Employment Authorization.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Forms I–765; I–765WS; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals and households. USCIS will require an individual seeking employment authorization who has a final order of

removal and was temporarily released on an order of supervision to file the Form I–765. USCIS will use the data collected on this form to determine if an individual temporarily released on an order of supervision and seeking employment authorization is eligible based on DHS's determination that his or her removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents. Form I–765WS is used to determine if the individual seeking employment authorization has an economic need to work.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection Form I–765 is 2,286,000 and the estimated hour burden per response is 5 hours; the estimated total number of respondents for the information collection Form I–765WS is 307,697 and the estimated hour burden per response is .50 hours; the estimated total number of respondents for the information collection biometrics is 308,232 and the estimated hour burden per response is 1.17 hours: the estimated total number of respondents for the information collection passport-style photographs is 2,280,303 and the estimated hour burden per response is .50 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 13,084,631hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this information collection is $400,838,850.

K. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 106

Immigration, user fees.

8 CFR Part 241

Administrative practice and procedure, Aliens, Employment, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Regulatory Amendments

Accordingly, DHS proposes to amend parts 106, 241 and 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

PART 106—USCIS FEE SCHEDULE

■ 1. The authority for Part 106 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b, 1304, 1356; Pub. L. 107–609; 48 U.S.C. 1806; Pub. L. 115–218.

■ 2. Amend § 106.2 by adding paragraph (a)(32)(i)(C) to read as follows:

§ 106.2 Fees

(a) * * *

(32) * * *

(i) * * *

(C) An alien subject to a final order of removal and temporarily released on an order of supervision who is applying for initial or renewal of employment authorization under 8 CFR 274a.12(c)(18).

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

■ 3. The authority citation for part 241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4103(c)(4); Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101, *et. seq.*); 8 CFR part 2.

■ 4. Amend § 241.4 by revising paragraph (j)(3) to read as follows:

§ 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

* * * * *

(j) * * *

(3) *Employment authorization.* An alien who is subject to a final order of deportation or removal and whom U.S. Immigration and Customs Enforcement has temporarily released on an order of supervision pursuant to section 241(a)(3) of the Act may apply to USCIS for employment authorization pursuant to the procedures prescribed under 8 CFR 274a.12(c)(18) and 274a.13. Any grant of employment authorization by USCIS is completely discretionary and the burden is on the alien to establish that he or she warrants a favorable exercise of discretion to receive employment authorization under this part. USCIS will only grant employment authorization if USCIS determines that the alien meets the criteria for employment authorization under 8 CFR 274a.12(c)(18) and warrants a favorable exercise of discretion. The alien must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions, and must submit biometrics, with any required fee.

* * * * *

■ 5. Amend § 241.5 by revising paragraphs (a) and (c) to read as follows:

§ 241.5 Conditions of release after removal period.

(a) *Order of Supervision.* Any alien U.S. Immigration and Customs Enforcement releases pursuant to 8 CFR 241.4 or 241.13(h), must be temporarily released on an order of supervision and must be issued a completed Form I–220B, Order of Supervision, specifying the conditions of release and the consequences for failure to comply with the conditions of release, including DHS authority to take the alien back into custody and the potential for criminal charges and fines under section 243 of the Act if the alien fails to comply with the conditions of release. The Secretary, Director of ICE, or designated delegate must have the authority to issue an order of supervision under this section. The order of supervision must specify the conditions of release including, but not limited to, the following:

* * * * *

(c) *Employment authorization.* An alien who is subject to a final order of deportation or removal and whom U.S. Immigration and Customs Enforcement has temporarily released on an order of supervision pursuant to section 241(a)(3) of the Act may apply to USCIS for employment authorization pursuant to 8 CFR 274a.12(c)(18) and 274a.13. USCIS will only grant employment authorization under this paragraph if USCIS determines, in the sole and unreviewable discretion of USCIS, that the alien meets the criteria to apply for employment authorization under 8 CFR 274a.12(c)(18) and warrants a favorable exercise of discretion.

§ 241.13 [Amended]

■ 6. Amend § 241.13(h)(3) by

■ a. Removing the words ''The Service'' and adding in its place ''USCIS''; and

■ b. Removing the reference to paragraph ''§ 241.5(c)'' and adding in its place ''8 CFR 241.5, 274a.12(c)(18), and 274a.13''.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 7. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 8. Amend § 274a.12 by revising paragraphs (a)(10) and (c)(18) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

(a) * * *

(10) An alien granted withholding of removal under section 241(b)(3) of the Act or pursuant to 8 CFR 208.16(c), 8 CFR 1208.16(c), and an alien granted CAT deferral of removal pursuant to 8 CFR 208.17, 1208.17, for the period of time in that status, as evidenced by an employment authorization document issued by USCIS.

* * * * *

(c) * * *

(18)(i) USCIS, in its sole and unreviewable discretion, may grant employment authorization to an alien who is subject to a final order of deportation or removal and temporarily released from custody on an order of supervision, pursuant to section 241(a)(3) of the Act, who establishes economic necessity for employment, and for whom DHS has determined that the alien's removal is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents.

(ii) USCIS may grant employment authorization under 8 CFR 274a.12(c)(18) for a period that USCIS determines is appropriate at its discretion, not to exceed one year. Factors that USCIS will consider in determining whether an applicant with a final order of removal and temporarily released on an order of supervision warrants a favorable exercise of discretion include but are not limited to:

(A) Whether the alien is the primary provider of economic support for a dependent U.S. citizen or lawful permanent resident spouse, child(ren), and/or parent;

(B) Whether the alien is complying with the order of supervision;

(C) The anticipated length of time before the alien can be removed from the United States; and

(D) The alien's criminal history, including but not limited to whether the alien has been arrested for or convicted of any crimes after having been ordered removed from the United States and released from custody on an order of supervision;

(iii) For renewal applications only, the applicant must also show that he or she is employed by a U.S. employer who is a participant in good standing in E-Verify.

* * * * *

■ 9. Amend § 274a.13 by adding paragraph (a)(3) and revising paragraph (b) to read as follows:

§ 274a.13 Application for employment authorization.

(a) * * *

(3) Aliens with final orders of removal or deportation who have been temporarily released from detention on an order of supervision and whose removal DHS has determined is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents, and are applying for initial employment authorization or renewal of employment authorization based on 8 CFR 274a.12(c)(18) must file the appropriate form designated by USCIS, with the prescribed fee, and in accordance with the form instructions.

(i) *Evidence for initial applications.* Aliens who are applying for initial employment authorization under 8 CFR 274a.12(c)(18) must submit the following supporting documentation:

(A) A decision by an immigration judge or the Board of Immigration Appeals or an administrative removal order issued by DHS demonstrating that the alien is subject to a final order of removal or deportation;

(B) A completed Form I–765WS, Form I–765 Worksheet or successor form designated by USCIS and in accordance with the form instructions to show economic necessity; and

(C) A copy of the complete order of supervision issued by U.S. Immigration and Customs Enforcement including a copy of the complete Personal Report Record which reflects that the alien has been in continuous compliance with the order of supervision, from the date the alien was temporarily released on an order of supervision through the time of adjudication of the application for employment authorization.

(ii) *Evidence for Renewal Applications for Employment Authorization.* In addition to the evidence required under paragraph (a)(3)(i) of this section, aliens seeking renewal of employment authorization based on 8 CFR 274a.12(c)(18) must provide their U.S. employer's E-Verify Company Identification Number (or client company identification number if the U.S. employer uses an agent) and the employer's name as listed in E-Verify. An E-Verify employer is a participant in good standing if the employer has enrolled in E-Verify with respect to all hiring sites in the United States that employ an alien temporarily released from custody on an order of supervision who has received employment authorization under this rule, when the alien files their application for employment authorization; is in compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees at those hiring sites; and continues to be a participant in good standing in E-Verify at any time during which the employer employs an alien temporarily released on an order of supervision who has received employment authorization under this rule.

(b) *Approval of application.* If USCIS approves an application for employment authorization, USCIS will notify the alien. USCIS will issue an Employment Authorization Document (EAD) valid for a specific period and subject to any terms and conditions noted. For aliens granted employment authorization based on DHS's determination that the alien's removal is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue a travel document, USCIS may limit the validity period, in its discretion, not to exceed one year.

* * * * *

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel,U.S. Department of Homeland Security.

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