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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0709; Airspace Docket No. 20–AEA–2]

RIN 2120–AA66

Amendment of V–6, V–30, V–58, V–119, and V–226 in the Vicinity of Clarion, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends VHF Omnidirectional Range (VOR) Federal airways V–6, V–30, V–58, V–119, and V–226 in the vicinity of Clarion, PA. The VOR Federal airway modifications are necessary due to the planned decommissioning of the VOR portion of the Clarion, PA, VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID). The Clarion VOR/DME provides navigation guidance for portions of the affected ATS routes. The Clarion VOR is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

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

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at https://www.faa.gov/air_traffic/publications/. For further information, you can contact the Rules and Regulations 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:

Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; *telephone:* (202) 267–8783.

SUPPLEMENTARY INFORMATION:

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 the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2020–0709 in the **Federal Register** (85 FR 49324; August 13, 2020), amending VOR Federal airways V–6, V–30, V–58, V–119, and V–226 in the vicinity of Clarion, PA. The proposed amendment actions were due to the planned decommissioning of the VOR portion of the Clarion, PA, VOR/DME. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

VOR Federal airways are published in paragraph 6010(a) 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 VOR Federal airways listed in this document will be subsequently published in the Order.

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying VOR Federal airways V–6, V–30, V–58, V–119, and V–226. The planned decommissioning of the VOR portion of the Clarion, PA, VOR/DME NAVAID has made this action necessary. The VOR Federal airway changes are outlined below.

V–6: V–6 extends between the Oakland, CA, VOR/DME and the DuPage, IL, VOR/DME; between the intersection of the Chicago Heights, IL, VOR/Tactical Air Navigation (VORTAC) 358° and Gipper, MI, VORTAC 271° radials (NILES fix) and the intersection of the Gipper, MI, VORTAC 092° and Litchfield, MI, VOR/DME 196° radials (MODEM fix); and between the Clarion, PA, VOR/DME and the La Guardia, NY, VOR/DME. The airway segment overlying the Clarion, PA, VOR/DME between the Clarion, PA, VOR/DME and the Philipsburg, PA, VORTAC is removed. The unaffected portions of the existing airway remain as charted.

V–30: V–30 extends between the Badger, WI, VOR/DME and the Litchfield, MI, VOR/DME; and between the Clarion, PA, VOR/DME and the Solberg, NJ, VOR/DME. The airway segment overlying the Clarion, PA, VOR/DME between the Clarion, PA, VOR/DME and the Philipsburg, PA, VORTAC is removed. The unaffected portions of the existing airway remain as charted.

V–58: V–58 extends between the intersection of the Franklin, PA, VOR 176° and Clarion, PA, VOR/DME 222° radials (GRACE fix) and the Williamsport, PA, VOR/DME; and between the intersection of the Sparta, NJ, VORTAC 018° and Kingston, NY, VOR/DME 270° radials (HELON fix) and the Nantucket, MA, VOR/DME. The airspace within R–4105 is excluded

during times of use. The airway segment between the Franklin, PA, VOR 176° and Clarion, PA, VOR/DME 222° radials (GRACE fix) and the Philipsburg, PA, VORTAC is removed. Additionally, the restricted area exclusion language is removed also. The unaffected portions of the existing airway remain as charted.

V-119: V-119 extends between the Henderson, WV, VORTAC and the Clarion, PA, VOR/DME. The airway segment overlying the Clarion, PA, VOR/DME between the Indian Head, PA, VORTAC and the Clarion, PA, VOR/DME is removed. The unaffected portions of the existing airway remain as charted.

V-226: V-226 extends between the intersection of the Franklin, PA, VOR 175° and Clarion, PA, VOR/DME 222° radials (GRACE fix) and the Stillwater, NJ, VOR/DME. The airway segment overlying the Clarion, PA, VOR/DME between the intersection of the Franklin, PA, VOR 175° and Clarion, PA, VOR/DME 222° radials (GRACE fix) and the Keating, PA, VORTAC is removed. The unaffected portions of the existing airway remain as charted.

The NAVAID radials in the VOR Federal airway descriptions below are unchanged and stated in True degrees.

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

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action of amending VOR Federal airways V-6, V-30, V-58, V-119, and V-226, due to the planned decommissioning of the VOR portion of the Clarion, PA, VOR/DME NAVAID, qualifies for categorical exclusion under

the National Environmental Policy Act and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5-6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points). As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V-6 [Amended]

From Oakland, CA; INT Oakland 039° and Sacramento, CA, 212° radials; Sacramento; Squaw Valley, CA; Mustang, NV; Lovelock, NV; Battle Mountain, NV; INT Battle Mountain 062° and Wells, NV, 256° radials; Wells; 5 miles, 40 miles, 98 MSL, 85 MSL, Lucin, UT; 43 miles, 85 MSL, Ogden, UT; 11 miles, 50 miles, 105 MSL, Fort Bridger, WY;

Rock Springs, WY; 20 miles, 39 miles, 95 MSL, Cherokee, WY; 39 miles, 27 miles, 95 MSL, Medicine Bow, WY; INT Medicine Bow 106° and Sidney, NE, 291° radials; Sidney; North Platte, NE; Grand Island, NE; Omaha, IA; Des Moines, IA; Iowa City, IA; Davenport, IA; INT Davenport 087° and DuPage, IL, 255° radials; to DuPage. From INT Chicago Heights, IL, 358° and Gipper, MI, 271° radials; Gipper; to INT Gipper 092° and Litchfield, MI, 196° radials. From Philipsburg, PA; Selinsgrove, PA; Allentown, PA; Solberg, NJ; INT Solberg 107° and Yardley, PA, 068° radials; INT Yardley 068° and La Guardia, NY, 213° radials; to La Guardia.

* * * * *

V-30 [Amended]

From Badger, WI; INT Badger 102° and Pullman, MI, 303° radials; Pullman; to Litchfield, MI. From Philipsburg, PA; Selinsgrove, PA; East Texas, PA; INT East Texas 095° and Solberg, NJ, 264° radials; to Solberg.

* * * * *

V-58 [Amended]

From Philipsburg, PA; to Williamsport, PA. From INT Sparta, NJ, 018° and Kingston, NY, 270° radials; Kingston; INT Kingston 095° and Hartford, CT, 269° radials; Hartford; Groton, CT; Sandy Point, RI; to Nantucket, MA.

* * * * *

V-119 [Amended]

From Henderson, WV; Parkersburg, WV; INT Parkersburg 067° and Indian Head, PA, 254° radials; to Indian Head.

* * * * *

V-226

From Keating, PA; Williamsport, PA; Wilkes-Barre, PA; to Stillwater, NJ.

* * * * *

Issued in Washington, DC, on December 3, 2020.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2020-26914 Filed 12-8-20; 8:45 am]

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DEPARTMENT OF JUSTICE

28 CFR Part 79

[CIV Docket No.159]

Radiation Exposure Compensation Act: Procedures for Claims Submitted at the Statutory Filing Deadline

AGENCY: Civil Division, Department of Justice.

ACTION: Notification of procedures.

SUMMARY: The Department of Justice (“the Department”) is publishing this document to inform the public of the Department’s procedures for filing

claims under the Radiation Exposure Compensation Act (“RECA”) at the statutory filing deadline. RECA requires that claims shall be barred unless filed within 22 years after the date of enactment of the Radiation Exposure Compensation Act Amendments of 2000. The Department is publishing this document to articulate its policy that RECA claims that bear a date of July 11, 2022 on the postmark or stamp by another commercial carrier shall be deemed timely filed upon receipt by the Radiation Exposure Compensation Program. The Department will return untimely claims and will not accept electronic submissions. Consistent with the statutory requirement that the Department make a determination within 12 months of filing for timely filed claims, documentation to establish the eligibility of any potential beneficiary of an awarded claim must be provided by July 12, 2023, or the award shall be deemed rejected.

DATES: This document is effective on December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Gerard W. Fischer (Assistant Director), 202–616–4090, Constitutional and Specialized Tort Litigation Section, Torts Branch, Civil Division, Department of Justice, Washington, DC 20530.

SUPPLEMENTARY INFORMATION:

Background

Codified at 42 U.S.C. 2210 note, the Radiation Exposure Compensation Act (“RECA”) offers an apology and monetary compensation to individuals (or their survivors) who have contracted certain cancers and other serious diseases following exposure to radiation released during above-ground atmospheric nuclear weapons tests or following their employment in the uranium production industry during specified periods. This unique program was designed by Congress as an alternative to litigation in that the statutory criteria do not require claimants to establish causation. Rather, if the claimant can satisfy the requirements outlined in the statute, which include demonstrating that he or she contracted a compensable disease after working or residing in a designated location for a specific period of time, he or she qualifies for compensation.

Congress charged the Attorney General with authority to establish filing procedures and responsibility for adjudicating claims under the Act. The Attorney General delegated this function to the Constitutional and Specialized Tort Litigation Section of

the Torts Branch of the Civil Division of the United States Department of Justice.

Statutory Deadline for RECA Claims

RECA was enacted on October 15, 1990, by Public Law 101–426. The statute of limitations under Public Law 101–426 set a 20 year period from the date of its enactment for parties to file claims with the Department of Justice. On July 10, 2000, the RECA Amendments of 2000 were enacted as Public Law 106–245. The RECA Amendments of 2000 provided expanded coverage and extended the filing period for claims 22 years from its date of enactment.

As codified at 42 U.S.C. 2210 note (2018), the deadline for claims under RECA is as follows:

Under section 8, Limitations on Claims:

- In general—A claim to which this Act applies shall be barred unless the claim is filed within 22 years after the date of the enactment of the Radiation Exposure Compensation Act Amendments of 2000 [July 10, 2000].
- Resubmittal of claims—After the date of the enactment of the Radiation Exposure Compensation Act Amendments of 2000 [July 10, 2000], any claimant who has been denied compensation under this Act may resubmit a claim for consideration by the Attorney General in accordance with this Act not more than three times. Any resubmittal made before the date of the enactment of the Radiation Exposure Compensation Act Amendments of 2000 shall not be applied to the limitation under the preceding sentence.

RECA delegates authority to the Department to establish procedures whereby individuals may submit claims for payments under the Act. 42 U.S.C. 2210 note (2018), Sec. 6(a). For timely filed claims, RECA requires the Department to complete the determination on each claim filed not later than twelve months after the claim is filed. 42 U.S.C. 2210 note (2018), sec. 6(d)(1).

On March 23, 2004, the Department published a final rulemaking to implement the RECA Amendments of 2000. *See* 69 FR 13628; 28 CFR part 79. The regulation at § 79.71(a) sets forth procedures for filing of claims, and requires them to be submitted in writing on a standard claim form and mailed with supporting documentation to the Radiation Exposure Compensation Program, P.O. Box 146, Ben Franklin Station, Washington DC 20044–0146. The regulation at § 79.71(b) sets forth that “[t]he Assistant Director will file a claim after receipt of the standard form with supporting documentation and

examination for substantial compliance with this part.” The final rulemaking did not address filing procedures on the statutory deadline for filing claims.

Statement of Policy

As the deadline for filing claims approaches, several stakeholders have requested clarification with respect to the date of the last day for filing claims and the procedures for determining when a claim is filed. RECA does not set forth a method for calculating time. In addition, the apparent statutory filing deadline, July 10, 2022, is a Sunday. Finally, the Department’s implementing regulations do not clearly state filing procedures on the last day.

The Department is publishing this document to articulate its policy that RECA claims that bear a date of July 11, 2022 on the postmark or stamp by another commercial carrier shall be deemed timely filed upon receipt by the Radiation Exposure Compensation Program.

A Monday, July 11, 2022 deadline is consistent with methods for computing time set forth at Federal Rule of Civil Procedure 6(a), and with standard agency practice in the event a deadline falls on a weekend or holiday establishing the next business day as the deadline for submissions. The postmark requirement is consistent with the Department’s existing procedures for submitting claims at § 79.71(a) and (b), requiring a claim to be submitted in writing on a standard claim form and mailed to the address of the Radiation Exposure Compensation Program. In addition, this policy allows claimants to affirmatively establish the timely filing of their claim by obtaining a postmark or other mailing date stamp consistent with the filing deadline.

The regulation at § 79.71(a) requires that claims be mailed to the Department. Accordingly, the Department will not accept electronically submitted claims.

Claims bearing a date on and after July 12, 2022, as indicated by the postmark or stamp by another commercial carrier, shall be returned to the submitting party due to untimely filing. Claims returned due to untimely filing will include a letter from the Radiation Exposure Compensation Program indicating the Department is barred by statute from reviewing the claim or awarding compensation.

This policy applies to all claims received at the filing deadline, including the resubmission of a previously denied claim under Sec. 8(b) of RECA. Resubmissions of previously denied claims bearing a postmark or stamp by another commercial carrier

dated July 12, 2022 or later shall be returned due to untimely filing.

For timely filed claims in which a share of the compensation award is held in trust pending documentation to establish the eligibility of a potential beneficiary, such shares of compensation shall be deemed rejected consistent with 28 CFR 79.75(b) if sufficient documentation to establish the eligibility of the potential beneficiary is not received within the 12 month determination period provided by the Act, or by July 12, 2023, whichever date falls earlier.

This document is intended to inform the public of the Department's policy regarding procedures for filing claims at the statutory deadline. The Department will post this document to its RECA website at www.justice.gov/civil/common/reca, and continue to announce this policy at outreach events and in communications with claimants, counsel, and support groups.

Dated: December 1, 2020.

Gerard W. Fischer,

Assistant Director, Torts Branch, Civil Division.

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 42

[Docket No. PTO-P-2019-0024]

RIN 0651-AD40

PTAB Rules of Practice for Instituting on All Challenged Patent Claims and All Grounds and Eliminating the Presumption at Institution Favoring Petitioner as to Testimonial Evidence

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) revises the rules of practice for instituting review on all challenged claims or none in *inter partes* review (IPR), post-grant review (PGR), and the transitional program for covered business method patents (CBM) proceedings before the Patent Trial and Appeal Board (PTAB or Board) in accordance with the U.S. Supreme Court decision in *SAS Institute Inc. v. Iancu* (SAS). Consistent with SAS, the Office also revises the rules of practice for instituting a review, if at all, on all grounds of unpatentability for the

challenged claims that are asserted in a petition. Additionally, the Office revises the rules to conform to the current standard practice of providing sur-replies to principal briefs and providing that a reply and a patent owner response may respond to a decision on institution. The Office further revises the rules to eliminate the presumption that a genuine issue of material fact created by the patent owner's testimonial evidence filed with a preliminary response will be viewed in the light most favorable to the petitioner for purposes of deciding whether to institute a review.

DATES: *Effective date:* The changes in this final rule are effective January 8, 2021.

Applicability date: This final rule applies to all IPR and PGR petitions filed on or after January 8, 2021.

FOR FURTHER INFORMATION CONTACT:

Michael Tierney, Vice Chief Administrative Patent Judge, by telephone at 571-272-9797.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose: The final rule revises the rules of practice for IPR, PGR, and CBM proceedings that implemented provisions of the Leahy-Smith America Invents Act (AIA) providing for trials before the Office.

The U.S. Supreme Court held in *SAS* that a decision to institute an IPR under 35 U.S.C. 314 may not institute on fewer than all claims challenged in a petition. *See SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018). The Court held that the Office has the discretion to institute on either all of the claims challenged in the petition or to deny the petition. Previously, the Board exercised discretion to institute an IPR, PGR, or CBM on all or some of the challenged claims and on all or some of the grounds of unpatentability asserted in a petition. For example, the Board exercised discretion to authorize a review to proceed on only those claims and grounds for which the required threshold had been met, thus narrowing the issues for efficiency in conducting a proceeding.

In light of *SAS*, the Office provided guidance that, if the Board institutes a trial under 35 U.S.C. 314 or 324, the Board will institute on all claims and all grounds included in a petition of an IPR, PGR, or CBM. To implement this practice in the regulation, this final rule revises the rules of practice for instituting an IPR, PGR, or CBM to require institution on either all challenged claims (and all of the grounds) presented in a petition or

none. Under the amended rule, therefore, in all pending IPR, PGR, and CBM proceedings before the Office, the Board will either institute review on all of the challenged claims and grounds of unpatentability presented in the petition or deny the petition.

The second change is conforming the rules to certain standard practices before the PTAB in IPR, PGR, and CBM proceedings. Specifically, this final rule amends the rules to set forth the briefing requirements of sur-replies to principal briefs and to provide that a reply and a patent owner response may respond to a decision on institution.

Finally, this final rule amends the rules to eliminate, when deciding whether to institute an IPR, PGR, or CBM review, the presumption in favor of the petitioner for a genuine issue of material fact created by testimonial evidence submitted with a patent owner's preliminary response. As with all other evidentiary questions at the institution phase, the Board will consider all evidence to determine whether the petitioner has met the applicable standard for institution of the proceeding.

Costs and Benefits: This rulemaking is not economically significant under Executive Order 12866 (Sept. 30, 1993).

Background

On September 16, 2011, the AIA was enacted into law (Pub. L. 112-29, 125 Stat. 284 (2011)), and within one year, the Office implemented rules to govern Office practice for AIA trials, including IPR, PGR, CBM,¹ and derivation proceedings pursuant to 35 U.S.C. 135, 316, and 326 and AIA 18(d)(2). *See* Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 FR 48612 (Aug. 14, 2012); Changes to Implement *Inter Partes* Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 FR 48680 (Aug. 14, 2012); and Transitional Program for Covered Business Method Patents—Definitions of Covered Business Method Patent and Technological Invention, 77 FR 48734 (Aug. 14, 2012). Additionally, the Office published a Patent Trial Practice Guide to advise the public on the general framework of the regulations, including the structure and times for taking action in each of the new proceedings. *See*

¹ The transitional covered business method patent review program expired on September 16, 2020, in accordance with AIA 18(a)(3). Although the program has sunset, existing CBM proceedings, based on petitions filed before September 16, 2020, are still pending.

Office Patent Trial Practice Guide, 77 FR 48756 (Aug. 14, 2012) (TPG2012). This guide has been periodically updated. See Office Patent Trial Practice Guide, August 2018 Update, 83 FR 39989 (Aug. 13, 2018) (TPG2018); and Office Patent Trial Practice Guide, July 2019 Update, 84 FR 33925 (July 16, 2019) (TPG2019). A consolidated Trial Practice Guide, incorporating updates to the original August 2012 Practice Guide, was published in November 2019. See Consolidated Trial Practice Guide, 84 FR 64280 (Nov. 21, 2019) (CTPG).

Previously, under 37 CFR 42.108(a) and 42.208(a), the Board exercised the discretion to institute an IPR, PGR, or CBM on all or some of the challenged claims and on all or some of the grounds of unpatentability asserted for each claim presented in a petition. For example, the Board exercised the discretion to authorize a review to proceed on only those claims and grounds for which the required threshold under 35 U.S.C. 314(a) or 324(a) had been met, narrowing the issues for efficiency.

The U.S. Supreme Court held in *SAS*, however, that a decision to institute an IPR trial under 35 U.S.C. 314 may not institute review on fewer than all claims challenged in a petition. The Court held that the Office has the discretion to institute trial on either all of the claims challenged in the petition or to deny the petition. On April 26, 2018, the Office posted guidance on the impact of *SAS* on AIA trial proceedings at <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/trials/guidance-impact-sas-aia-trial>. In light of *SAS*, the guidance states that if the Board institutes a trial for an IPR, PGR, or CBM under 35 U.S.C. 314 or 324, the Board will institute on all claims and all grounds included in a petition. The guidance provides that “the PTAB will institute as to all claims or none,” and “[a]t this time, if the PTAB institutes a trial, the PTAB will institute on all challenges raised in the petition.” *Id.*

Subsequently, the U.S. Court of Appeals for the Federal Circuit (the Federal Circuit) has held that “[e]qual treatment of claims and grounds for institution purposes has pervasive support in *SAS*.” *PGS Geophysical AS v. Jancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018) (noting that the Supreme Court in *SAS* wrote that “the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises,” *SAS*, 138 S. Ct. at 1355, and that section 314 “indicates a binary choice—either institute review or don’t,” *id.*, adding that “Congress didn’t choose to pursue” a statute that “allows the Director to

institute proceedings on a claim-by-claim and ground-by-ground basis” as in *ex parte* reexamination, *id.* at 1356). The Federal Circuit has also held that “if the Board institutes an IPR, it must similarly address all grounds of unpatentability raised by the petitioner.” *AC Techs. S.A. v. Amazon.com, Inc.*, 912 F.3d 1358, 1364 (Fed. Cir. 2019).

Consistent with *SAS*, the Office’s guidance, and Federal Circuit’s case law, this final rule revises §§ 42.108(a) and 42.208(a) to provide for instituting an IPR, PGR, or CBM trial on all challenged claims or none. This final rule also revises these rules for instituting a review, if at all, on all of the grounds of unpatentability for the challenged claims that are presented in a petition. In all pending IPR, PGR, and CBM proceedings before the Office, the Board will either institute on all of the challenged claims and on all grounds of unpatentability asserted for each claim or deny the petition.

In addition, consistent with the TPG2018, this final rule amends §§ 42.23, 42.24, 42.120, and 42.220 to permit (1) replies and patent owner responses to address issues discussed in the institution decisions, and (2) sur-replies to principal briefs (*i.e.*, to a reply to a patent owner response or to a reply to an opposition to a motion to amend). TPG2018 at 14–15.

As noted in the TPG2018, in response to issues arising from *SAS*, the petitioner is permitted to address in its reply brief issues discussed in the institution decision. Similarly, the patent owner is permitted to address the institution decision in its response and a sur-reply, if necessary to respond to the petitioner’s reply. However, the sur-reply may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness. Sur-replies may only respond to arguments made in reply briefs, comment on reply declaration testimony, or point to cross-examination testimony. A sur-reply may also address the institution decision if necessary to respond to the petitioner’s reply. This sur-reply practice essentially replaces the previous practice of filing observations on cross-examination testimony.

In 2012, the Office also promulgated §§ 42.107(c) and 42.207(c), which initially included a prohibition against a patent owner filing new testimony evidence with its preliminary response. In particular, these rules stated: “No new testimonial evidence. The preliminary response shall not present new testimony evidence beyond that already of record, except as authorized

by the Board.” 37 CFR 42.107(c) and 42.207(c) (2012).

In April 2016, after receiving comments from the public and carefully reviewing them, the Office promulgated a rule to allow new testimonial evidence to be submitted with a patent owner’s preliminary response. Amendments to Rules of Practice for Trials Before the Patent Trial and Appeal Board, 81 FR 18750 (April 1, 2016). The Office also amended the rules to provide a presumption in favor of the petitioner for a genuine issue of material fact created by such testimonial evidence solely for purposes of deciding whether to institute an IPR, PGR, or CBM review. *Id.* at 18755–57.

Stakeholder feedback received in party and amicus briefing as part of the Precedential Opinion Panel (POP) review process in *Hulu, LLC v. Sound View Innovations, LLC*, Case IPR2018–01039, Paper 15 (PTAB Apr. 3, 2019) (granting POP review), indicated that the rule has caused some confusion at the institution stage for AIA proceedings. For example, certain stakeholders indicated that the presumption in favor of the petitioner for genuine issues of material fact created by patent owner testimonial evidence also creates a presumption in favor of the petitioner for questions relating to whether a document is a printed publication. *Hulu*, Paper 29 at 16. The Office has clarified in *Hulu* that this is not the case—the only presumption in favor of the petitioner is set forth in 37 CFR 42.108(c) applying to genuine issues of material fact created by testimonial evidence. *Id.* As to that presumption, the Office’s experience is consistent with the concerns raised by commenters here that the presumption may discourage patent owners from filing testimonial evidence with their preliminary responses to avoid creating a presumption against the patent owner where none would otherwise exist.

Section 314(a) of 35 U.S.C. provides that “[t]he Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. 314(a). That is, the statute provides that a petitioner is required to present evidence and arguments sufficient to show that it is reasonably likely that it will prevail in showing unpatentability. *Hulu*, Paper 29, at 12–13 (citing 35 U.S.C. 312(a)(3), 314(a)). For a PGR proceeding, the standard for institution is whether it is “more likely than not” that the

petitioner would prevail at trial. *See* 35 U.S.C. 324(a). In determining whether the information presented in the petition meets the standard for institution, the PTAB considers the totality of the evidence currently in the record. *See Hulu*, Paper 29, at 3, 19. Thus, a petitioner carries the burden in both IPRs and PGRs at the institution stage. The Office's experience with the 2016 rule change, however, is that having a presumption in favor of the petitioner at the institution stage for one class of evidence may lead to results that are inconsistent with this statutory scheme.

Accordingly, the Office has an interest in ensuring that testimonial evidence is treated similarly to other evidence for purposes of institution and consistently with the statutory scheme. This final rule amends the rules of practice to eliminate the presumption in favor of the petitioner for a genuine issue of material fact created by testimonial evidence submitted with a patent owner's preliminary response when deciding whether to institute an IPR, PGR, or CBM review. Thus, consistent with the statutory framework, any testimonial evidence submitted with a patent owner's preliminary response will be taken into account as part of the totality of the evidence. Doing so will remove a disincentive to patent owners submitting pre-institution testimony, eliminate a source of confusion, and align the Board's practice with its treatment of other evidence at the time of institution, without adversely impacting petitioners' ability to ensure that otherwise meritorious petitions proceed to trial. Further, while parties normally do not have an opportunity to depose the testifying parties prior to institution, the Board's experience is that cross-examination is not necessary to weigh the strengths and weaknesses of the testimony for purposes of institution.

Discussion of Specific Rules

37 CFR, part 42, is amended as follows:

Section 42.23

Section 42.23 is amended to permit patent owners and petitioners to file sur-replies to principal briefs (*i.e.*, to a reply to a patent owner response or to a reply to an opposition to a motion to amend). In particular, the title and § 42.23(a) are amended to add "sur-replies" so that the rule is amended as follows: "42.23 Oppositions, replies, and sur-replies. (a) Oppositions, replies, and sur-replies . . . and, if the paper to which the opposition, reply, or sur-reply . . ."

Paragraph (b) of § 42.23 is amended to permit petitioners to address issues discussed in the institution decision in the reply briefs. Specifically, § 42.23(b) is amended to replace the second sentence with: "A reply may only respond to arguments raised in the corresponding opposition, patent owner preliminary response, patent owner response, or decision on institution." Paragraph (b) of § 42.23 is amended to address the content of a sur-reply by adding the following: "A sur-reply may only respond to arguments raised in the corresponding reply, and may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness."

Section 42.24

The title and § 42.24(c) are amended to provide for word count limit for sur-replies so that they are amended as follows: "§ 42.24 Type-volume or page limits for petitions, motions, oppositions, replies, and sur-replies" and "(c) *Replies and Sur-replies*. The following word counts or page limits for replies and sur-replies apply . . ."

Paragraph (c) of § 42.24 is amended to add a new paragraph (4) that would limit sur-replies to replies to patent owner responses to petitions to 5,600 words.

Section 42.71

The third sentence of § 42.71(d) is amended to add "a sur-reply" so that a rehearing request may identify matters in a sur-reply consistent with §§ 42.23 and 42.24 that allow the parties to file sur-replies to principal briefs.

Sections 42.108 and 42.208

Each of §§ 42.108(a) and 42.208(a) is amended to state that when instituting IPR or PGR, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.

Each of §§ 42.108(b) and 42.208(b) is amended to state that at any time prior to institution of IPR or PGR, the Board may deny all grounds for unpatentability for all of the challenged claims. Denial of all grounds is a Board decision not to institute IPR or PGR.

The second sentence in each of §§ 42.108(c) and 42.208(c) is amended to delete the phrase "but a genuine issue of material fact created by such testimonial evidence will be viewed in the light most favorable to the petitioner solely for purposes of deciding whether to institute [a] review." Therefore, the second sentence in each of §§ 42.108(c) and 42.208(c) states the following: "The Board's decision will take into account a patent owner preliminary response

where such a response is filed, including any testimonial evidence."

Sections 42.120 and 42.220

The first sentence of each of §§ 42.108(a) and 42.208(a) is replaced with the following: "(a) *Scope*. A patent owner may file a single response to the petition and/or decision on institution."

Response to Comments

In the notice of proposed rulemaking, the Office sought comments on these proposed changes. PTAB Rules of Practice for Instituting on All Challenged Patent Claims and All Grounds and Eliminating the Presumption at Institution Favoring Petitioner as to Testimonial Evidence, 85 FR 31728 (May 27, 2020). The Office received a total of 40 comments, including 5 comments from individuals, 30 comments from associations, 1 comment from a law firm, and 4 comments from corporations. The Office appreciates the thoughtful comments representing a diverse set of views from the various public stakeholder communities. All of the comments are posted on the PTAB website at <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/comments-proposed-rules-aia-trial>.

Upon careful consideration of the public comments, and taking into account the effect of the rule changes on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete instituted proceedings, the Office adopts the proposed rule changes (with minor deviations in the rule language, as discussed below). Any deviations from the proposed rule are based upon a logical outgrowth of the comments received.

The Office's responses address the comments that are directed to the proposed changes set forth in the notice of proposed rulemaking. 85 FR 31728. Any comments directed to topics that are beyond the scope of the notice of proposed rulemaking will not be addressed at this time.

Instituting on All Claims and All Grounds

Comment 1: Most comments strongly supported the proposed rules that codify the Board's existing practice for instituting on all challenged claims and all grounds presented in a petition when the Board institutes a review. Several comments indicated that instituting on all challenged claims and grounds is the most efficient course of action to fully address the parties' dispute before the Board and to allow district courts to

apply AIA estoppel in the most efficient manner during any subsequent, parallel litigation, including making the estoppel provisions of section 315(e)(2) more predictable and robust. A number of comments also stated that this type of review structure is consistent with the Supreme Court's decision in *SAS* and promotes efficiency by resolving all challenges presented in a single proceeding, which will increase certainty for patent owners. A few comments further noted that instituting on all claims and grounds may strike a balance that helps achieve the Congressional objective of providing a fair, comprehensive, and efficient alternative to district court litigation, and adopting the proposed rules may help promote clarity.

Response: The Office appreciates the thoughtful comments and agrees with them. In this final rule, the Office adopts the proposed rules that codify the Board's existing practice that has been in place for over two years. Under the amended rules, when instituting a review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.

Comment 2: A comment stated that the Supreme Court in *SAS* did not squarely address partial-grounds institution and that if the rules were implemented rigidly, they would harm patent owners, petitioners, and the public affected by the challenged patent. In particular, the comment suggested that denying petitions that have some meritorious grounds or instituting reviews that have some non-meritorious grounds would constitute waste, making this rulemaking economically significant under Executive Orders 12866 and 13771.

Response: The Federal Circuit has held that "[e]qual treatment of claims and grounds for institution purposes has pervasive support in *SAS*." *PGS Geophysical AS*, 891 F.3d at 1360. The Federal Circuit noted that the Supreme Court in *SAS* wrote that "the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises" and that section 314 "indicates a binary choice—either institute review or don't," adding that "'Congress didn't choose to pursue' a statute that 'allows the Director to institute proceedings on a claim-by-claim and ground-by-ground basis' as in *ex parte* reexamination." *Id.* (quoting *SAS*, 138 S. Ct. at 1355–1356). The Federal Circuit has also held that "if the Board institutes an IPR, it must similarly address all grounds of unpatentability raised by the petitioner." *AC Techs. S.A.*, 912 F.3d at 1364.

As discussed above, this final rule codifies the Board's existing practice that has been in place for over two years for instituting on all challenged claims and grounds when the Board institutes a review. The Office of Management and Budget (OMB) has determined this rule to be not economically significant under Executive Order 12866. Further, there is no significant economic impact as the rule merely implements the law, as mandated by *SAS* and further supported by subsequent Federal Circuit precedent like *PGS Geophysical AS*, 891 F.3d at 1360. As some of the comments have recognized, on balance, the amended rules promote clarity and efficiency by addressing in one proceeding all challenges asserted in a petition.

In short, instituting on all challenged claims and grounds is consistent with the Supreme Court's decision in *SAS*, is mandated by the Federal Circuit, and is consistent with the Board's existing practice. In adopting the proposed rules, the Office has considered the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted.

Comment 3: Some comments encouraged the Office to clarify that the preexistence of a claim where no reasonable likelihood of success has been demonstrated does not create a presumption against institution where there is another claim that does have a reasonable likelihood of succeeding. A few comments urged the Office not to apply the rules for instituting on all claims and grounds to deny meritorious petitions as to some claims or grounds.

Response: The Office appreciates the thoughtful comments. Even when a petitioner demonstrates a reasonable likelihood of prevailing with respect to one or more claims, institution of review remains discretionary. *SAS*, 138 S. Ct. at 1356 ("[Section] 314(a) invests the Director with discretion on the question whether to institute review . . ." (emphasis omitted)); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) ("[T]he PTO is permitted, but never compelled, to institute an IPR proceeding."). In exercising that discretion, the Board is guided by the statutory requirement, in promulgating regulations for IPR, PGR, and CBM, to consider the effect of any regulations on "the efficient administration of the Office [and] the ability of the Office to timely complete proceedings," 35 U.S.C. 316(b) and 326(b), as well as the requirement to construe our rules to "secure the just, speedy, and inexpensive resolution of every proceeding," 37 CFR 42.1(b). The

Office's guidance, issued on June 5, 2018, also explains that the Board may consider the number of claims and grounds that meet the reasonable likelihood standard when deciding whether to institute a review. *SAS* Q&As, Part D, Effect of *SAS* on Future Challenges that Could Be Denied for Statutory Reasons (June 5, 2018), available at https://www.uspto.gov/sites/default/files/documents/sas_qas_20180605.pdf ("[T]he panel will evaluate the challenges and determine whether, in the interests of efficient administration of the Office and integrity of the patent system (see 35 U.S.C. 316(b)), the entire petition should be denied under 35 U.S.C. 314(a).").

Comment 4: One comment suggested several changes in the language of § 42.108. For example, the comment suggested (1) changing the title of § 42.108 from "Institution of *inter partes* review" to "Decision whether to institute review"; (2) changing "When" to "If" in the phrase "When instituting *inter partes* review" in § 42.108(a); (3) deleting the phrase "the Board will authorize" in § 42.108(a); and (4) replacing "all of the challenged claims" with "all involved claims."

Response: The Office appreciates the comment. The suggested changes are not necessary to codify the existing practice for instituting on all challenged claims and grounds when the Board institutes a review. Notably, the title of § 42.108 is consistent with the title of 35 U.S.C. 314, which is "Institution of *inter partes* review." Moreover, the term "challenged claims" is consistent with 35 U.S.C. 318 and 328, each of which states "a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added."

Addressing the Institution Decision

Comment 5: Most comments strongly supported the proposed rules codifying the Board's existing practice that allows the parties to address issues raised in the institution decision. Several comments recognized that the institution decision is a vehicle by which the Board can solicit responsive evidence and arguments on certain issues and that allowing the parties to address those issues may lead to developing a more complete written record, clarifying the issues, and ensuring fairness. A few comments sought clarification about whether a patent owner may file a response to either or both the petition and decision on institution, and whether a petitioner may file a reply when the patent owner elects not to file a response.

Response: The Office appreciates the thoughtful comments. In this final rule, the Office adopts the proposed rules codifying the Board's existing practice that allows the parties to address issues raised in the institution decision. Under the amended rules, a patent owner may file a single response to address issues raised in either or both the petition and institution decision, and a petitioner may file a single reply to address issues raised in either or both the patent owner response and institution decision. For those rare circumstances in which the patent owner elects not to file a response, the patent owner must arrange a conference call with the parties and the Board, as required by the scheduling order, and the petitioner is expected to notify the Board during the conference call whether it intends to file a reply to the decision on institution. The absence of a patent owner response will not prevent a petitioner from filing a reply where appropriate to address the institution decision.

Comment 6: One comment does not support the rule changes that allow the parties to address the issues raised in the institution decision because the Board should not take sides in the dispute. Another comment suggested that the rules should not provide a basis for parties to re-litigate the institution decision.

Response: As noted above, a few comments have recognized that the institution decision is a vehicle by which the Board can solicit responsive evidence and arguments on certain issues. Notably, a decision instituting a review does not make a final determination with respect to the patentability of the challenged claims or with respect to the claim construction. Allowing the parties to address the issues raised in the institution decision may promote developing a more complete written record, clarify the issues, and ensure fairness in issuing the final written decision on patentability.

Sur-Replies

Comment 7: Most comments strongly supported the proposed rules that codify the Board's existing practice of allowing sur-replies to principal briefs. Several comments indicated that allowing sur-replies provides certainty to Board processes. Some comments also noted that allowing sur-replies gives a patent owner an opportunity to respond to new exhibits or other new information in a petitioner's reply, providing balance during AIA proceedings and affording patent owners a fair opportunity to be heard. Some comments stated that sur-replies

are preferable to the previous procedure of authorizing a patent owner to file observations on cross-examination testimony in response to testimonial evidence submitted with a reply because they provide a more complete record.

Response: The Office appreciates these thoughtful comments. The amended rules are intended to conform to existing practice. Consistent with the practice as outlined in the TPG2018, and the CTPG published in November 2019, the new rules will permit sur-replies to principal briefs (*i.e.*, to a reply to a patent owner response or to a reply to an opposition to a motion to amend). However, a sur-reply may not be accompanied by new evidence other than transcripts of the cross-examination testimony of any reply witness. Sur-replies are permitted only to respond to arguments made in reply briefs, comment on reply declaration testimony, or point to cross-examination testimony. A sur-reply also may address the institution decision if necessary to respond to the petitioner's reply. This sur-reply practice essentially replaces the previous practice of filing observations on cross-examination testimony.

Comment 8: Some comments expressed concern that the amended rules do not expressly provide for a sur-reply as a matter of right, stating that this may lead to uncertainty among parties involved in an AIA trial proceeding.

Response: See response to comment 7. Consistent with existing practice as provided in the TPG2018 and the CTPG, no prior authorization is required to file a sur-reply to a reply to a patent owner response or to a reply to an opposition to a motion to amend.

Comment 9: Some comments expressed concern that the Proposed Rules do not place limits on the introduction of new evidence in a sur-reply, which could lead to uncertainty and gamesmanship.

Response: The Office appreciates these thoughtful comments. The Office has revised the text of rule 42.23(b) to clarify that the sur-reply "may not be accompanied by new evidence other than transcripts of the cross-examination testimony of any reply witness." This conforms to existing practice as stated in the TPG2018 and the CTPG.

Word Limits for Sur-Replies

Comment 10: Most comments strongly supported the proposed rule change to 37 CFR 42.24(c), which imposes a limit of 5,600 words for sur-replies to patent owner responses to petitions. Some

comments noted that this rule provides certainty as well as fairness.

Response: The Office appreciates these comments. The amended rule is intended to conform to existing practice. Consistent with the practice as outlined in the TPG2018 and the CTPG, sur-replies are subject to the same word or page limit as a reply.

Comment 11: The Office has also received comments on the existing practice of requiring, in response to a paper that contains a statement of material fact, a listing of facts that are admitted, denied, or cannot be admitted or denied.

Response: The Office appreciates the comments received; however, they are beyond the scope of the current rulemaking. No changes to that practice are implemented in the amended rules. The Office will take these comments into account as the Office continually seeks to improve the AIA review process to maintain fair procedures.

Comment 12: The Office has also received some comments suggesting changes to the word count limit. For example, one comment requested that the word count be a function of the number of claims in a challenged patent or the length of those claims. Another comment expressed concern about perceived unfairness in word counts, wherein patent owners may file both a preliminary response and an opposition, each containing 14,000 words, in addition to a sur-reply of 5,600 words, whereas a petitioner is limited to a petition of 14,000 words followed by a reply of 5,600 words. This comment suggested that some of this disparity could be mitigated if petitioners are allowed to file a reply whenever a patent owner files a preliminary response.

Response: The Office appreciates the comments received; however, they are beyond the scope of the current rulemaking. The Office will take these comments into account as the Office continually seeks to improve the AIA review process to maintain fair procedures.

Eliminating the Presumption at Institution

Comment 13: Most comments favored adoption of the proposed rule eliminating the presumption at institution that a genuine issue of material fact created by testimonial evidence will be viewed in a light most favorable to petitioner for purposes of deciding whether to institute. However, a number of comments opposed adopting the proposed rule.

Response: The Office appreciates the input from the public on this issue,

whether supporting or opposing the proposed rule. The suggestion that the present rule be retained is not adopted. The presumption in favor of the petitioner where there is a genuine dispute of material fact created by testimonial evidence in a patent owner preliminary response has created confusion as to how other evidence should be weighed. This confusion was resolved in large part in *Hulu*, but *Hulu* highlights an inconsistency in the treatment of evidence that the proposed rule is intended to resolve. In particular, in *Hulu*, the Board held that disputed questions of material fact raised by evidence other than testimonial evidence are resolved by the Board at the institution phase without a presumption, even where additional evidence or discovery might have illuminated them. See *Hulu*, Paper 29, at 16–20 (addressing the standard for proving printed publication pre-institution). The proposed rule confirms that no presumption applies in favor of institution regardless of the existence or nature of a factual dispute in the pre-institution record and regardless of the type of evidence, testimonial or otherwise.

Many of the comments opposing the proposed rule are arguments in favor of an institution presumption generally. This would conflict with the statute, which makes clear that the burden is on the petitioner to meet the applicable standard that it would prevail with respect to at least one of the claims challenged in the petition. See 35 U.S.C. 314(a), 324(a). Moreover, the presumption provided by the existing rule has proved unnecessary to resolve the institution question in other contexts. Disputed questions of material fact raised by other than testimonial evidence are resolved by the Board at the institution phase without a presumption. See *Hulu*, Paper 29, at 16–20 (addressing the standard for proving printed publication pre-institution).

Comment 14: A number of comments supporting the rule change asserted that the current presumption in favor of the petitioner is biased towards institution and discourages patent owners from submitting conflicting testimonial evidence with a preliminary response. One comment suggested that, in view of the presumption of validity, testimonial evidence should instead be viewed in the light most favorable to patentability and that a presumption in favor of the patent owner would be appropriate. Another comment suggested that a neutral presumption is best in the interest of fairness and reduces the risk that innovators will be deprived of their innovations.

Response: The Office appreciates the comments and agrees that any presumption in favor of institution is inappropriate. The Office also agrees that under the current rule, a patent owner might not be inclined to submit pre-institution testimony that might, under the presumption, create an issue of material fact. As in the proposed rule, the final rule modifies the existing rule to address these concerns and no longer specifies that a genuine issue of material fact created by testimonial evidence results in a presumption in favor of a petitioner. The rule change removes any bias or appearance of bias in favor of petitioner, and provides a balanced approach to ensure that all testimonial evidence submitted by the parties is fairly considered.

Comment 15: Several comments in support of the rule change noted that the practice to view testimonial evidence in the light most favorable to the petitioner for purposes of instituting a review conflicts with the decision of Congress to place the burden of proof on the petitioner. One comment noted that, by eliminating the presumption, the proposed rule change enables the PTAB to consider the totality of the evidence in deciding whether the petition meets the standard for institution. Another comment opposing the rule change stated the change thwarts Congress's purposes in establishing the AIA by hampering the ability to challenge low-quality patents.

Response: The Office appreciates these thoughtful comments. As set forth in the statutes established by Congress, the burden is on the petitioner to meet the applicable standard that it would prevail with respect to at least one of the claims challenged in the petition. See 35 U.S.C. 314(a), 324(a). In response to recent feedback received from the public, the Office agrees it is inconsistent with the statutory framework to view testimonial evidence in the light most favorable to petitioners. The presumption has caused confusion at the institution stage for AIA proceedings and has proved unnecessary to resolve the institution question in other contexts. With the elimination of the presumption, the PTAB will consider the totality of the evidence to determine whether the petitioner has met the standard for institution of the procedure.

The Office disagrees that elimination of the presumption frustrates the intention of Congress. To the contrary, Congress provided that institution of IPR is discretionary and conditioned on the petitioner meeting the applicable standard for review. *Id.* Elimination of the presumption furthers Congressional

intent. In addition, elimination of the presumption does not impact the ability of petitioners to file with the Office a petition to institute a review of a patent.

Comment 16: A number of comments opposing the proposed rule questioned the fairness of the proposed rule to petitioners. One comment expressed concern that under the proposed rule, the patent owner would have a “one-sided ability to enter unchallenged evidence prior to institution.” Other comments expressed concern that crediting a patent owner's testimonial evidence without providing cross-examination or an opportunity to respond may lead to denials of institution that cannot be appealed, even where the patent owner's factual contentions are mistaken. Several comments expressed the view that the lack of cross-examination is especially concerning when the patent owner introduces testimony asserting “secondary considerations” such as unexpected results, commercial success, copying by others, and long-felt but unmet need. One comment expressed concern that the proposed rule would lead to more discretionary denials of institution. One comment expressed concern that the proposed rule would reduce patent quality, drive up costs, and invite “gamesmanship.”

Response: The Office appreciates these comments but does not adopt them. The Office believes the Board is adequately able to weigh the parties' testimonial evidence and fairly resolve factual disputes at the institution stage without a presumption crediting the petitioner's testimony. For example, testimony must still disclose the underlying facts and data upon which it relies, or it will be entitled to little weight. See 37 CFR 42.65(a); CTPG, at 35. Moreover, consistent with existing practice, limited pre-institution discovery may be granted at the discretion of the Board. Nonetheless, although cross-examination of pre-institution testimony might be helpful in a few cases, as a general matter, the Office believes that its benefits will be outweighed by the greater expense to the Office and the parties, where the Board is able to reach a decision on institution based on the briefs and documents as submitted by the parties.

Comment 17: Several comments expressed concern that adopting the proposed rule would unduly complicate the pre-institution phase for AIA trials. This is sometimes described in the comments as creating a “trial within a trial.” One comment expressed concern that the proposed rule could give rise to “almost universal requests” for pre-institution discovery and additional

briefing, leading to greater costs and burdens to the parties. Another comment expressed concern that there are no procedural guidelines in place to prevent this. This comment expressed concern that “over complication” of the pre-institution stage advantages more experienced parties, and that the costs and burdens to the Office may increase due to pre-institution depositions and additional briefing. Several other comments suggested that the rule should give petitioners the opportunity to reply if a patent owner submits testimony with the preliminary response that raises a genuine issue of material fact. One comment expressed the view that the chances of error by the Board are greater if institution is decided without the safeguards of discovery, cross-examination, additional briefing, and a hearing. Another comment opposed the proposed rule because it endorses resolution of disputes of fact at the institution phase on an incomplete record and without judicial review.

Response: The Office appreciates these thoughtful comments and concerns on this issue. At present, although timely and well-supported requests are permitted, as consistent with existing practice, no additional briefing or discovery (e.g., depositions of declarants) during the institution phase is contemplated as a result of the submission of testimony with the preliminary response. In this way, no trial within a trial is anticipated, and the parties will not be burdened with greater costs. The Board has the benefit of the documentary evidence of record, as well as elucidating argument from the parties, in evaluating the testimonial evidence. In most cases, in the Board’s experience, this evidence is sufficient to resolve the facts in dispute. For instance, declaration evidence alleging secondary considerations would, consistent with normal practice, be given little weight absent supporting documentary evidence. Thus, a declaration alleging commercial success would not be given much weight on institution absent sufficient supporting evidence demonstrating sales figures, etc.

Comment 18: Several comments opposing the proposed rule expressed concern about unfairness to the petitioner if the patent owner withdraws its reliance on testimony submitted with the preliminary response. One comment suggested that the patent owner might be “incentivized” to introduce less supportable testimony prior to institution that can be withdrawn if a trial is instituted. Another comment expressed concern that, because

eliminating the presumption may allow a patent owner to introduce disputes of material fact via expert testimony on the patentability of the challenged claims that lead to a denial of institution, the petitioner should be entitled to take the deposition of an expert whose declaration is submitted with the preliminary response. The comment stated that if a new expert declaration is submitted with the patent owner response, the petitioner should also be permitted to take the deposition of that expert as well.

Response: The Office appreciates but does not adopt the comments. Under the current rule, once a trial is instituted, a patent owner may choose not to rely on testimony submitted with the preliminary response. CTPG, at 51. That would not change under the final rule. Once a trial commences, petitioners can also withdraw evidence. *See Hulu*, Paper 29, at 6 (additional evidence regarding the date of publication at issue raised more questions than it answered and was withdrawn). If both parties can withdraw their reliance on evidence that turns out to be weak, there is no unfairness.

The Office does not believe patent owners will be motivated to provide “less supportable” testimony from their declarants as a result of the rule change. The Office believes parties generally recognize that their goals are best served by providing the most credible testimony from their declarants. *See* 37 CFR 42.65(a); CTPG, at 51. If, after trial is initiated, the patent owner withdraws reliance on a declarant and a declaration submitted with the preliminary response, that declarant will usually not be subject to a deposition on the withdrawn declaration. CTPG, at 51.

Comment 19: One comment expressed a concern that the new rule should not alter the standard for instituting a trial.

Response: The Office agrees. The final rule does not change the standard for instituting trial and does not shift the burden of proving unpatentability away from the petitioner.

Comment 20: One comment opposing the rule change suggested that a presumption in favor of the petitioner should continue and should apply to all disputed evidentiary issues, including questions of whether a document is a printed publication.

Response: The Office appreciates but does not adopt this comment. The final rule eliminates the presumption as to genuine issues of material fact. The *Hulu* decision expressly provides guidance on establishing a document as a printed publication. *Hulu*, Paper 29, at 11–19.

Comment 21: Several comments addressed the standard of review under the rule. One comment expressed concern that the rule does not make it clear how pre-institution testimony will be evaluated. Another stated that the rule should specify the burden and asserted that removing the summary judgment standard in the proposed rule would make Board decisions on disputed facts arbitrary and capricious.

Response: The Office appreciates but does not adopt the comments. The final rule provides no presumption as to disputed issues of material fact. However, the decision in *Hulu* provides guidance on the institution standard and evidentiary dynamics, albeit in the context of a printed publication issue. *Hulu*, Paper 29, at 11–19. The Office has ample experience in evaluating declaration testimony without cross-examination in a variety of contexts and does not see the need to provide further guidance in the rule itself. Additional guidance on the application of the rule change may be provided in future precedential and informative Board decisions.

Comment 22: Several comments opposing the rule change expressed concerns that removal of the presumption would violate due process requirements because it would allow for a decision not to institute based on unchallenged testimonial evidence. One comment asserted the change would be unconstitutional because it does not allow a petitioner to confront an adverse witness.

Response: The Office appreciates the comments but disagrees the final rule violates due process requirements or is unconstitutional. Institution of AIA review proceedings is discretionary, and there is no right provided in the statutory framework to challenge testimony at the institution stage. *See* 35 U.S.C. 314(a), 324(a). Under the final rule, both the petitioner and patent owner are able to submit testimonial evidence. The Office has ample experience in evaluating declaration testimony without cross-examination in a variety of contexts. Such testimony must be supported as appropriate, or it will be accorded little weight. *See* 37 CFR 42.65(a); CTPG, at 51. The Board will consider the totality of the evidence presented to determine if the petitioner meets the threshold standard to institute review.

Comment 23: A number of comments expressed concern that the Office did not provide adequate justification for the rule change and asserted the rationale for the change is inconsistent with the Office findings in the 2016 rulemaking that established the

presumption. A few comments suggested that any stakeholder confusion caused by the rule does not justify abandoning the rule but should instead be addressed by precedential decisions or the next revision of the Trial Practice Guide.

Response: As part of ongoing efforts to improve AIA proceedings, the Office continuously evaluates its procedures based on feedback from the public. Upon evaluation of recent feedback, the Office has determined that the presumption causes confusion at the institution stage and potentially discourages patent owners from submitting testimonial evidence. In addition, the Office's experience is that having a presumption in favor of the petitioner at the institution stage may lead to results that are inconsistent with the statutory scheme, which places the burden on the petitioner.

Although there were valid reasons for promulgating the original rule, the Office has determined that the problems and confusion engendered by the rule, discussed above, outweigh those reasons. The Office has ample experience in evaluating declaration testimony without cross-examination in a variety of contexts. The Office believes, therefore, that the Board will remain able to fairly and efficiently resolve factual disputes at the institution phase in deciding whether to institute the requested trial without the current presumption. The Office received numerous comments that support and agree with the Office's rationale for the change as eliminating a source of confusion, removing a disincentive to patent owners to provide pre-institution testimonial evidence, and better according with the statutory standards for institution. See 35 U.S.C. 314(a), 324(a). Accordingly, the Office has elected to revise its rule.

Comment 24: A few comments expressed concern with the retroactive application of the rule change and requested that the rule not go into immediate effect. Several other comments stated that the Office should provide an opportunity for further discussion and consideration on this proposed rule change.

Response: The Office acknowledges the concerns with the retroactive application of the rule. The change to eliminate the presumption will apply only to petitions filed on or after the effective date of the rule. The Office appreciates all comments submitted in response to the proposed rule and does not believe further discussion is needed.

Comment 25: A few comments stated the rulemaking fails to comply with the procedural requirements imposed by the

Administrative Procedure Act and Executive Order 12866. The comments assert that the rule making is significant—economically significant—and the 30-day comment period failed to provide the public a meaningful opportunity to respond to the comments.

Response: The OMB has determined this rule to be not significant for purposes of Executive Order 12866. Further, the Office disagrees that the final rule will impose additional costs because no additional briefing or discovery is contemplated as a result of the rule change.

Rulemaking Considerations

A. Administrative Procedure Act (APA): This final rule revises the rules relating to Office trial practice for IPR, PGR, and CBM proceedings. The changes set forth in this final rule do not change the substantive criteria of patentability. These changes involve rules of agency procedure and interpretation. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (Interpretive rules “advise the public of the agency’s construction of the statutes and rules which it administers.”) (citation and internal quotation marks omitted); *Bachow Commc’ns, Inc. v. F.C.C.*, 237 F.3d 683, 690 (D.C. Cir. 2001) (Rules governing an application process are procedural under the Administrative Procedure Act.); *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001) (Rules for handling appeals were procedural where they did not change the substantive requirements for reviewing claims.); *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (Rule that clarifies the interpretation of a statute is interpretive.); *JEM Broadcasting Co. v. F.C.C.*, 22 F.3d 320, 328 (D.C. Cir. 1994) (Rules are not legislative because they do not “foreclose effective opportunity to make one’s case on the merits.”).

Accordingly, prior notice and opportunity for public comment are not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law). See *Perez*, 135 S. Ct. 1199, 1206 (Notice-and-comment procedures are required neither when an agency “issue[s] an initial interpretive rule” nor “when it amends or repeals that interpretive rule.”); *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for “interpretative rules, general statements of policy, or rules of agency organization, procedure,

or practice”) (quoting 5 U.S.C. 553(b)(3)(A)).

The Office, nevertheless, published the notice of proposed rulemaking for comment, as it sought the benefit of the public’s views on the Office’s proposed changes. See 85 FR 31728.

B. Regulatory Flexibility Act: For the reasons set forth herein, the Deputy General Counsel for General Law of the USPTO has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes adopted in this final rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

This final rule revises certain trial practice procedures before the Board in light of the Supreme Court’s ruling in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018), that a decision to institute an IPR under 35 U.S.C. 314 may not institute on fewer than all claims challenged in a petition. In accordance with that ruling, this final rule revises the rules of practice for instituting review on all challenged claims or none in IPR, PGR, and CBM proceedings before the PTAB. This final rule also revises the rules of practice for instituting a review on all grounds of unpatentability for the challenged claims that are asserted in a petition. Additionally, this final rule revises the rules to conform to the current standard practice of providing sur-replies to principal briefs and providing that a patent owner response and reply may respond to a decision on institution. This final rule further revises the rules to eliminate the presumption that a genuine issue of material fact created by the patent owner’s testimonial evidence filed with a preliminary response will be viewed in the light most favorable to the petitioner for purposes of deciding whether to institute a review. The changes in this final rule are procedural in nature, and any requirements resulting from these changes are of minimal or no additional burden to those practicing before the Board.

For the foregoing reasons, the changes in this final rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits

justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs): This final rule is not expected to be an Executive Order 13771 (Jan. 30, 2017) regulatory action because this final rule is not significant under Executive Order 12866 (Sept. 30, 1993).

F. Executive Order 13132 (Federalism): This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

G. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property): This rulemaking will not affect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act: Under the Congressional Review Act

provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the USPTO will submit a report containing the rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this final rule are not expected to result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this rulemaking is not a “major rule” as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995: The changes set forth in this final rule do not involve a federal intergovernmental mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, of \$100 million (as adjusted) or more in any one year, or a federal private-sector mandate that will result in the expenditure by the private sector of \$100 million (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions that involve the use of technical standards.

O. Paperwork Reduction Act: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3549) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This final rule does not involve an information collection requirement that is subject to review by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3549). This rulemaking does not add any additional information requirements or fees for parties before the Board. Therefore, the Office is not resubmitting information collection

packages to OMB for its review and approval because the revisions in this rulemaking do not materially change the information collections approved under OMB control number 0651–0069.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 42

Administrative practice and procedure, Inventions and patents, Lawyers.

For the reasons set forth in the preamble, the Office amends part 42 of title 37 as follows:

PART 42—TRIAL PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD

- 1. The authority citation for part 42 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 6, 21, 23, 41, 135, 311, 312, 316, 321–326; Pub. L. 112–129, 125 Stat. 284; and Pub. L. 112–274, 126 Stat. 2456.

- 2. Revise § 42.23 to read as follows:

§ 42.23 Oppositions, replies, and sur-replies.

(a) Oppositions, replies, and sur-replies must comply with the content requirements for motions and, if the paper to which the opposition, reply, or sur-reply is responding contains a statement of material fact, must include a listing of facts that are admitted, denied, or cannot be admitted or denied. Any material fact not specifically denied may be considered admitted.

(b) All arguments for the relief requested in a motion must be made in the motion. A reply may only respond to arguments raised in the corresponding opposition, patent owner preliminary response, patent owner response, or decision on institution. A sur-reply may only respond to arguments raised in the corresponding reply and may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.

- 3. Amend § 42.24 by revising the section heading and paragraph (c) introductory text and adding paragraph (c)(4) to read as follows:

§ 42.24 Type-volume or page limits for petitions, motions, oppositions, replies, and sur-replies.

* * * * *

(c) *Replies and sur-replies.* The following word counts or page limits for replies and sur-replies apply and include any statement of facts in support of the reply. The word counts or page limits do not include a table of contents; a table of authorities; a listing of facts that are admitted, denied, or cannot be admitted or denied; a certificate of service or word count; or an appendix of exhibits.

* * * * *

(4) *Sur-replies to replies to patent owner responses to petitions:* 5,600 words.

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■ 4. Amend § 42.71 by revising the third sentence of paragraph (d) introductory text to read as follows:

§ 42.71 Decision on petitions or motions.

* * * * *

(d) * * * The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, a reply, or a sur-reply. * * *

* * * * *

■ 5. Revise § 42.108 to read as follows:

§ 42.108 Institution of *inter partes* review.

(a) When instituting *inter partes* review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.

(b) At any time prior to a decision on institution of *inter partes* review, the Board may deny all grounds for unpatentability for all of the challenged claims. Denial of all grounds is a Board decision not to institute *inter partes* review.

(c) *Inter partes* review shall not be instituted unless the Board decides that the information presented in the petition demonstrates that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable. The Board's decision will take into account a patent owner preliminary response where such a response is filed, including any testimonial evidence. A petitioner may seek leave to file a reply to the preliminary response in accordance with §§ 42.23 and 42.24(c). Any such request must make a showing of good cause.

■ 6. Amend § 42.120 by revising paragraph (a) to read as follows:

§ 42.120 Patent owner response.

(a) *Scope.* A patent owner may file a single response to the petition and/or decision on institution. A patent owner response is filed as an opposition and is subject to the page limits provided in § 42.24.

* * * * *

■ 7. Amend § 42.208 by revising paragraphs (a), (b), and (c) to read as follows:

§ 42.208 Institution of post-grant review.

(a) When instituting post-grant review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.

(b) At any time prior to institution of post-grant review, the Board may deny all grounds for unpatentability for all of the challenged claims. Denial of all grounds is a Board decision not to institute post-grant review.

(c) Post-grant review shall not be instituted unless the Board decides that the information presented in the petition demonstrates that it is more likely than not that at least one of the claims challenged in the petition is unpatentable. The Board's decision will take into account a patent owner preliminary response where such a response is filed, including any testimonial evidence. A petitioner may seek leave to file a reply to the preliminary response in accordance with §§ 42.23 and 42.24(c). Any such request must make a showing of good cause.

* * * * *

■ 8. Amend § 42.220 by revising paragraph (a) to read as follows:

§ 42.220 Patent owner response.

(a) *Scope.* A patent owner may file a single response to the petition and/or decision on institution. A patent owner response is filed as an opposition and is subject to the page limits provided in § 42.24.

* * * * *

Andrei Iancu,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2020-27048 Filed 12-8-20; 8:45 am]

BILLING CODE 3510-16-P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-HQ-OAR-2019-0611; FRL-10017-82-OAR]

RIN 2060-AU54

Implementation of the Revoked 1997 8-Hour Ozone National Ambient Air Quality Standards; Updates to 40 CFR Part 52 for Areas That Attained by the Attainment Date; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to the receipt of adverse comment, the Environmental Protection Agency (EPA) is withdrawing the October 9, 2020, direct final rule to update the Code of Federal Regulations (CFR) to codify its findings that nine areas in four states attained the revoked 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS) by the applicable attainment dates. The EPA will address all comments received in a subsequent final rule for which the EPA will not institute a second comment period.

DATES: The direct final rule published on October 9, 2020 (85 FR 64046) is withdrawn effective December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Virginia Raps, Air Quality Policy Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code: C539-01, Research Triangle Park, NC 27711, telephone (919) 541-4383; fax number: (919) 541-5315; email address: raps.virginia@epa.gov.

SUPPLEMENTARY INFORMATION: On October 9, 2020, the EPA published a direct final rule (85 FR 64046) to codify its findings that nine areas in four states attained the revoked 1997 8-hour ozone NAAQS by the applicable attainment dates. In the proposal for the direct final rule published on the same day (85 FR 64089), the EPA stated that written comments must be received on or before November 9, 2020. The EPA stated that if any relevant adverse comments are received on the proposal, the EPA will publish a timely withdrawal of the direct final rule in the **Federal Register**. On November 2, 2020, an anonymous comment was posted in the docket that the EPA interprets as relevant and adverse. Therefore, the EPA is withdrawing the direct final rule and will publish a subsequent final rule wherein the EPA will address all comments received. The EPA will not

institute a second comment period on the subsequent final rule.

List of Subjects in 40 CFR Part 52

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

Andrew Wheeler,
Administrator.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ Accordingly, the rule amending 40 CFR 52.282, 52.350, 52.1683, and 52.2585 published in the **Federal Register** on October 9, 2020 (85 FR 64046) is withdrawn effective December 9, 2020.

[FR Doc. 2020–26960 Filed 12–8–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

[Docket No. FRA–2014–0099, Notice No. 2]

RIN 2130–AC49

Revision of Method for Calculating Monetary Threshold for Reporting Rail Equipment Accidents/Incidents

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA’s accident/incident reporting regulation requires railroads to report to FRA all rail equipment accidents/incidents above the monetary reporting threshold (reporting threshold) applicable to that calendar year. In this final rule, FRA amends this regulation to modify the way it calculates periodic adjustments to the reporting threshold and the way it communicates each calendar year’s threshold to railroads. This final rule will improve the accuracy of accident/incident data gathered from the railroads.

DATES: This final rule is effective January 8, 2021.

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or visit

U.S. Department of Transportation, Docket Operations, 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 FURTHER INFORMATION CONTACT:

Prabhdeep S. Chawla, Industry Economist, U.S. Department of Transportation, Federal Railroad Administration, Office of Safety Analysis, RRS–21, W33–321, 1200 New Jersey Ave. SE, Washington, DC 20590 (telephone 202–493–6298); or Senya Waas, Attorney Adviser, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, W31–223, 1200 New Jersey Ave. SE, Washington, DC 20590 (telephone 202–493–0665).

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

On May 17, 2019, FRA published a notice of proposed rulemaking (NPRM) proposing two technical revisions to the formula for calculating its accident/incident reporting threshold and an administrative change to the way FRA communicates the reporting threshold applicable to the upcoming year. *See* 84 FR 22410. This final rule substantially adopts all of the proposals in the NPRM. First, FRA revises the percentage term used to determine a change in equipment costs, so it is consistent with the percentage term used to determine a change in labor costs. Second, to reflect overall economic data trends better, this final rule revises the formula to use full-year data instead of only second-quarter data to calculate the reporting threshold. Third, FRA is revising 49 CFR 225.19(e) to indicate that it will publish an annual notice on its website stating the reporting threshold for the upcoming calendar year (CY). FRA will publish this annual

notice on its website no later than November 30th of each year, providing at least one month advance notice to stakeholders of the new threshold before it becomes effective. Issuing a notice each year, as opposed to a final rule, will simplify and expedite the communication of the reporting threshold, and will be more practical and efficient than FRA annually publishing a final rule incorporating the reporting threshold amount in the rule text in 49 CFR 225.19(c) and (e).

In the NPRM, FRA proposed no revisions to 49 CFR 225.19(c) regarding rail equipment accidents. However, because that section currently lists the reporting threshold for each calendar year since 2002, FRA is revising that section to remove those specific references consistent with the revisions to § 225.19(e) discussed above. Specifically, FRA will no longer publish each year’s reporting threshold in the rule text of part 225. Instead, each year, FRA will issue a notice announcing the reporting threshold for the upcoming year.

FRA analyzed the economic impacts of this final rule against a “no action” baseline reflecting what would happen in the absence of this final rule. That is, what would happen if the reporting threshold continued to be calculated according to the current, technically-flawed formula. FRA estimated that, going forward, the technical revisions to the reporting threshold formula adopted in this final rule will yield slightly lower reporting thresholds than the existing formula would produce. This lower threshold will likely result in railroads being required to report more rail equipment accidents/incidents under this final rule. As noted in the NPRM, FRA estimated this rule would cause the railroads to report an average of 140 more rail equipment accidents/incidents annually over the 10-year period from 2019 to 2028.¹ The present value of the costs to report these accidents/incidents to FRA totals \$138,913 using a 7 percent discount rate, and \$170,744 using a 3 percent discount rate. The annualized costs are \$19,778 using a 7 percent discount rate, and \$20,016 using a 3 percent discount rate. To place the estimated marginal increase in reported rail equipment accidents/incidents in perspective, the expected increase represents about 7.5 percent of the 1,850 total reported rail equipment accidents/incidents every year (an average over the years 2014 to 2018)—and an even smaller percentage of the approximately 12,000 total

¹ This estimate was based on projections using data from 2006–2018, as described in the NPRM.

accidents/incidents reported annually on average (including highway-rail incidents and other incidents).

FRA also quantified the cost-savings from not publishing the reporting threshold in the **Federal Register**. Over 10 years, the expected present value of cost savings totals \$8,927 discounted at 7 percent, and \$10,842 discounted at 3 percent. The corresponding annualized cost savings are \$1,271 using a 7 percent discount rate, and also \$1,271 using a 3 percent discount rate.

Although this final rule may require railroads to report slightly more accidents and incidents in any given year, FRA expects it will result in more accurate and consistent train accident data for analyzing railroad safety trends. The improved data is expected to help inform future regulatory and other actions that better address safety risks and reduce the occurrence of rail equipment accidents/incidents. Additionally, users of FRA's data (including states, researchers, and other stakeholders), will benefit from access to more accurate and consistent data. Overall, the revisions will benefit a broad range of analyses.

II. Background

The NPRM contained a detailed background discussion of the existing formula FRA used to calculate the annual reporting threshold, the proposed revisions to that formula, and the agency's proposal to issue a notice on its website each year announcing the reporting threshold for the upcoming calendar year.

Given that FRA received limited comments to the NPRM, FRA is not reproducing the NPRM analysis here. Please refer to the NPRM for the full background discussion. 84 FR at 22411–22417.

III. Discussion of Specific Comments and Conclusions

In the NPRM, FRA requested comments on the assumptions and methodology used in its analysis. In response, FRA received two comments. One comment was filed jointly by the Association of American Railroads and the American Short Line and Regional Railroad Association (Railroads), and a second comment was submitted anonymously. The comments received are in the public docket for this rulemaking at www.regulations.gov.

In their comment, the Railroads expressed concern over how FRA will communicate the threshold for the

upcoming year to railroads and the public at-large. The Railroads recommended three changes to the NPRM. First, they suggested FRA provide a dedicated website address where the reporting threshold could be reliably found. Second, to provide certainty regarding the effective date of any changes to the threshold, the Railroads asked FRA to provide an annual date for when to expect publication of the reporting threshold notice on FRA's website. Third, the Railroads suggested FRA should have and communicate a plan to keep the reporting threshold on the FRA website in case of a partial Government shutdown. The Railroads did not object to the proposed technical revisions to the reporting threshold formula.

In consideration of the Railroads' comments, FRA has established a dedicated web page for the reporting threshold on its website. The web page address is: <https://railroads.dot.gov/forms-guides-publications/guides/monetary-threshold-notice>. In addition, a link to the reporting threshold will be featured under "Related Links" on the FRA Safety Data & Reporting web page at <https://railroads.dot.gov/safety-data>, when it is first published and for some time thereafter. These websites will help the public find the reporting threshold when needed.

In response to the Railroads' second concern, FRA is modifying the rule text to state that it will publish a notice on its website no later than November 30th each year announcing the new reporting threshold that will take effect on January 1st of the upcoming calendar year. This change will provide the Railroads and other stakeholders advance notification about when the reporting threshold will be published.

While partial Government shutdowns noted by the Railroads occur, they are infrequent events. From 1990 to 2019, there have been 7 Government shutdowns totaling 83 days, accounting for less than 1 percent of the total number of days over those 30 years.² Moreover, FRA's web pages continue to operate during a Government shutdown. Routine operations, including hosting the reporting threshold, continue under

a Government shutdown. However, any specific service a user might need would be deferred until after the shutdown. FRA also suggests that users who need the reporting threshold simply print or save a copy the reporting threshold for their records, as it will remain the same for the entire calendar year.

FRA received an anonymous comment recommending every accident/incident be investigated without regard to the reporting threshold. The commenter stated that small incidents can indicate systemic issues leading to catastrophic events.

While FRA does not have the resources to investigate every accident/incident, it exercises its jurisdiction in the course of conducting inspections and investigations to request information on accidents/incidents below the reporting threshold from the railroads. See 49 CFR 225.25. To mandate railroads regularly report every accident/incident to FRA is beyond the scope of this rulemaking.

Other than the change to the rule text discussed above, FRA has adopted the requirements proposed in the NPRM in this final rule.

IV. Regulatory Review and Notices

A. Executive Orders 12866 and 13771, and DOT Regulatory Policies and Procedures

This final rule is a nonsignificant rulemaking and evaluated in accordance with existing policies and procedures under Executive Order 12866 and DOT's Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. This rulemaking is not a regulatory action under Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," because it is not significant under Executive Order 12866. See 82 FR 9339, Jan. 30, 2017.

FRA is revising its formula for determining the reporting threshold. The changes are summarized in the "Executive Summary" section above, and discussed in detail in the NPRM. The changes are intended to improve the accuracy of the reporting threshold, and the resulting rail equipment accident/incident data gathered from the railroads over time. The improved data is expected to help formulate regulations and other actions that better address safety risks. Table 1 below summarizes these costs and benefits.

² Jennifer Earl, "A Look Back at Every Government Shutdown in US History," Fox News, published February 9, 2018, updated January 28, 2019, accessed December 17, 2019, <https://www.foxnews.com/politics/a-look-back-at-every-government-shutdown-in-us-history>.

Calculation: 83 days/(30 years * 365 days per year) = 0.0076, or about 0.8%.

TABLE 1—SUMMARY OF COSTS AND BENEFITS
[Over a 10-year period of analysis]

	Costs	Cost savings *	Benefits
Undiscounted, Nominal	\$202,032	\$12,710	Qualitative: More Accurate Data.
Present Value (PV) at 3%	170,744	10,842	Qualitative: More Accurate Data.
Present Value (PV) at 7%	138,913	8,927	Qualitative: More Accurate Data.
Annualized at 3%	20,016	1,271	Qualitative: More Accurate Data.
Annualized at 7%	19,778	1,271	Qualitative: More Accurate Data.

* FRA will realize cost savings from issuing the reporting threshold on its website due to a reduction in printing costs.

To estimate these costs, FRA's analysis in the NPRM indicated the changes in the reporting threshold formula would produce a slightly lower threshold in future years as compared to the existing formula.³ FRA's analysis also showed, for rail equipment accidents/incidents near the reporting threshold, railroads reported an average of 8 rail equipment accidents/incidents for every \$100 increase in the reporting threshold. FRA forecasts both the baseline and slightly lower revised (*i.e.*, final rule) thresholds from 2019 to 2028, and calculated the monetary differences between them. Next, FRA applied the rate of 8 accidents/incidents per \$100 increase to the monetary differences between the reporting thresholds to estimate the marginal increase in reported accidents/incidents. Finally, FRA multiplied the \$144 cost to submit an accident/incident report to FRA on Form F 6180.54 to the marginal increase in reported accidents/incidents, to calculate the costs presented in the table above.

This final rule modifies the NPRM rule text by stating FRA will publish the upcoming reporting threshold on its website before it becomes effective, per comments received from the Railroads. No additional costs are expected from this change. This change will provide advance notification of the new reporting threshold to the railroads and public.

B. Regulatory Flexibility Determination and Executive Order 13272: Certification of No Significant Economic Impact on a Substantial Number of Small Entities

Need for the Final Rule

This section examines the impact of the final rule on small entities. FRA is changing the way the reporting threshold is calculated because FRA found the existing formula was overestimating the change in equipment costs. As explained in detail in the

NPRM, FRA is standardizing the way the percent change in equipment costs is calculated. Equipment cost changes will be calculated consistently with the way that labor costs are calculated. FRA is also incorporating 12 months of data in the reporting threshold calculation. In addition, FRA is notifying railroads of the new reporting threshold for the upcoming year by publishing an annual notice on FRA's website.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, and Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (Aug. 16, 2002), require agency review of proposed and final rules to assess their impact on small entities unless the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities. FRA prepared an Initial Regulatory Flexibility Analysis (IRFA) at the time the proposed reporting threshold rule was published in the **Federal Register**. The analysis below supports that the final rule will not have a significant economic effect on a substantial number of small entities.

FRA requested comment on potential small business impacts of the proposed rule. No commenters objected to the technical revisions to the reporting threshold formula, or to the potential costs of the proposed changes on small entities.

Description of Regulated Entities

Under section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, FRA has issued a final policy statement that formally establishes “small entities” are railroads that meet the line-haulage revenue requirements of a Class III railroad, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 49 CFR part 209, app. C. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity. *Id.*

All railroads currently governed by 49 CFR part 225 railroad accident/incident reporting requirements will be subject to this final rule. Of those, FRA considers about 735 of the approximately 784 railroads in the United States to be small entities. The final rule will result in a slightly lower future reporting threshold. Small entities affected by this rulemaking will be those that report accidents/incidents with associated monetary damages near the reporting threshold amount. Small railroads that report rail equipment accidents/incidents with monetary damages that are much above (or below) the reporting threshold will continue to report (or not report) these to FRA. FRA's analysis in the IRFA showed a range of 8 to 18 small railroads reported accidents/incidents near the reporting threshold annually over the period from 2014 to 2018, or an average of 12 small railroads that would be affected. On average, these railroads represent about 1.7 percent of the 735 small railroads. Given the low proportion of small railroads impacted, this final rule is not expected to impact a substantial number of small entities.

Description of Compliance Requirements

In the NPRM, to determine the potential compliance costs for small entities, FRA conducted an analysis similar to the economic analysis for all railroads. The steps and calculations in the analysis are summarized here. First, FRA calculated the rate of additional rail equipment accidents/incidents that small entities may have to report for every \$100 change in the reporting threshold. FRA found an average of one more rail equipment accident/incident reported per \$100 change. This rate is based on rail equipment accidents/incidents reported by the small entities in the past for the period 2006 to 2018. FRA lacks information on accidents/incidents below the current threshold because railroads do not have to report these. Therefore, FRA broadly assumed the pattern of accidents/incidents below a lower threshold calculated under this final rule would be similar to those

³ For the years 2006 to 2018, the revised threshold formula in this final rule produces a reporting threshold about six percent lower on average than the no-action baseline reporting threshold formula.

above the threshold, a mirror image for accidents/incidents near the threshold.

To estimate the trend of the thresholds calculated using the baseline formula (*i.e.*, the reporting threshold formula in effect before this final rule), and the thresholds calculated using the formula in this final rule, FRA forecast both thresholds for the years 2019 to 2028. The forecasts allowed FRA to calculate the monetary differences between the baseline and final-rule reporting thresholds in the future, by

year. Next, FRA converted the monetary differences between the reporting thresholds to the number of additional rail equipment accident/incident reports that small railroads may have to submit to FRA under the final rule. FRA estimated these additional accident/incident reports by applying the rate of accidents/incidents per \$100 change in the reporting threshold noted above.

Finally, FRA multiplied the railroad's cost to submit an accident/incident report to FRA (\$144 per report) by the

number of additional rail equipment accident/incident reports, to produce the compliance cost per year for the small entities. Please see the cost schedule below. For the 10-year period, the undiscounted (nominal) costs amount to \$25,488. The present value of total costs discounted at a 7 percent discount rate equals \$17,526, and when discounted at a 3 percent rate equals \$21,541.

TABLE 2—ESTIMATED COSTS BASED ON FORECASTED NUMBER OF RAIL EQUIPMENT ACCIDENTS/INCIDENTS: SMALL ENTITIES

Calendar year	Reporting threshold (baseline formula, pre-final rule) calculated	Reporting threshold (final-rule formula with full-year data)	Difference between final-rule and pre-final rule thresholds	Number of extra accidents/incidents reported (rounded)	Estimated annual cost @ \$144 per accident/incident
2019	\$12,021	\$ 10,566	–\$1,456	15	\$2,160
2020	12,329	10,807	–1,522	15	2,160
2021	12,637	11,048	–1,589	16	2,304
2022	12,944	11,289	–1,655	17	2,448
2023	13,252	11,530	–1,721	17	2,448
2024	13,559	11,771	–1,788	18	2,592
2025	13,867	12,012	–1,854	19	2,736
2026	14,174	12,254	–1,921	19	2,736
2027	14,482	12,495	–1,987	20	2,880
2028	14,789	12,736	–2,053	21	3,024
Total Undiscounted Cost 2019–2028 (10 Years), Nominal					
Present Value (PV) of Total Cost Discounted at 7% 2019–2028					25,488
Present Value (PV) of Total Cost Discounted at 3% 2019–2028					17,526
Total Annualized Cost Using 7% Discount Rate 2019–2028					21,541
Total Annualized Cost Using 3% Discount Rate 2019–2028					2,495
Total Annualized Cost Using 3% Discount Rate 2019–2028					2,525

In terms of the estimated economic impact of the final rule on small entities, FRA expects the impact to be minimal based on the above analysis. Given the annualized cost is approximately \$2,500, the cost per railroad for this group of railroads is about \$139 to \$313 per year—or on average about \$210 per year per railroad. (Calculated as \$2,500/18 railroads = \$139; and \$2,500/8 railroads = \$312.50; for a range of about \$139 to \$313.) When compared to annual revenues, the impact is very small. The industry trade organization representing small railroads, the American Short Line and Regional Railroad Association (ASLRRA), reports the average freight revenue per Class III railroad is \$4.8 million.⁴ Relative to the average freight

revenue per railroad, FRA estimates the proposed rule will affect less than 0.1 percent of revenues. (Calculated as \$210 compliance cost per year per railroad/\$4,800,000 average freight revenue per railroad = 0.00004 = 0.004 percent.) FRA therefore expects the average compliance costs for a small entity to be not significant.

Certification

Under the RFA, FRA prepared and made available for public comment an IRFA describing the impacts of the proposed rule on small entities (5 U.S.C 603(a)). FRA received no comments regarding the impact on small entities. Additionally, the ASLRRA did not object to the technical revisions or costs of the proposed rule. As explained above, FRA finds the average compliance costs for a small entity to be not significant. Accordingly, the FRA Administrator hereby certifies that this

final rule will not have a significant economic impact on a substantial number of small entities.

C. Other Specialized Analyses

Paperwork Reduction Act

The burden for Accident/Incident Reporting and Recordkeeping is approved in the information collection for 49 CFR part 225 under OMB No. 2130–0500. OMB re-approval for this collection of information was granted on June 6, 2018, and the expiration date is June 30, 2021.

Federalism

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are

⁴ See American Short Line and Regional Railroad Association. (2014). *Short Line and Regional Railroad Facts and Figures*. (Pamphlet). Washington, DC: Author.

defined in the Executive order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under E.O. 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed in accordance with the principles and criteria contained in E.O. 13132. FRA has determined that, if adopted, the final rule 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. In addition, FRA has determined that this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of E.O. 13132 do not apply.

However, this final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970 (FRSA), repealed and recodified at 49 U.S.C. 20106, and the former Accident Reports Act of 1910, repealed and recodified at 49 U.S.C. 20901. *See* Public Law 103–272 (July 5, 1994). The former FRSA provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this final rule in accordance with the principles

and criteria contained in E.O. 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under the former FRSA. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

Environmental Impact

FRA has evaluated this final rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, other environmental statutes, related regulatory requirements, and its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999). FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s NEPA Procedures, “Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.” *See* 64 FR 28547 (May 26, 1999). Categorical exclusions (CEs) are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4.

In analyzing the applicability of a CE, the agency must also consider whether extraordinary circumstances are present that would warrant a more detailed environmental review through the preparation of an EA or EIS. *Id.* In accordance with section 4(c) and (e) of FRA’s Procedures, the Agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds this rule is not a major Federal action that significantly affects the quality of the human environment.

Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Mar. 22, 1995); 2 U.S.C. 1531, each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act (2 U.S.C. 1532) further requires that before promulgating any general notice of

proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This final rule is not expected to result in the expenditure, in the aggregate, of \$100,000,000 or more, adjusted for inflation, in any one year, and thus preparation of such a statement is not required.

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” *See* 66 FR 28355 (May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking (1) that is a significant regulatory action under Executive Order 12866 or any successor order, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a “significant energy action.” FRA has evaluated this final rule under Executive Order 13211. FRA has does not anticipate that this final rule is likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

D. Privacy Act

Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

E. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action

listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

In consideration of the foregoing, FRA amends part 225 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 225—RAILROAD ACCIDENTS/ INCIDENTS: REPORTS CLASSIFICATION, AND INVESTIGATIONS

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–20902, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. In § 225.19, revise paragraphs (c) and (e) and remove the parenthetical authority citation at the end of the section to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(c) *Group II—Rail equipment.* Rail equipment accidents/incidents are collisions, derailments, fires, explosions, acts of God, and other events involving the operation of on-track equipment (standing or moving) that result in damages higher than the current reporting threshold to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and costs for acquiring new equipment and material.

* * * * *

(e) *Notice.* No later than November 30 of each year, the Administrator will publish a notice on FRA's website announcing the reporting threshold that will take effect on January 1 of the following calendar year.

■ 3. Appendix B to part 225 is revised to read as follows:

Appendix B to Part 225—Procedure for Determining Reporting Threshold

1. Wage data used in the calculation are collected from railroads by the Surface Transportation Board (STB) on Form A—STB Wage Statistics. Rail equipment data from the U.S. Department of Labor, Bureau of Labor Statistics (BLS), LABSTAT Series reports are used in the calculation. The equation used to adjust the reporting threshold has two

components: (a) The average hourly earnings of certain railroad maintenance employees as reported to the STB by the Class I railroads and Amtrak; and (b) an overall rail equipment cost index determined by the BLS. The wage component is weighted by 40% and the equipment component by 60%.

2. For the wage component, the average of the data from Form A—STB Wage Statistics for Group No. 300 (Maintenance of Way and Structures) and Group No. 400 (Maintenance of Equipment and Stores) employees is used.

3. For the equipment component, LABSTAT Series Report, Producer Price Index (PPI) Series WPU 144 for Railroad Equipment is used.

4. In the month of October, second-quarter and first-quarter wage data for the current year, and fourth-quarter and third-quarter wage data for the previous year are obtained from the STB. For equipment costs, the corresponding BLS railroad equipment indices for the same time period as the STB wage data are obtained.

5. The wage data are reported in terms of dollars earned per hour, while the equipment cost data are indexed to a base year of 1982.

6. The procedure for adjusting the reporting threshold is shown in the formula below. The wage and equipment components appear as fractional changes relative to the prior year. After performing the calculation, the result is rounded to the nearest \$100.

7. The weightings result from using STB wage data and BLS equipment cost data to produce a reasonable estimation of the reporting threshold that was calculated using the threshold formula in effect immediately before calendar year 2006, a formula that assumed damage repair costs, at levels at or near the threshold, were split approximately evenly between labor and materials.

8. Formula:

$$\text{New Threshold} = \text{Prior Threshold} \times [1 + 0.4(\text{W}_{\text{new}} - \text{W}_{\text{prior}})/\text{W}_{\text{prior}} + 0.6(\text{E}_{\text{new}} - \text{E}_{\text{prior}})/\text{E}_{\text{prior}}]$$

Where:

W_{new} = New average hourly wage rate (\$).
W_{prior} = Prior average hourly wage rate (\$).
E_{new} = New equipment average PPI value.
E_{prior} = Prior equipment average PPI value.

Issued in Washington, DC.

Quintin C. Kendall,

Deputy Administrator.

[FR Doc. 2020–25863 Filed 12–8–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 200113–0013; RTID 0648–XA688]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2020 Commercial Closure for South Atlantic Snowy Grouper

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure for the commercial sector of snowy grouper in the exclusive economic zone (EEZ) of the South Atlantic. NMFS projects commercial landings of snowy grouper will reach the commercial annual catch limit (ACL) for the July through December season by December 12, 2020. Therefore, NMFS closes the commercial sector for snowy grouper in the South Atlantic EEZ on December 12, 2020. This closure is necessary to protect the snowy grouper resource.

DATES: This temporary rule is effective at 12:01 a.m., local time, on December 12, 2020, until 12:01 a.m., local time, on January 1, 2021.

FOR FURTHER INFORMATION CONTACT:

Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: mary.vara@noaa.gov.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes snowy grouper and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

All weights described in this temporary rule are in gutted weight.

The commercial ACL (commercial quota) for snowy grouper in the South Atlantic is divided into two 6-month fishing seasons. The total commercial ACL for snowy grouper is allocated 70 percent, or 107,754 lb (48,876 kg), for the January through June commercial fishing season, and 30 percent, or 46,181 lb (20,947 kg), for the July through December fishing season, as

specified in 50 CFR 622.190(a)(1)(i) and (ii).

After the January through June 2020 fishing season, 3,048 lb (1,382 kg) of the snowy grouper commercial quota remained unharvested. As specified in 50 CFR 622.190(a)(1)(iii), NMFS added this unused portion of the snowy grouper commercial quota to the commercial quota for the July through December 2020 fishing season. Therefore, the snowy grouper commercial quota for the July through December 2020 fishing season is 49,229 lb (22,329 kg). Any unused commercial quota for the July through December fishing season becomes void and will not be added to any subsequent quota (622.190(a)(1)(iii)).

Under 50 CFR 622.193(b)(1), NMFS is required to close the commercial sector for snowy grouper when the commercial quota specified in 50 CFR 622.190(a)(1) is reached or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS projects that commercial landings of South Atlantic snowy grouper, as estimated by the Science and Research Director, will reach the adjusted July through December 2020 commercial quota by December 12, 2020.

Accordingly, the commercial sector for South Atlantic snowy grouper is closed effective at 12:01 a.m., local time, on December 12, 2020, and remains closed until the start of the next January through June fishing season on January 1, 2021.

The operator of a vessel with a valid commercial vessel permit for South Atlantic snapper-grouper having snowy grouper on board must have landed and bartered, traded, or sold such snowy grouper prior to 12:01 a.m., local time, on December 12, 2020. During the commercial closure, harvest and possession of snowy grouper in or from the South Atlantic EEZ is limited to the bag and possession limits, as specified in § 622.187(b)(2)(ii) and (c)(1). Also during the commercial closure, the sale or purchase of snowy grouper taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to the sale or purchase of snowy grouper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, on December 12, 2020, and were held in cold storage by a dealer or processor.

For a person on board a vessel for which a Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, the bag and possession limits and the sale and purchase provisions during the commercial closure for snowy grouper apply regardless of

whether the fish are harvested in state or Federal waters, as specified in 50 CFR 622.190(c)(1)(ii).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 622.193(b)(1), which was issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment as such procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the regulations associated with the commercial quota for South Atlantic snowy grouper have already been subject to notice and comment, and all that remains is to notify the public of the commercial closure for the remainder of the July through December 2020 fishing season. Prior notice and opportunity for public comment on this action is contrary to the public interest because of the need to immediately implement the commercial closure to protect South Atlantic snowy grouper, because the capacity of the fishing fleet allows for rapid harvest of the commercial quota. Prior notice and opportunity for public comment would require time and would potentially result in a harvest that exceeds the commercial quota.

For the aforementioned reasons, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in the effective date of this action.

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

Dated: December 4, 2020.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 2020-27064 Filed 12-7-20; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 120627194-3657-02]

RTID 0648-XA629

Atlantic Highly Migratory Species; North Atlantic Swordfish Fishery

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

ACTION: Temporary rule; inseason Swordfish General Commercial permit retention limit adjustment.

SUMMARY: NMFS is adjusting the Swordfish General Commercial permit retention limits for the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions for January through June of the 2021 fishing year, unless otherwise later noticed. The Swordfish General Commercial permit retention limit in each of these regions is increased from the regulatory default limit (either two or three fish) to six swordfish per vessel per trip. The Swordfish General Commercial permit retention limit in the Florida Swordfish Management Area will remain unchanged at the default limit of zero swordfish per vessel per trip, as discussed in more detail below. These adjustments apply to Swordfish General Commercial permitted vessels and to Highly Migratory Species (HMS) Charter/Headboat permitted vessels with a commercial endorsement when on a non-for-hire trip. This action is based upon consideration of the applicable inseason regional retention limit adjustment criteria.

DATES: The adjusted Swordfish General Commercial permit retention limits in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions are effective from January 1, 2021, through June 30, 2021.

FOR FURTHER INFORMATION CONTACT:

Sarah McLaughlin, sarah.mclaughlin@noaa.gov 978-281-9260, Lauren Latchford, lauren.latchford@noaa.gov 301-427-8503, or Larry Redd, larry.redd@noaa.gov 301-427-8503.

SUPPLEMENTARY INFORMATION:

Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of North Atlantic swordfish by persons and

vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. North Atlantic swordfish quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and implemented by the United States into two equal semi-annual directed fishery quotas; an annual incidental catch quota for fishermen targeting other species or catching swordfish recreationally, and a reserve category, according to the allocations established in the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (2006 Consolidated Atlantic HMS FMP) (71 FR 58058, October 2, 2006), as amended, and in accordance with implementing regulations. NMFS is required under ATCA and the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota.

The increase in the retention limit will help provide a reasonable opportunity to harvest available quota. The current annual U.S. baseline quota is 2,937.6 mt dressed weight (dw) (3,907 mt whole weight (ww)). Under § 635.27(c)(3)(ii), and consistent with the applicable ICCAT recommendation, NMFS may carry over underharvest from 2020, limited to 15 percent of the 2020 annual baseline quota, which is a maximum of 440.6 mt dw (586.0 mt ww). With underharvest as expected in 2020, NMFS anticipates carrying over the maximum underharvest allowed, which would result in an adjusted North Atlantic swordfish quota for the 2021 fishing year of 3,378.2 mt dw (2,937.6 + 440.6 = 3,378.2 mt dw). As in past years, NMFS anticipates allocating 50 mt dw from the adjusted quota to the Reserve category for inseason adjustments/research and allocating 300 mt dw to the Incidental category, which includes recreational landings and landings by incidental swordfish permit holders, consistent with § 635.27(c)(1)(i)(D) and (B). This would result in a final adjusted quota of 3,028.2 mt dw for the directed fishery, which would be split equally (1,514.1 mt dw) between the two semi-annual periods in 2021 (January through June, and July through December).

For additional context and information on a related matter, NMFS notes that earlier this year, NMFS published a proposed rule to modify the North Atlantic swordfish and shark retention limits for certain permit holders and add inseason adjustment authorization criteria (85 FR 23315, April 27, 2020). Relevant to swordfish, the proposed rule would modify retention limits for highly migratory

species (HMS) Commercial Caribbean Small Boat (CCSB) permit holders, Swordfish General Commercial permit holders, and HMS Charter/Headboat permit holders with a commercial endorsement on a non-for hire (*i.e.*, commercial) trip, and add inseason adjustment criteria to the CCSB permit. NMFS anticipates that the proposed rule would streamline HMS regulations to align retention limits for commercial swordfish permits established for HMS CCSB permit holders under Amendment 4 with those established in Amendment 8 to the 2006 Consolidated HMS FMP for Swordfish General Commercial permit holders. If the rule were to be finalized as proposed, NMFS anticipates that it would no longer be necessary to increase the default swordfish retention limit through inseason adjustment for Swordfish General Commercial permit holders and HMS Charter/Headboat permit with a commercial endorsement on a commercial trip to provide additional fishing opportunities for these permit holders. The ability to reduce the default retention limit through inseason adjustment to account for possible quota overages would remain in effect.

Adjustment of Swordfish General Commercial Permit Vessel Retention Limits

The 2021 North Atlantic swordfish fishing year will begin on January 1, 2021. Regional default retention limits for the Swordfish General Commercial permit have been established and are automatically effective from January 1 through December 31 each year, unless changed based on the inseason regional retention limit adjustment criteria at § 635.24(b)(4)(iv). The Swordfish General Commercial permit default retention limits are: (1) Northwest Atlantic region—three swordfish per vessel per trip; (2) Gulf of Mexico region—three swordfish per vessel per trip; (3) U.S. Caribbean region—two swordfish per vessel per trip; and, (4) Florida Swordfish Management Area—zero swordfish per vessel per trip. The default retention limits apply to Swordfish General Commercial permitted vessels and to HMS Charter/Headboat permitted vessels with a commercial endorsement when fishing on non-for-hire trips. Permitted vessels may not possess, retain, or land any more swordfish than is specified for the region in which the vessel is located.

Under § 635.24(b)(4)(iii), NMFS may increase or decrease the Swordfish General Commercial permit vessel retention limit in any region within a range from zero to a maximum of six swordfish per vessel per trip. Any

adjustments to the retention limits must be based upon a consideration of the relevant criteria provided in § 635.24(b)(4)(iv). NMFS has considered these criteria as discussed below and their applicability to the Swordfish General Commercial permit retention limit in all regions for January through June of the 2021 North Atlantic swordfish fishing year.

NMFS must consider the effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments. See § 635.24(b)(4)(iv)(D). The objective is to provide opportunities to harvest the full North Atlantic directed swordfish quota without exceeding it, and the goal, based upon the 2006 Consolidated Atlantic HMS FMP, is to manage Atlantic HMS fisheries for continuing optimum yield so as to provide the greatest overall benefit to the Nation, particularly with respect to food production, providing recreational opportunities, preserving traditional fisheries, and taking into account the protection of marine ecosystems. This action will help preserve the swordfish handgear fishery (rod and reel, handline, harpoon, bandit gear, and greenstick). Although this action does not specifically provide recreational fishing opportunities, it will have a minimal impact on the recreational sector because recreational landings are counted against a separate incidental swordfish quota.

NMFS has examined dealer reports and landing trends and determined that the information obtained from biological sampling and monitoring of the North Atlantic swordfish stock is useful. See § 635.24(b)(4)(iv)(A). Regarding the estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year, § 635.24(b)(4)(iv)(B), NMFS reviewed electronic dealer landings data, which indicates that sufficient directed swordfish quota should be available for the January through June 2021 semi-annual quota period if recent swordfish landings trends continue. The directed swordfish quota has not been fully harvested for several years and, based upon current landing trends, is not likely to be harvested or exceeded in 2021. Based upon recent landings rates from dealer reports, an increase in the vessel retention limits to six fish for Swordfish General Commercial permit holders and Charter/Headboat permit holders with a commercial endorsement (when on a non-for-hire trip) in three regions is not likely to cause quotas for other categories of the fishery to be exceeded. See § 635.24(b)(4)(iv)(C). Similarly,

regarding the criteria about the effects of catch rates in one region precluding vessels in another region from having a reasonable opportunity to harvest a portion of the overall swordfish quota, § 635.24(b)(4)(iv)(F), NMFS expects there to be sufficient swordfish quota for the entirety of the 2021 fishing year. Thus, increased catch rates in these three regions as a result of this action would not be expected to preclude vessels in the other region (e.g., the buoy gear fishery in the Florida Swordfish Management Area) from having a reasonable opportunity to harvest a portion of the overall swordfish quota.

In making adjustments to the retention limits, NMFS must also consider variations in seasonal distribution, abundance, or migration patterns of swordfish, and the availability of swordfish on the fishing grounds. See § 635.24(b)(4)(iv)(E) and (G). With regard to swordfish abundance, the 2020 report by ICCAT's Standing Committee on Research and Statistics indicated that the North Atlantic swordfish stock is not overfished and overfishing is not occurring. Increasing retention limits for the General Commercial fishery is not expected to affect the swordfish stock status determination because any additional landings would be within the ICCAT-recommended U.S. North Atlantic swordfish quota allocation, which is consistent with conservation and management measures to prevent overfishing on the stock. Increasing opportunities by increasing retention limits from the default levels beginning on January 1, 2021, is also important because of the migratory nature and seasonal distribution of swordfish. In a particular geographic region, or waters accessible from a particular port, the amount of fishing opportunity for swordfish may be constrained by the short amount of time that the swordfish are present in the area as they migrate.

NMFS has determined that the retention limit for the Swordfish General Commercial permit will remain at zero swordfish per vessel per trip in the Florida Swordfish Management Area at this time. As described in Amendment 8 to the 2006 Consolidated Atlantic HMS FMP (78 FR 52011, August 21, 2013), the area off the southeastern coast of Florida, particularly the Florida Straits, contains oceanographic features that make the area biologically unique. It provides important juvenile swordfish habitat, and is essentially a narrow migratory corridor containing high concentrations of swordfish located in close proximity to high concentrations of people who

may fish for them. Public comment on Amendment 8 indicated concern about the resultant high potential for the improper rapid growth of a commercial fishery, increased catches of undersized swordfish, the potential for larger numbers of fishermen in the area, and the potential for crowding of fishermen, which could lead to gear and user conflicts. These concerns remain valid. NMFS continues to collect information to evaluate the appropriateness of the retention limit in the Florida Swordfish Management Area and other regional retention limits.

The directed swordfish quota has not been fully harvested for several years and, based upon current landing trends, is not likely to be harvested or exceeded during 2021. In 2020, a six swordfish per vessel trip limit was in effect for Swordfish General Commercial permit holders in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions for the entire fishing season. As of October 31, 2020, this limit resulted in total annual directed swordfish landings of approximately 760.1 mt dw, or 25.1 percent of the 3,028.2-mt dw annual adjusted directed quota for 2020, which includes landings under the six-fish trip limit. This information indicates that sufficient directed swordfish quota should be available from January 1 through June 30, 2021, at the higher retention levels, within the limits of the scientifically-supported Total Allowable Catch (TAC) and consistent with the goals of the 2006 Consolidated Atlantic HMS FMP as amended, ATCA, and the Magnuson-Stevens Act, and are not expected to negatively impact stock health.

Given that 2020 swordfish directed landings will likely fall well below the available 2020 quota, and that 2021 landings will likely follow a similar trend, and in consideration of the inseason regional retention limit adjustment criteria above, NMFS has determined that the Swordfish General Commercial permit retention limits in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions applicable to persons issued a Swordfish General Commercial permit or HMS Charter/Headboat permit with a commercial endorsement (when on a non-for-hire trip) should be increased from the default levels that would otherwise automatically become effective on January 1, 2021, to six swordfish per vessel per trip from January 1 through June 31, 2021. These are the same limits that were implemented through an inseason adjustment for the period July 1 through December 31, 2020 (85 FR 38091, June 25, 2020). Given the rebuilt status of the stock and the availability

of quota, increasing the Swordfish General Commercial permit retention limits in three regions to six fish per vessel per trip will increase the likelihood that directed swordfish landings will approach, but not exceed, the available annual swordfish quota, and increase the opportunity for catching swordfish during the 2021 fishing year.

Monitoring and Reporting

NMFS will continue to monitor the swordfish fishery closely during 2021 through mandatory landings and catch reports. Dealers are required to submit landing reports and negative reports (if no swordfish were purchased) on a weekly basis.

Depending upon the level of fishing effort and catch rates of swordfish, NMFS may determine that additional retention limit adjustments or closures are necessary to ensure that the available quota is not exceeded or to enhance fishing opportunities. Subsequent actions, if any, will be published in the **Federal Register**. In addition, fishermen may access <https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-highly-migratory-species-landings-updates> for updates on quota monitoring.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 635, which was issued pursuant to section 304(c), and is exempt from review under Executive Order 12866.

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated Atlantic HMS FMP, as amended, provide for inseason retention limit adjustments to respond to changes in swordfish landings, the availability of swordfish on the fishing grounds, the migratory nature of this species, and regional variations in the fishery. Based on available swordfish quota, stock abundance, fishery performance in recent years, and the availability of swordfish on the fishing grounds, among other considerations, adjustment to the Swordfish General Commercial permit retention limits from the default levels of two or three fish to six swordfish per vessel per trip as discussed above is warranted, while maintaining the default limit of zero-fish retention in the Florida Swordfish Management Area. Analysis of available data shows that adjustment to the

swordfish retention limit from the default levels would result in minimal risk of exceeding the ICCAT-allocated quota.

Delays in temporarily increasing these retention limits caused by the time required to publish a proposed rule and accept public comment would adversely and unnecessarily affect those Swordfish General Commercial permit holders and HMS Charter/Headboat permit holders with a commercial endorsement (when on a non-for-hire trip) that would otherwise have an opportunity to harvest more than the otherwise applicable lower default retention limits of three swordfish per vessel per trip in the Northwest Atlantic and Gulf of Mexico regions, and two swordfish per vessel per trip in the U.S. Caribbean region. Limiting opportunities to harvest available directed swordfish quota may have negative social and economic impacts for U.S. fishermen. Adjustment of the retention limits needs to be effective on January 1, 2021, to allow Swordfish General Commercial permit holders and HMS Charter/Headboat permit holders with a commercial endorsement (when on a non-for-hire trip) to benefit from the adjustment during the relevant time period, which could pass by for some fishermen who have access to the fishery during a short time period because of seasonal fish migration, if the action is delayed for notice and public comment. Furthermore, the public was given an opportunity to comment on the underlying rulemakings, including the adoption of the North Atlantic swordfish U.S. quota, and the retention limit adjustments in this action would not have any additional effects or impacts since the retention limit does not affect the overall quota. Thus, there would be little opportunity for meaningful input and review with public comment on this action. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 1, 2020.

Jennifer M. Wallace,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 2020–26796 Filed 12–8–20; 8:45 am]
BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 200623–0167; RTID 0648–XA697]

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer From MA to RI

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

ACTION: Notification; quota transfer.

SUMMARY: NMFS announces that the Commonwealth of Massachusetts is transferring a portion of its 2020 commercial bluefish quota to the State of Rhode Island. This quota adjustment is necessary to comply with the Atlantic Bluefish Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised commercial bluefish quotas for Massachusetts and Rhode Island.

DATES: Effective December 4, 2020, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Laura Hansen, Fishery Management Specialist, (978) 281–9225.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic bluefish fishery are found in 50 CFR 648.160 through 648.167. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through Florida. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.162, and the final 2020 allocations were published on June 29, 2020 (85 FR 38794).

The final rule implementing Amendment 1 to the Bluefish Fishery Management Plan (FMP) published in the **Federal Register** on July 26, 2000 (65 FR 45844), and provided a mechanism for transferring bluefish quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can request approval to transfer or combine bluefish commercial quota under § 648.162(e)(1)(i) through (iii). The Regional Administrator must approve any such transfer based on the criteria in § 648.162(e). In evaluating requests to transfer a quota or combine quotas, the Regional Administrator shall consider whether: The transfer or combinations would preclude the

overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Act.

Massachusetts is transferring 15,000 lb (6,804 kg) of bluefish commercial quota to Rhode Island through mutual agreement of the states. This transfer was requested to ensure that Rhode Island would not exceed its 2020 state quota. The revised bluefish quotas for 2020 are: Massachusetts, 170,838 lb (77,491 kg); and Rhode Island, 313,366 lb (142,140 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.162(e)(1)(i) through (iii), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

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

Dated: December 4, 2020.

Jennifer M. Wallace,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 2020–27044 Filed 12–4–20; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 200604–0152]

RIN 0648–BJ35

Fisheries of the Exclusive Economic Zone off Alaska; Modifying Seasonal Allocations of Pollock and Pacific Cod for Trawl Catcher Vessels in the Central and Western Gulf of Alaska; Correction

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

ACTION: Final rule; correction.

SUMMARY: NMFS is correcting a final rule that published in the **Federal Register** on June 25, 2020, implementing Amendment 109 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP) and a regulatory amendment to the regulations governing pollock fishing in the Gulf of Alaska (GOA). The final rule's intent as to Pacific cod was to change the seasonal apportionments of Pacific cod for the trawl catcher

vessel (CV) sector. However, in changing the seasonal apportionments, the final rule's regulatory text inadvertently affected the jig sector such that it became unclear if the new, overall seasonal apportionments apply to the jig sector. This correction is necessary to clarify seasonal apportionments of Pacific cod for the jig sector.

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

FOR FURTHER INFORMATION CONTACT: Kelly Cates, 907-586-7228.

SUPPLEMENTARY INFORMATION:

Need for Correction

NMFS published Amendment 109 to the GOA FMP and a regulatory amendment to the regulations governing pollock fishing in the GOA in the **Federal Register** on June 25, 2020 (85 FR 38093), which will be referred to in this correction collectively as Amendment 109. The final rule addresses operational and management inefficiencies in the trawl CV pollock and Pacific cod fisheries in the Central Regulatory Area (CGOA) and the Western Regulatory Area (WGOA) of the GOA. This correction does not affect the pollock seasons and allocations as revised by Amendment 109.

The final rule to implement Amendment 109 is effective on January 1, 2021, and, in part, revises § 679.20(a)(12)(i) to specify the new seasonal apportionments of Pacific cod total allowable catch (TAC) for the trawl CV sector in the CGOA and the WGOA. The trawl CV sector is one of several sectors for which the regulations allocate the Pacific cod TAC in the WGOA and CGOA and apportion those allocations seasonally (among gear and operation types) between the A and B seasons (§ 679.20(a)(12)(i)(A) and (B)). The final rule to implement Amendment 109 changes the trawl CV sector's seasonal apportionments in the CGOA and WGOA: The A seasonal apportionment increases by approximately 4 percent, while the B seasonal apportionment decreases by approximately 4 percent. Because the final rule shifts one sector's seasonal apportionment between the A and B seasons, the overall seasonal apportionment across all sectors in the CGOA and WGOA also shifts between the A and B seasons. The final rule to implement Amendment 109 therefore changes the WGOA and CGOA Pacific cod overall seasonal apportionments from 60 percent (A season) and 40 percent (B season) as follows: 63.84 percent of the WGOA TAC apportioned to the A season and 36.16 percent of the

WGOA TAC apportioned to the B season, and 64.16 percent of the CGOA TAC apportioned to the A season and 35.84 percent of the CGOA TAC apportioned to the B season.

In changing these seasonal apportionments, however, the final rule for Amendment 109 inadvertently affected the jig sector: Because the regulations do not specify the jig sector seasonal apportionment, unlike the A and B season apportionments for all other sectors and gear and operation types in the CGOA and WGOA, it became ambiguous if the new, overall Pacific cod seasonal apportionments should be applied to the jig sector. To remove any ambiguity, NMFS is correcting the final rule to implement Amendment 109 to specify that the CGOA and WGOA Pacific cod TACs will be seasonally apportioned to the jig sector such that 60 percent of the TAC is apportioned to the A season and 40 percent of the TAC is apportioned to the B season.

In implementing the final rule for Amendment 109, the North Pacific Fishery Management Council (Council) and NMFS were clear that they did not intend for Amendment 109 to affect any sectors other than the trawl CV sector. In the preambles to both the proposed rule (85 FR 11939, February 28, 2020) and final rule (85 FR 38093, June 25, 2020) to implement Amendment 109, NMFS specified that although the overall ratio of A and B seasonal apportionments of Pacific cod for the trawl CV sector is changing, the rule does not affect the seasonal apportionments of Pacific cod to any other sectors. The preambles further clarified that the seasonal apportionment of Pacific cod remains unchanged for all other sectors in the CGOA and the WGOA.

In addition, the Council and NMFS have clearly indicated their intention regarding the jig sector's seasonal apportionment on two fronts. First, the rulemaking to implement Amendment 83 to the GOA FMP (76 FR 74670, December 1, 2011) specified that the jig sector seasonal apportionment would be 60 percent for the A season and 40 percent for the B season in the CGOA and the WGOA (76 FR 44700, July 26, 2011). Second, NMFS has implemented the same apportionment in the annual GOA groundfish harvest specifications since the approval of Amendment 83. However, the regulatory text at § 679.20(a)(12)(i) does not specify the jig sector seasonal apportionment (like the A and B season apportionments are for all other sectors and gear and operation types in the CGOA and WGOA).

In order to clarify the seasonal apportionment to the jig sector for Pacific cod in the WGOA and CGOA, the final rule for Amendment 109 will be revised to expressly state the A and B season apportionments of Pacific cod to the jig sector. As revised, the regulations now will provide that a portion of the annual Pacific cod TAC, pursuant to § 679.20(a)(12)(i)(A) and (B), will be allocated to vessels with a Federal Fishing Permit that use jig gear, before TAC is apportioned among other non-jig sectors. This portion of the CGOA and WGOA Pacific cod TACs will be seasonally apportioned to the jig sector such that 60 percent of the TAC is apportioned to the A season and 40 percent of the TAC is apportioned to the B season, as specified in § 679.23(d)(3). Once the TAC for Pacific cod is apportioned to the jig sector, the remainder of the WGOA and CGOA Pacific cod TACs will be seasonally apportioned among the non-jig sectors such that 63.84 percent of the WGOA TAC is apportioned to the A season and 36.16 percent of the WGOA TAC is apportioned to the B season, and 64.16 percent of the CGOA TAC is apportioned to the A season and 35.84 percent of the CGOA TAC is apportioned to the B season, as specified in § 679.23(d)(3). This correction makes these clarifications in § 679.20(a)(12)(i).

This correction to the final rule to implement Amendment 109 will ensure that the new seasonal allocations of Pacific cod are available at the start of the fishing year. The purposes of Amendment 109 are to allow the fisheries to more fully harvest the Pacific cod and pollock TACs in the WGOA and CGOA, increase management flexibility, and, potentially, decrease the prohibited species catch, while not redistributing fishing opportunities between management areas or harvest sectors.

Correction

Effective January 1, 2021, in rule document 2020-12453 at 85 FR 38093 in the issue of June 25, 2020, on page 38100, in the third column, in amendatory instruction 2, paragraph (a)(12)(i) introductory text is corrected to read as follows:

§ 679.20 [Corrected]

* * * * *

(a) * * *

(12) * * *

(i) *Seasonal allowances by sector.* The Western and Central GOA Pacific cod TACs will be seasonally apportioned to the jig sector such that 60 percent of the TAC is apportioned to the A season and

40 percent of the TAC is apportioned to the B season, as specified in § 679.23(d)(3), before TAC is apportioned among other non-jig sectors. The Western and Central GOA Pacific cod TACs will be seasonally apportioned among the non-jig sectors such that 63.84 percent of the Western GOA TAC is apportioned to the A

season and 36.16 percent of the Western GOA TAC is apportioned to the B season, and 64.16 percent of the Central GOA TAC is apportioned to the A season and 35.84 percent of the Central GOA TAC is apportioned to the B season, as specified in § 679.23(d)(3).

* * * * *

Dated: December 2, 2020.

Samuel D. Rauch III,

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

[FR Doc. 2020–26954 Filed 12–8–20; 8:45 am]

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Proposed Rules

Federal Register

Vol. 85, No. 237

Wednesday, December 9, 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 VETERANS AFFAIRS

38 CFR Part 36

RIN 2900-AR05

Loan Guaranty: COVID-19 Veterans Assistance Partial Claim Payment Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to establish the COVID-19 Veterans Assistance Partial Claim Payment program (COVID-VAPCP), a temporary program to help veterans return to making normal loan payments on a VA-guaranteed loan (guaranteed loan) after exiting a Coronavirus Aid, Relief, and Economic Security Act (CARES Act) forbearance period. Under this proposed program, a servicer could consider a partial claim option after the servicer has evaluated all loss-mitigation options for feasibility. If the veteran qualifies and opts to move forward, VA would act as a mortgage investor of last resort by purchasing the amount of indebtedness necessary to bring the veteran's guaranteed loan current. The veteran would have up to 60 months to defer repayment to VA and up to 120 months to repay the loan in full, with the interest rate fixed at 1 percent per annum.

DATES: Comments must be received on or before January 8, 2021.

ADDRESSES: Comments may be submitted through www.Regulations.gov or mailed to Stephanie Li, Chief of Regulations, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Please note that due to circumstances associated with the COVID-19 pandemic, VA discourages the submission of comments by mail. Comments should indicate that they are submitted in response to "RIN 2900-AR05—Loan Guaranty: COVID-19 Veterans Assistance Partial Claim

Payment Program." Comments received will be available at regulations.gov for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT:

Andrew Trevaune, Assistant Director, Loan Property and Management, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632-8862. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

One of the primary goals of VA's Home Loan Guaranty Service is to help veterans who use their guaranteed loan benefit retain their homes and avoid foreclosure. To that end, VA and loan servicers intervene dynamically when guaranteed loans are more than 60 days in default. Such actions to assist veterans in default not only help veterans retain their homes and minimize damage to their credit ratings, but also help produce cost savings to the Government.

Given the unique needs of veterans and loan servicers during the novel coronavirus disease (COVID-19) national emergency, VA proposes to initiate a temporary program that would establish a partial claim option to aid veterans who suffer financial hardship due to COVID-19. VA's program would be modeled after existing partial claim programs already available to borrowers with other federally backed loans; that is, those guaranteed or insured by the U.S. Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA) and the U.S. Department of Agriculture's (USDA) Rural Housing Service.

Under VA's proposed COVID-VAPCP, servicers would consider a veteran for the program only after evaluating the feasibility of loss-mitigation options that are already available in VA's program. If a servicer determines that the veteran satisfies the COVID-VAPCP requirements and the veteran elects to participate, VA would purchase the veteran's forbore indebtedness, which is similar to VA's existing loan refund process. As a mortgage investor of last resort, VA would purchase the amount of indebtedness that is necessary to bring the veteran's guaranteed loan current. The veteran would repay VA for this amount, and the indebtedness

would be secured as a lien against the veteran's home upon execution and recordation of the security instrument. The servicer would handle all aspects of the origination. With the veteran's guaranteed loan brought current, the veteran would resume making regularly scheduled monthly loan payments to the servicer. The veteran would also repay VA for the new loan, under the terms proposed below. The new loan would be serviced under VA's existing loan portfolio.

While VA's proposed COVID-VAPCP would bear many similarities to the COVID-related partial claim programs offered by FHA and USDA,¹ VA's program would not be identical to either. Similarities to such agencies' programs would include the following: (1) The guaranteed loan for which a partial claim payment is requested must have been, on March 1, 2020, either current or less than 30 days past due; (2) a partial claim payment would only be payable to the servicer if the veteran missed at least one scheduled monthly payment under a CARES Act forbearance and at least one such payment remains unpaid; (3) VA would only pay one partial claim payment per veteran; (4) the veteran would need to occupy, as the veteran's residence, the property securing the guaranteed loan for which the partial claim is associated; and (5) the servicer would be required to determine whether the veteran satisfies the program requirements, to prepare the appropriate loan documents on VA's behalf, and to bring the veteran's guaranteed loan current, before submitting to VA a request for partial claim payment.

Distinguishing aspects of VA's program would include the following: (1) The partial claim payment could not exceed 15 percent of the unpaid principal balance of the guaranteed loan as of the date the veteran entered into a CARES Act forbearance; (2) the veteran would have up to 120 months to repay the partial claim VA paid to the servicer on the veteran's behalf; (3)

¹ See 12 U.S.C. 1715u(b); 24 CFR 203.371; Mortgagee Letter 2020-06, *FHA's Loss Mitigation Options for Single Family Borrowers Affected by the Presidentially-Declared COVID-19 National Emergency in Accordance with the CARES Act* (Apr. 1, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-06hsgml.pdf>; Mortgagee Letter 2020-22, *FHA's COVID-19 Loss Mitigation Options* (Jul. 8, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-22hsgml.pdf>. See also 42 U.S.C. 1472(h)(14); 7 CFR 3555.304(d).

repayment in full would be required immediately upon the veteran's transfer of title to the property, the refinancing of the guaranteed loan for which the partial claim payment is associated, or payment in full of such guaranteed loan; (4) VA would automatically defer a veteran's monthly payments for the first 60 months of the loan, meaning that a veteran would not have to make any payment to VA during the period of deferment; (5) a veteran would be allowed to pay during such deferment, without premium or fee, the entire indebtedness or any portion thereof, provided that such portion is not less than what would be due for one full monthly payment as specified in the loan documents; (6) VA would charge a fixed interest rate of 1.00 percent per annum on the loan; and (7) VA would require servicers to certify that the veteran's monthly residual income, as described in 38 CFR 36.4340(e), would be adequate to meet living expenses after estimated monthly shelter expenses (e.g., payments on the guaranteed loan) have been paid and other monthly obligations have been met.

Another distinguishing aspect of VA's program is that VA would expect that servicers consider the partial claim payment option only as a last resort, after a servicer has evaluated the feasibility of providing loss-mitigation options that are already available in VA's program. Consistent with VA's existing regulations and policies, servicers would evaluate a veteran's financial situation and, if appropriate, offer the veteran options that are within the servicer's financial capabilities and business model.

As initial CARES Act forbearance periods near their end, VA stakeholders confront numerous decisions that have far-reaching consequences. Many veterans, for example, must decide whether to request additional forbearance and watch their forborene indebtedness grow, or attempt to resume their regularly scheduled monthly payments, despite potential hardships and uncertainties caused by the national emergency. VA's partial claim assistance may well be the determining factor for certain veterans, affecting the extent to which they can recover financially from the crisis. Similarly, servicers must evaluate their liquidity positions and other factors to determine how to make the advances necessary for investor requirements. Some servicers may even be questioning whether they can stay afloat, which ultimately harms not just the servicer, but also the veterans whose guaranteed loans are being serviced.

VA's proposed COVID-VAPCP would create a "soft landing" for certain veterans, enabling them to return to their regularly scheduled monthly payments without suffering another financial shock. The program would also provide a lifeline for certain servicers, thereby mitigating the risk that veterans would be left without the benefit of prudent loan servicing.

II. Background

A. VA's Existing Policies for Delinquent Loans

VA's loan administration policies and oversight have resulted in one of the lowest foreclosure inventory rates in the industry over the past decade.² Data reported in the most recent Veterans Benefits Administration Annual Benefits Report reflects that such policies and oversight saved approximately 100,000 veterans from foreclosure annually over the past four fiscal years.³

VA requires holders of guaranteed loans to establish and maintain a loan servicing program consistent with industry standards.⁴ If a veteran misses one loan payment, the guaranteed loan becomes delinquent.⁵ Once a guaranteed loan reaches 61 days delinquent, servicers are required to report the delinquency to VA, to work with the veteran to consider loss-mitigation options or alternatives to foreclosure, and to report updates on the status of the guaranteed loan to VA.⁶ Upon notification to VA, a VA loan technician will review the case, monitor servicer activities, and intervene as needed during the delinquency to ensure that the servicer has provided adequate servicing and has presented all appropriate options to attempt to reinstate the guaranteed loan or avoid foreclosure.

Servicers are ultimately responsible for utilizing loss-mitigation options and alternatives to foreclosure to help veterans avoid foreclosure. VA regulations allow VA to pay an incentive to a servicer whenever the

servicer completes one of five borrower-assistance actions (i.e., loss-mitigation options and alternatives to foreclosure).⁷ Additionally, while VA generally does not require servicers to pursue loss-mitigation options and alternatives to foreclosure in a particular order, VA has informed servicers of VA's preferred order of alternatives (i.e., a hierarchy for review), as follows: Repayment plan, special forbearance, loan modification, compromise sale, and deed-in-lieu of foreclosure.⁸

Loss-mitigation options are pursued with the intent of bringing the delinquent guaranteed loan current and keeping the veteran in his or her home. As mentioned, these options include repayment plans, special forbearances, and loan modifications. Under a repayment plan, the borrower agrees to pay the normal monthly payment plus an agreed upon portion of the delinquency each month to the servicer.⁹ A special forbearance suspends or reduces a borrower's normal monthly payments for an agreed upon period of time.¹⁰ A loan modification permanently changes one or more terms of the guaranteed loan and may include re-amortization of the balance due. While all loan modifications must meet the requirements set forth by 38 CFR 36.4315, VA generally classifies a loan modification as one of four types—traditional loan modification, streamline modification, VA affordable modification, and VA disaster modification—depending on a borrower's circumstances.¹¹

Servicers generally pursue compromise sales and deeds-in-lieu of foreclosure when a traditional, private sale is not feasible and the borrower either has no desire to retain the property or when a loss-mitigation option is not feasible given the borrower's current financial circumstances. Under a compromise

⁷ 38 CFR 36.4319.

⁸ 38 CFR 36.4319(a).

⁹ A repayment plan is a "written executed agreement by and between the borrower and the holder to reinstate a loan that is 61 or more calendar days delinquent, by requiring the borrower to pay each month over a fixed period (minimum of three months duration) the normal monthly payments plus an agreed upon portion of the delinquency each month." 38 CFR 36.4301.

¹⁰ A special forbearance is "a written agreement executed by and between the holder and the borrower where the holder agrees to suspend all payments or accept reduced payments for one or more months, on a loan 61 or more calendar days delinquent, and the borrower agrees to pay the total delinquency at the end of the specified period or enter into a repayment plan." 38 CFR 36.4301.

¹¹ VA Servicer Handbook, VA Manual 26–4, Chap. 5: Loss Mitigation, 5.06 (Feb. 26, 2019), https://www.benefits.va.gov/WARMS/docs/admin26/m26_04/Ch5_Loss_Mitigation.docx.

² Mortgage Bankers Association, *National Delinquency Survey Data*, 2010 through 2020, <https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/national-delinquency-survey>.

³ See VBA Annual Benefits Report: Home Loan Guaranty, Fiscal Year 2019, page 19, <https://www.benefits.va.gov/REPORTS/abr/docs/2019-loan-guaranty.pdf>.

⁴ 38 CFR 36.4350(a).

⁵ VA Servicer Handbook, VA Manual 26–4, Chap. 4: Delinquent Loan Servicing, 4.01a. (Feb. 26, 2019), https://www.benefits.va.gov/WARMS/docs/admin26/m26_04/Ch4.docx.

⁶ 38 CFR 36.4317(c)(7) (requiring an electronic default notification (EDN) when the guaranteed loan becomes at least 61 days delinquent).

sale (sometimes called a short sale), the servicer agrees to release the guaranteed loan obligation in exchange for the proceeds of a sale to a third party for an amount that is less than the borrower's total indebtedness on the guaranteed loan.¹² Under this alternative, the servicer recovers some portion of the unpaid balance of the guaranteed loan through the sale. In cases where there is little or no likelihood of a private sale or compromise sale, servicers should consider a deed-in-lieu of foreclosure. Under this alternative to foreclosure, the borrower voluntarily transfers title to the property to the servicer in exchange for a release of all obligations under the guaranteed loan.¹³ VA considers compromise sales and deeds-in-lieu of foreclosure to be successfully completed when the servicer files a claim under VA's guaranty.¹⁴

In cases where servicers are unable to complete a loss-mitigation option or an alternative to foreclosure, servicers must, before initiating a foreclosure, provide VA with the option of what is commonly called a "loan refund." This process, authorized under 38 U.S.C. 3732, is where VA takes assignment of the existing guaranteed loan indebtedness in exchange for VA's payment to the servicer of the unpaid principal balance, plus accrued interest.¹⁵ The loan is then placed into VA's portfolio, and the veteran makes loan payments to VA. VA's internal data from fiscal year 2015 to date indicates that VA has completed an average of 20 loan refunds per fiscal year.

VA has employed contractors since the late 1990s to perform loan boarding and servicing functions for VA's portfolio. VA's portfolio currently comprises approximately 4,500 loans totaling approximately \$420 million. Notably, this amounts to about half the number of loans that VA has held in previous years. The portfolio includes refunded loans, as well as the loans where VA was, in contrast to its role in the refunding program, the direct lender (as in the Native American Direct Loan and vendee loan programs; neither of which would be affected under this rulemaking).

B. COVID-19 Emergency and CARES Act Forbearances

By late March 2020, the COVID-19 national emergency was significantly affecting the economy. Between March 15 and May 15, 2020, over 35 million Americans filed initial jobless claims, and the unemployment rate climbed to over 14 percent in April—the highest monthly level since 1948, which is when the U.S. Bureau of Labor Statistics started tracking this data.¹⁶

On March 27, 2020, the President signed the CARES Act into law. Section 4022(b) of the Act, in relevant part, states that borrowers with a "Federally backed mortgage loan" (e.g., a VA-guaranteed loan) experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency may request forbearance on such loan, regardless of delinquency status, by submitting a request to the borrower's servicer and affirming that the borrower is experiencing a financial hardship during the COVID-19 emergency. Upon such a request, servicers must, with no additional documentation required other than the borrower's attestation to a financial hardship caused by the COVID-19 emergency, and with no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the housing loan contract) provide the forbearance for up to 180 days.¹⁷ The forbearance period can be extended for an additional period of up to 180 days at the request of the borrower, provided that the borrower's request for an extension is made during the covered period. Either the initial or extended period of forbearance may be shortened at the borrower's request.¹⁸ While borrowers can postpone loan payments under a CARES Act forbearance, borrowers are still obliged to repay the forborne indebtedness. In other words, forbearance is not forgiveness. However, many borrowers simply have no choice but to postpone payments to weather the economic storm. Given the broad protections afforded by CARES Act forbearances, servicers have utilized such forbearances as a primary tool in helping borrowers who are struggling to afford housing loan payments due to the COVID-19 emergency.

The CARES Act does not specify how borrowers receiving CARES Act

forbearances must repay the forborne payments. To ensure that servicers do not attempt to require immediate payment of forborne amounts upon the borrower's exit from a CARES Act forbearance (as can be required under a special forbearance), VA issued guidance notifying servicers that they should not require a veteran to make a lump sum payment equal to what would have been due if a forbearance was not in effect, after the forbearance period ends. VA is instead encouraging servicers to consider other loss-mitigation options, such as those described above.

As of August 1, 2020, VA's internal data showed that approximately 149,645 active guaranteed loans are in a CARES Act forbearance (approximately 4.3 percent of all active guaranteed loans). Of those loans, 61,795 were current as of March 1, 2020, and were also paid current through July 31, 2020. An additional 51,043 loans were current as of March 1, 2020, but were no longer current through July 31, 2020, meaning the veteran missed at least one loan payment between such dates.

C. COVID-19 Emergency: Post-Forbearance Options and Post-Delinquency Options

VA and the servicing industry have significant experience applying VA's current loss-mitigation policies to assist veterans struggling financially due to major disasters, such as natural disasters like hurricanes and floods. Nevertheless, there are many key differences between discrete natural disasters and the widespread and long-lasting crisis caused by the COVID-19 pandemic.

The current national emergency will likely have more far-reaching consequences of greater magnitudes for veterans than the consequences posed by a natural disaster, for example. Unlike a natural disaster, it is impossible to approximate when the imminent danger caused by a global pandemic will recede. Generally, at the outset of natural disasters like hurricanes and floods, public policy experts can reasonably predict the endpoint of imminent danger, after which an assessment of the damage and impact to the borrower may be completed. A comparable endpoint to the COVID-19 pandemic is much more difficult to predict because multiple factors change daily, including rates of infection and death. Rising and falling infection rates directly influence economic factors such as employment levels and expected borrower income. These factors are also affected by policy

¹² A compromise sale is a sale to a third party for an amount less than is sufficient to repay the unpaid balance on the guaranteed loan where the holder has agreed in advance to release the lien in exchange for the proceeds of such sale. 38 CFR 36.4301. VA requirements for a compromise sale are set forth by 38 CFR 36.4322(e).

¹³ VA requirements for a DIL of foreclosure are set forth by 38 CFR 36.4322(f).

¹⁴ 38 CFR 36.4319(c).

¹⁵ See 38 U.S.C. 3732(a)(2); 38 CFR 36.4320.

¹⁶ U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/ces>.

¹⁷ Public Law 116–136, section 4022(c)(1) (Mar. 27, 2020).

¹⁸ Id.

approaches that may vary at federal, state, and local levels.

Further, unlike geographically and temporally bounded disasters, COVID-19 has spread across the globe over the course of months, affecting communities of all sizes and compositions. Borrowers will likely not have safety nets in place to mitigate the harrowing outcomes. Conversely, borrowers affected by major natural disasters like hurricanes and floods often are covered by hazard and other insurance policies, which can help to offset financial losses.

The duration, scope, and impact of the COVID-19 pandemic, along with the lack of safety nets to help absorb the financial upheaval, has created enormous challenges for the housing finance market. When borrowers do not make their regularly scheduled monthly loan payments, loan servicers are often contractually obligated to step in and advance such missed amounts to the loan holder.¹⁹ The volume of CARES Act forbearances in a servicer's portfolio, coupled with the protracted length of such a forbearance (*i.e.*, up to 360 days), has placed many servicers in a position where they may be required to cover up to 12 months of loan payments for a significant segment of the loans they service. Federally backed mortgages, that is, those for which servicers must generally grant CARES Act forbearances upon a borrower's request, account for approximately 70 percent of all housing loans in the United States.²⁰ Recent data reveals that approximately 7 percent of all housing loans in the United States, corresponding to 3.6 million homeowners, are currently in forbearance.²¹ This increased number of borrowers in forbearance means that servicers can be left without budgetary resources to offer certain loss-mitigation options to borrowers, including veterans with VA-guaranteed loans.

VA notes that most VA-guaranteed loans are not held by the lenders that originate the loans. Rather, lenders that are issuers approved by the Government National Mortgage Association (Ginnie Mae) often originate VA-guaranteed

loans, package them into loan pools, and issue mortgage-backed securities (MBS) backed by such pools. Ginnie Mae can then guarantee, to MBS investors, the timely payment of principal and interest on such securities. Because Ginnie Mae requires servicers to purchase such securitized loans out of the Ginnie Mae pools before completing a loan modification, servicers facing liquidity shortages due to, for example, covering an unprecedented amount of forborne loan payments, may not be financially able to purchase such loans out of the pools. This means that such servicers would not be able to offer crucial loan modifications to veterans.

Servicers' decreased ability to offer loan modifications due to the repurchase requirement discussed above is especially significant given that veterans with large amounts of forborne indebtedness may not be able to return to normal loan repayment under other available loss-mitigation options. For example, while a veteran who ceased making payments under a CARES Act forbearance for 360 days may be able to resume making regularly scheduled monthly loan payments, post-forbearance, the veteran may be unable to repay a whole year's worth of missed payments under a repayment plan, in a relatively short timeframe established by a servicer that may be facing liquidity strains.

Similarly, a special forbearance may also not be financially feasible from the perspective of both the veteran and the servicer. A central issue is the ability of the borrower to repay forborne indebtedness over a relatively short period. A special forbearance could be problematic in that the veteran would have even more forborne indebtedness to repay, and the servicer would need to advance additional payments without receiving any offsetting payments from the veteran.

Given the issues described above, the unprecedented nature of the COVID-19 emergency, its impact on the economy, and the lengthy forbearance period authorized under the CARES Act (*i.e.*, up to 360 days), VA is continuously evaluating how best to help veterans with large amounts of forborne indebtedness avoid foreclosure. For example, VA recently issued guidance clarifying that servicers may offer what the servicing industry commonly calls loan "deferment," as a novel home retention option.²² Under this option,

the servicer would allow the veteran to defer repayment of forborne payments until the guaranteed loan matures, is refinanced, or otherwise paid in full, or when the borrower transfers the property, whichever occurs first. The deferred indebtedness would not accrue any additional interest, and the veteran would not incur any fees or costs associated with the deferment option. The option would not necessarily require the servicer to modify the existing guaranteed loan. Ordinarily, VA's regulation at 38 CFR 36.4310(a) would prohibit a final installment payment on a guaranteed loan from exceeding two times the average of the preceding installments. In cases where veterans have deferred several months' worth of payments, the final installment (*i.e.*, the total deferred indebtedness), will often exceed the limit. However, in order to provide veterans with a full gamut of options, VA temporarily waived²³ this limit for certain cases where servicers can offer a loan deferment option that complies with VA's policy guidance.

While loan deferment may present the best option for certain borrowers, many servicers are facing a liquidity crunch and lack financial resources to float large amounts of forborne indebtedness for what can be, depending on the case, two to three decades. As a result, VA continues to consider innovative ways to assist veterans mitigate the effects of the COVID-19 emergency, including options that, until recently, were not considered or utilized in VA's home loan program.

D. The Partial Claim Loss-Mitigation Option

As part of VA's effort to analyze all possible options that could help veterans, VA considered home retention options available to borrowers with other types of federally backed mortgages; that is, those available through single-family loan guarantee/insurance programs administered by

¹⁹ Deloitte, *Mortgage Series on Management Estimates*, pg. 7, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-msme-perational-considerations-july2013r.pdf>.

²⁰ Urban Institute, *The Price Tag for Keeping 29 Million Families in Their Homes: \$162 Billion*, (Mar. 27, 2020), <https://www.urban.org/urban-wire/price-tag-keeping-29-million-families-their-homes-162-billion>; Mortgage Bankers Association (MBA), *Share of Mortgage Loans in Forbearance Declines Slightly to 7.20%*, (Aug. 24, 2020), <https://www.mba.org/2020-press-releases/august/share-of-mortgage-loans-in-forbearance-declines-slightly-to-720>.

²¹ *Id.*

²² VA Circular 26-20-33, *Deferment as a COVID-19 Loss-Mitigation Option for CARES Act Forbearance Cases*, (Sept. 14, 2020), https://www.benefits.va.gov/HOMELANS/documents/circulars/26_20_33.pdf.

²³ See 38 CFR 36.4338(a) (authorizing VA, notwithstanding any requirement, condition, or limitation stated in or imposed by regulations governing guaranteed loans, to relieve undue prejudice to a debtor, holder, or other person, which might otherwise result, if VA finds that such action does not adversely affect the interests of the Government or impair the vested rights of any person affected thereby). See also Executive Order 13924, 85 FR 31353 (May 19, 2020) (stating that agencies should, to the extent possible, address the economic consequences of the COVID-19 emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery); Executive Order 13945, 85 FR 49935 (Aug. 8, 2020) (stating that it is the policy of the United States to minimize, to the greatest extent possible, residential evictions and foreclosures during the ongoing COVID-19 national emergency).

FHA and USDA. Notably, both agencies offer a “partial claim” as part of the suite of loss-mitigation options available to borrowers and servicers.²⁴ More recently, FHA announced COVID-19 specific guidelines to maximize use of its partial claim option while providing streamlined loss-mitigation for borrowers and servicers.²⁵ Under these programs, the partial claim option defers the repayment of housing loan principal through the creation of an interest-free subordinate loan (payable to the Government) that is generally not due until the primary loan is paid off. During the COVID-19 emergency, both FHA and USDA have authorized servicers to utilize the partial claim option to cover all housing loan payments borrowers do not make while under a CARES Act forbearance, up to 30 percent of the unpaid principal balance, subject to certain requirements.

III. Legal Authority

Unlike FHA and USDA, VA has never had explicit authority to establish a partial claim option. To help veterans recover from the financial hardships posed by the COVID-19 national emergency, VA looked to its loan refund authority in 38 U.S.C. 3732 and the broad powers authorized under 38 U.S.C. 3720. When read together, the text of these two sections authorizes VA to establish the COVID-VAPCP as an emergency measure.

Under 38 U.S.C. 3732(a), VA has the legal right to prevent a foreclosure by purchasing indebtedness that VA has already guaranteed. VA refers to such a purchase as a loan refund. If VA exercises the option, the holder must assign the loan to VA. VA then steps into the shoes of the holder and often allows for a loan modification, which makes the terms more affordable for the veteran.

VA also has broad powers under 38 U.S.C. 3720, “notwithstanding the provisions of any other law,” to purchase assets and pay any claim, however acquired, relating to or arising from matters in the VA-guaranteed loan program and to offer forbearances or indulgences to veterans who have

suffered loss due to disasters.²⁶ In applying the authorities as a consistent, coherent framework, VA would, by way of a loan to the veteran, purchase from the servicer the veteran’s CARES Act indebtedness and establish repayment terms favorable to the veteran, while leaving intact the veteran’s guaranteed loan.

IV. COVID-19 Veterans Assistance Partial Claim Payment Program

VA, therefore, proposes to establish a temporary program that would provide a partial claim option to certain veterans who are financially impacted by COVID-19. Under VA’s proposed COVID-VAPCP, servicers would present the partial claim option to a veteran only after evaluating the feasibility of loss-mitigation options already available in VA’s program (*i.e.*, repayment plan, special forbearance, and loan modification). If the veteran qualifies and opts to move forward with a partial claim option, VA would purchase the veteran’s forborne indebtedness, like when VA refunds a guaranteed loan. Acting as a mortgage investor of last resort, VA would purchase the amount of indebtedness that is necessary to bring the veteran’s guaranteed loan current (instead of the whole amount of the guaranteed loan, as would be the case in a typical loan refund). The veteran would repay VA for this amount, and the indebtedness would be secured as a lien against the veteran’s home upon execution and recordation of the security instrument. The servicer would handle all aspects of the origination of the new COVID-VAPCP loan. The new loan would be serviced under VA’s existing loan portfolio.

To ensure that veterans can benefit from a partial claim option in ways like FHA and USDA borrowers, VA proposes to mirror requirements from FHA’s and USDA’s COVID-19 partial claim programs, whenever feasible. Therefore, like FHA’s and USDA’s COVID-related partial claim programs, VA’s proposed COVID-VAPCP would only be available for guaranteed loans that were, on March 1, 2020, either current or less than 30 days past due. Additionally, VA’s partial claim payment would only be payable to a servicer on behalf of a veteran if there remains unpaid at least one scheduled monthly payment that the veteran missed while under a CARES Act forbearance. VA notes that some borrowers have continued to make their monthly loan payments despite being under a CARES Act forbearance. A partial claim payment option would

be unnecessary for those individuals because there would be no forborne indebtedness to resolve upon exiting the forbearance. Consistent with FHA’s COVID-19 National Emergency Standalone Partial Claim, VA would only pay one partial claim payment per veteran and require that the veteran occupy, as a residence, the property securing the guaranteed loan for which the partial claim is requested. Also consistent with FHA and USDA, VA’s proposed COVID-VAPCP would require the servicer to determine whether the veteran satisfies the program requirements, prepare the appropriate loan documents on VA’s behalf, and bring the veteran’s guaranteed loan current, prior to submitting to VA a request for partial claim payment.

While VA’s proposed COVID-VAPCP would bear many similarities to FHA and USDA’s COVID-related partial claim programs, it would not be identical to either program. VA notes that FHA and USDA provide 100 percent and 90 percent backing on their guaranteed/insured loans,²⁷ respectively, whereas VA’s guaranty is typically no more than 25 percent.²⁸ VA’s smaller guaranty is relevant for two reasons.

First, compared to FHA- and USDA-backed loans with similar loan balances, VA-guaranteed loans generally expose the Government to less financial risk per loan. While VA’s unique mission requires VA to promote favorable outcomes for veterans, which might increase costs, VA must also continue to be a responsible steward of taxpayer funds. VA has determined that any proposed amount of assistance via a partial claim option cannot cause VA to incur financial risk that would eclipse the guaranty.

Therefore, while both the FHA and USDA partial claim programs provide payment to the servicer, on the borrower’s behalf, up to 30 percent of the unpaid principal balance at the time of initial default,²⁹ VA’s proposed program would provide for payment to the servicer, on the veteran’s behalf, up to 15 percent of the unpaid principal balance of the guaranteed loan as of the date the veteran entered into a CARES

²⁴ See 12 U.S.C. 1715u(b); 24 CFR 203.371. See also 42 U.S.C. 1472(h)(14); 7 CFR 3555.304(d) and 3555.307.

²⁵ Mortgagee Letter 2020-06, *FHA’s Loss Mitigation Options for Single Family Borrowers Affected by the Presidentially-Declared COVID-19 National Emergency in Accordance with the CARES Act*, (Apr. 1, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-06hsgml.pdf>; Mortgagee Letter 2020-22, *FHA’s COVID-19 Loss Mitigation Options*, (Jul. 8, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-22hsgml.pdf>.

²⁶ See 38 U.S.C. 3720(a), 3720(a)(3) through (5), and 3720(f).

²⁷ See 12 U.S.C. 1709; 42 U.S.C. 1472(h)(2).

²⁸ See 38 U.S.C. 3703(a)(1). While VA notes that the guaranty may be higher on loans with lower balances, such as 50 percent for loans with balances less than or equal to \$45,000, the average balance on guaranteed loans has exceeded \$200,000 since 2008. See VBA Annual Benefits Reports, Fiscal Years 2008 to 2019, <https://www.benefits.va.gov/REPORTS/abr/docs/2019-loan-guaranty.pdf> (Fiscal Year 2019); <https://www.benefits.va.gov/REPORTS/abr/archive.asp> (Fiscal Years 2008 to 2018).

²⁹ 12 U.S.C. 1715u(b)(2)(A); 42 U.S.C. 1472(h)(14)(A).

Act forbearance. VA notes that, based on an initial analysis of loans in forbearance, VA believes that a 15 percent cap would provide sufficient room for servicers to bring the guaranteed loans current, even if a veteran invokes the maximum period of forbearance; that is, 360 days, under the CARES Act.

FHA and USDA do not charge borrowers interest on the subordinate indebtedness that results from a partial claim payment. Also, in such programs, no payment on the subordinate indebtedness is generally due until such time as the property securing the insured/guaranteed loan is transferred or sold or the insured/guaranteed loan is refinanced or otherwise paid-in-full. However, in both programs, the partial claim is essentially treated as an advance paid to the servicer, on behalf of the borrower, enabling the insured/guaranteed loan to return to current.³⁰ This arrangement is to be expected given that FHA and USDA back all, or nearly all, of the insured/guaranteed loan. VA, on the other hand, views its partial claim payment option more like its loan refund program. As previously discussed, under the loan refund program, VA generally takes assignment of the guaranteed loan in exchange for VA's payment of the unpaid balance of the obligation, plus accrued interest. In the event VA takes the loan into its own portfolio for servicing, no guaranty claim is paid. The veteran continues to pay interest on the indebtedness and monthly payments as obligated, but to VA as noteholder, not to the former loan servicer.

Under this rulemaking, VA proposes to make COVID-VAPCP loans on terms extremely favorable to veterans; providing a lifeline to veterans as they recover financially. First, VA proposes to require repayment of the loan within 120 months of origination or upon the veteran's transfer of title to the property, the refinancing of the guaranteed loan with which the partial claim payment is associated, or payment in full otherwise of such guaranteed loan. VA would also automatically defer any monthly payments for the first 60 months of the loan. Based on the partial claim loan balances that VA anticipates, VA believes this time horizon would provide veterans with a reasonable path to repayment without additional undue financial hardship.

VA also proposes to charge a nominal, fixed interest rate of 1.00 percent per annum on any loan established under the COVID-VAPCP. VA notes that this is below what is generally charged for VA's portfolio loans (including refunded loans) and, in fact, represents no more than the approximate net present value of the money to be paid to servicers on behalf of veterans.³¹ In other words, the 1.00 percent interest rate established under the COVID-VAPCP represents roughly the 10-year cost of borrowing money from the U.S. Treasury that would be needed to reimburse servicers, on behalf of veterans, for partial claim payments.

The relatively small size of VA's guaranty is also relevant because the holder³² of a VA-guaranteed loan bears significantly more financial risk for a VA-guaranteed loan than for a loan insured or guaranteed by FHA or USDA. Due to VA's smaller guaranty percentage, the servicer has just as much, if not more, financial interest than the Government in seeing a delinquent VA-guaranteed loan brought current because, unlike in FHA and USDA's programs, VA will not pay more than 25 percent of the loan. Given the holder's significant financial incentive to offer a veteran the loss-mitigation option that is most likely to help the veteran return to normal repayment, VA generally does not prescribe which loss-mitigation options servicers must first offer to a veteran before considering other options.

Therefore, where FHA has mandated that servicers consider every owner-occupant borrower exiting a CARES Act forbearance who was current or less than 30 days past due as of March 1, 2020, for a COVID-19 National Emergency Standalone Partial Claim, and USDA has authorized a Disaster Mortgage Recovery Advance for similarly situated borrowers, VA would not mandate that servicers consider veterans for a partial claim payment option. Rather, VA would expect servicers to consider the feasibility of loss-mitigation options before considering a partial claim payment. Consistent with VA's existing regulations and policies, servicers would evaluate a veteran's financial situation and, if appropriate, offer loss-

mitigation options that are within the servicer's financial capabilities and business model.

VA further notes that, because of the way the COVID-VAPCP is structured, the COVID-VAPCP is a standalone home retention option. In other words, the COVID-VAPCP cannot be combined with loss-mitigation options, such as a special forbearance or loan modification, to assist borrowers who are exiting CARES Act forbearances. For example, a servicer cannot tack on a special forbearance period to the end of a CARES Act forbearance and then use the COVID-VAPCP to bring the guaranteed loan current. When a servicer offers a special forbearance to assist the borrower in returning to normal repayment, it indicates that the servicer views the option as the most prudent choice based on the circumstances. Similarly, if a servicer brings a veteran's guaranteed loan current through a loan modification, but shortly thereafter the veteran cannot make payments on the modified loan, the servicer cannot then pursue a partial claim payment. A loan modification requires servicers to ensure that the guaranteed loan "will be reinstated to performing status by virtue of the loan modification."³³ If the servicer reinstated the guaranteed loan to performing status by virtue of the loan modification, there would not be any remaining "indebtedness that [would be] necessary to bring the guaranteed loan current," under VA's proposed rule text below.

By requiring servicers to consider loss-mitigation options before evaluating a veteran for COVID-VAPCP, VA's proposed policy would help ensure that veterans are afforded options that may be more advantageous to them than a partial claim, without imposing additional administrative requirements on servicers. For example, servicers that have adequate resources to offer deferment³⁴ as a home retention option would be able to do so under VA's proposed program. Deferment can present a better option for certain veterans as compared to the COVID-VAPCP because, as explained above, the deferred amount does not accrue interest and may provide a veteran significantly more time before a payment would become due. Moreover, without a requirement that certain veterans be evaluated for COVID-VAPCP, servicers willing and able to

³⁰ See 24 CFR 203.341, 203.371, and 203.401 (casting FHA's partial claim as an "application for insurance benefits"). See also 7 CFR 355.304(d)(8) (stating that a USDA loss claim will be adjusted by any amount of mortgage recovery advance reimbursed to the lender).

³¹ VA's analysis of the net present value of partial claim payments made in accordance with the COVID-VAPCP was based on a review of the 10-year Treasury Yield Rate from Jan. 1, 2020, through Aug. 28, 2020.

³² 38 CFR 36.4301 defines holder as "[t]he lender or any subsequent assignee or transferee of the guaranteed obligation or the authorized servicing agent (also referred to as 'the servicer') of the lender or of the assignee or transferee."

³³ 38 CFR 36.4315(a)(6).

³⁴ See VA Circular 26-20-33, *Deferment as a COVID-19 Loss-Mitigation Option for CARES Act Forbearance Cases*, (Sept. 14, 2020), https://www.benefits.va.gov/HOMELANS/documents/circulars/26_20_33.pdf.

offer deferments would not have to alter their servicing process, train employees, and possibly upgrade technology to complete such evaluations.

Nevertheless, the option of COVID-VAPCP assistance may very well be necessary to ensure certain veterans can recover financially. In this regard, as servicers evaluate their liquidity positions and other factors, to determine how to make the advances necessary for investor requirements, some servicers may find themselves unable to offer certain loss-mitigation options, such as a loan modification. VA notes that, unlike a loan modification, a partial claim payment under VA's proposed COVID-VAPCP would not require the guaranteed loan to be purchased out of the Ginnie Mae pools. Thus, for these servicers, and the veterans whose guaranteed loans they service, the assistance VA is proposing would ensure veterans are afforded an option that enables them to retain their home, while simultaneously helping servicers avoid liquidity crunches, thereby affording veterans prudent and uninterrupted loan servicing.

As mentioned above, VA's proposed COVID-VAPCP would be available to veterans whose guaranteed loan was current or less than 30 days past due as of March 1, 2020, and who certify that they can resume making scheduled monthly payments, on time and in full. VA, however, would also require servicers to ensure that the veteran's monthly residual income, as described in 38 CFR 36.4340(e), is adequate to meet living expenses after estimated monthly shelter expenses (*e.g.*, payments on the guaranteed loan) have been paid and other monthly obligations have been met. Residual income has long been a critical component of VA underwriting.³⁵ As the information collected from the veteran to conduct this analysis coincides with the information already requested to evaluate VA's existing loss-mitigation options, this residual income requirement would help ensure that servicers have considered all loss-mitigation options for feasibility before pursuing a partial claim payment. Veterans would ultimately benefit from this additional financial assessment because servicers would be able to evaluate the financial impact of loss-mitigation options, such as loan modification, compared to a partial claim option. Take, for example, a veteran who enters a CARES Act forbearance with 300 monthly payments

remaining and an unpaid principal balance of \$239,450. Given a total monthly payment of \$1,587.83, at the end of a 12-month forbearance period, the veteran would owe \$19,054 in missed guaranteed loan payments.³⁶ A loan modification at the same interest rate and a new 30-year term would result in a \$26 decrease in monthly loan payments but \$39,518 in additional interest over the life of the guaranteed loan. Conversely, a VA partial claim payment would result in a \$341.58 per month payment to VA in years 6 through 10 but only \$1,441 in additional interest over the life of the guaranteed loan.

In cases where the servicer could not offer a deferment but could perhaps offer a modification, the partial claim option might present an even more beneficial outcome for both the veteran and the servicer. As the partial claim option would require the servicer to determine that the veteran can meet residual income standards, the veteran would not necessarily need the short-term savings of reduced monthly loan payments under a loan modification. It could be more beneficial for such a veteran to realize an overall interest savings of \$38,077 under a partial claim option.

V. Section-by-Section Analysis of the Proposed Regulatory Amendments

As previously noted, VA is proposing the COVID-VAPCP as a temporary program to help veterans return to making normal loan payments on their guaranteed loans after exiting a CARES Act forbearance period. VA further noted that its existing loss-mitigation and other servicing regulations and policies remain in effect. Thus, to avoid confusion, VA is proposing to add a new subpart F to part 36 of the Code of Federal Regulations (CFR) to contain the regulations that would govern this temporary program. The following outlines VA's proposed regulations, with further explanation of each individual section, as necessary.

A. Section 36.4800 Applicability

In proposed § 36.4800, VA would note that this subpart applies to all loans guaranteed by VA, to the extent such loans are affected by the COVID-19 national emergency.

B. Section 36.4801 Definitions

In proposed § 36.4801, VA would set forth the definitions applicable to new subpart F.

VA would define "alternative to foreclosure", "CARES Act forbearance", "CARES Act indebtedness", "Guaranteed loan", "Loss-mitigation option", "Secretary", and "Servicer" as set out in the regulatory text below.

C. Section 36.4802 General Purpose of the COVID-19 Veterans Assistance Partial Claim Payment Program

In § 36.4802, VA would set forth the general purpose of the COVID-VAPCP. Intending to provide some introductory context for this novel option within VA's home loan program, VA would state that the COVID-VAPCP is a temporary program to help veterans who have suffered a COVID-19 financial hardship. Notwithstanding the requirements elsewhere in part 36 regarding payment of a guaranty claim or refunding a loan, this proposed section would allow VA to assist a veteran exiting a CARES Act forbearance by purchasing from the servicer the veteran's CARES Act indebtedness. Such a purchase would be called a partial claim payment. In exchange for VA's partial claim payment on behalf of the veteran, the veteran would have to agree to repay the Secretary, in the amount of such partial claim payment, upon loan terms established by the Secretary.

D. Section 36.4803 General Requirements of the COVID-19 Veterans Assistance Partial Claim Payment Program

In § 36.4803, VA would set forth the general requirements of the COVID-VAPCP. First, VA would require that the loan for which a partial claim payment is requested must be a guaranteed loan that was, on March 1, 2020, either current or less than 30 days past due. Second, VA would require that the veteran on whose behalf VA would pay a partial claim payment both received a CARES Act forbearance and missed at least one scheduled monthly payment. Third, VA would require that there remains unpaid at least one scheduled monthly payment that the veteran did not make while under a CARES Act forbearance. Fourth, VA would require the veteran to certify that the veteran can resume making scheduled monthly payments, on time and in full, and that the veteran occupies, as the veteran's residence, the property securing the guaranteed loan for which the partial claim is requested. Fifth, VA would require the servicer to determine and certify that the veteran's monthly residual income, as described in § 36.4340(e), will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and

³⁵ See Public Law 99-576, section 402(b) (Oct. 28, 1986); 55 FR 4829, 4869 (Feb. 12, 1990); 56 FR 9835, 9853 (Mar. 8, 1991).

³⁶ This example assumes a starting guaranteed loan balance of \$245,000, fixed 3.75 percent interest rate, 360-month loan term, and monthly escrows of \$453.20.

other monthly obligations have been met. Lastly, VA would require the veteran to execute, in a timely manner, all loan documents necessary to establish an obligation to repay the Secretary for the partial claim payment.

E. Section 36.4804 Partial Claim Payment as Last Resort

In § 36.4804, VA would state that a partial claim payment would be an option of last resort. VA would reiterate that the COVID-VAPCP is designed to address the financial hardships due, directly or indirectly, to the COVID-19 national emergency. VA would state that servicers must consider all possible loss-mitigation options and that VA expects the partial claim payment option would be considered only as a last resort, after a servicer has evaluated loss-mitigation options for feasibility. VA would also state that the servicer would be able to immediately proceed to offering an alternative to foreclosure if the veteran notifies the servicer that the veteran does not want to retain ownership of the property securing the guaranteed loan.

F. Section 36.4805 Terms of the Partial Claim Payment

In § 36.4805, VA would set forth the terms of the partial claim payment. In paragraph (a), in order for a partial claim payment to be payable, the servicer would be required to submit to the Secretary, not later than 90 days after the date the veteran exits the CARES Act forbearance, a request for such payment, as prescribed in proposed § 36.4807. This would require a servicer to evaluate the veteran for all loss-mitigation options, as well as a partial claim option, and prepare and execute the appropriate loan documents, all before submitting an application to VA. VA notes that 90 days is consistent with FHA's COVID-19 loss-mitigation policies.³⁷ Nevertheless, in recognition of the fact that servicers will be faced with large numbers of borrowers exiting forbearance in the coming year, VA is specifically requesting comments on the proposed timeframe to complete these actions and submit an application for partial claim payment.

Paragraph (b) of this section would state that the amount of the partial claim payment that VA would pay to the servicer, as calculated under proposed paragraph (e), shall not exceed 15 percent of the unpaid principal balance of the guaranteed loan. For the purposes

of proposed paragraph (b), the unpaid principal balance of the guaranteed loan would mean such balance as of the date the veteran entered into a CARES Act forbearance. Paragraph (c) would state that VA would pay only one partial claim payment per guaranteed loan. Paragraph (d) would state that VA would pay only one partial claim payment per veteran.

In proposed paragraph (e)(1), VA would state that because VA would pay only one partial claim payment per guaranteed loan, and only one partial claim payment per veteran, a servicer would be required, in calculating the amount of partial claim payment to be paid by VA to the servicer, to include the full amount of indebtedness that is necessary to bring the guaranteed loan current. In paragraph (e)(2), VA would state that to bring the guaranteed loan current, servicers must include in the partial claim payment the full CARES Act indebtedness, comprising (i) all scheduled but missed monthly payments of principal and interest; and (ii) as applicable, all scheduled but missed monthly escrow payments for real estate taxes and insurance premiums, or where the guaranteed loan documents do not provide for monthly escrowing, all payments the servicer made to real estate tax authorities and insurance providers, on the veteran's behalf, during the CARES Act forbearance.

VA chose to require inclusion of payments of taxes and insurance because veterans are generally obligated, under the terms of the documents that establish a guaranteed loan, to keep current their taxes and insurance premiums. VA internal data shows that, in a little more than 99 percent of the time, servicers of guaranteed loans require borrowers to remit monthly, in addition to their principal and interest payments, the amounts necessary to ensure payment of the full year's tax and insurance obligations. When servicers require such monthly remittances, they hold the funds in escrow accounts until the sums are due. When the veteran's tax and insurance obligations become due, the servicer takes out of the escrow accounts the amounts necessary to keep the taxes up to date and the insurance coverage in place.

If the guaranteed loan documents provide for monthly escrow obligations, the loan can be considered in default when such obligations are missed. The default, and the resultant consequences of default, are the same as if the veteran defaults on payments of principal and interest. Because an objective of the COVID-VAPCP is to help bring

veterans' guaranteed loans current without additional financial hardship (e.g., having to find a way to replenish escrow accounts), VA determined the veteran's obligation could not be fully met unless VA also included in the partial claim calculation the amounts to cover missed escrow payments.

Also, VA is proposing under § 36.4805(e)(3) that, in cases where veterans make monthly escrow payments for taxes or insurance premiums, or both, servicers would be required to include not just the forborne amounts of taxes and insurance escrows, but also those amounts that are due within 31 days of the date the veteran executes the COVID-VAPCP note and security instrument. This is to help ensure a smooth handoff of the full obligation, rather than to learn, perhaps months after the fact, that an escrow payment was missed during the transfer of paperwork.

VA recognizes that there are cases where a veteran does not make escrow payments to the servicer for taxes or insurance premiums. In such cases, corresponding to less than 1 percent of guaranteed loans, the veterans make their payments directly to tax authorities and insurance providers. In such cases, while servicers are not taking funds from escrow accounts to make these payments, servicers still monitor whether the veteran satisfies the veteran's tax and insurance obligations.

Notably, VA requires servicers to obtain and retain a lien of proper dignity; that is, a primary lien, for all guaranteed loans. In that regard, VA can adjust its guaranty and take other actions against servicers that allow, for example, tax authorities to jeopardize the primacy of the guaranteed loan lien. Similarly, VA requires servicers to ensure that the property is adequately insured. In instances where a veteran does not pay taxes or insurance premiums timely, the servicer will advance payments, from its own funds, to avoid a lapse in payment, and to ensure that future guaranty payments, if any, are not jeopardized.

In cases where servicers were forced to advance payment on a veteran's behalf to tax authorities or insurance providers because the veteran (who normally makes payments directly to such entities) did not meet such obligations during a CARES Act forbearance, the veteran would need to repay the servicer to bring the guaranteed loan current. That is why VA proposes to require these obligations

³⁷ Mortgagee Letter 2020-22, *FHA's COVID-19 Loss Mitigation Options*, (Jul. 8, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-22hsgml.pdf>.

in the partial claim payment.³⁸ VA would not, however, authorize inclusion of any such amounts to cover payments that were not due on the date the veteran executes the COVID-VAPCP note and security instrument.

For example, consider a veteran who pays property taxes directly to their local tax office on a semi-annual basis (*i.e.*, on the first of January and of July) and elects a seven-month CARES Act forbearance beginning May 1, 2020. Assuming the veteran does not pay the property tax bill on July 1, 2020, the servicer would advance payment from its own funds. The veteran then exits the CARES Act forbearance on November 1, 2020 and executes the note and security instrument, consistent with proposed § 36.4806, on December 1, 2020. The partial claim payment amount calculated under paragraph (e) would include the amount of taxes paid by the servicer on behalf of the veteran in July. The veteran, however, would be responsible for paying the property tax bill due on January 1, 2021, and no dollar amount would be included in the partial claim payment to account for the fact that the veteran was in forbearance five out of the six months leading up to the next property tax bill.

The previous example contrasts with a veteran whose monthly loan payment to the servicer includes an amount that is set aside in an escrow account to be used for payment of property taxes. Using the same dates as above, the servicer would still advance payment from its own funds to cover the July property tax bill. However, the partial claim payment amount calculated under paragraph (e) will include the monthly scheduled amounts for taxes that should have been paid as part of the monthly loan payments missed for May through December 2020. The servicer would be reimbursed from this amount for the advance payment made in July; the remaining amount would be deposited into the veteran's escrow account and would be available for use when the January 1, 2021, property tax bill is due.

While VA does not intend to create differences between veterans who escrow and who do not escrow, VA notes the complexities associated with determining and disbursing funds to the servicer to cover tax and/or insurance bills that are not yet due and payable. In this regard, allowing for inclusion of such amounts in a partial claim payment might assume that veterans who opt to pay taxes or insurance

premiums directly to taxing authorities or insurance providers set aside funds each month to save up for tax and insurance bills that come due throughout the year. It would also put servicers in a situation where they would be required either to remit the amount paid as part of the partial claim directly to the veteran or make another payment on behalf of the veteran. Both scenarios could create unnecessary confusion. There would also be need for oversight by VA to ensure that any amounts to cover future payments not collected as part of a scheduled monthly loan payment are calculated correctly and ultimately used for their intended purpose (*i.e.*, taxes or insurance, or both).

Given VA's estimate that less than 1 percent of veterans pay their taxes and/or insurance directly to the appropriate authority/provider, rather than through monthly escrow payments to their servicer, VA proposes that, for partial claim payments associated with these veterans' guaranteed loans, a servicer can include only amounts the servicer actually paid on behalf of the veteran during the CARES Act forbearance period. Nevertheless, VA invites public comment on whether VA should cover prorated amounts associated with missed guaranteed loan payments for these veterans and, if so, how VA might best accomplish this for veterans and servicers.

In proposed paragraph (e)(3), VA would also require servicers to include all scheduled monthly payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) that are due within 31 days of the date the veteran executes the note and security instrument described in proposed § 36.4806. VA notes that any such payment due within 31 days of such date may be considered part of the veteran's obligation to bring the guaranteed loan current. As such, VA would require servicers to include this amount in the partial claim payment. From a practical standpoint, this means that a veteran who executes, on January 15, 2021, a COVID-VAPCP note and security instrument described in § 36.4806, would not have a guaranteed loan payment due to the servicer until March 1, 2021, as the February 1, 2021 payment would be due within 31 days and would need to be included in the partial claim amount. (Note: As explained below, the veteran would not have to begin repaying VA under the COVID-VAPCP loan until 2026.)

Additionally, as discussed below, VA proposes to allow servicers to include, if applicable, all scheduled monthly

payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) that were missed after March 1, 2020, but before the veteran was granted a CARES Act forbearance, provided the guaranteed loan was, as of March 1, 2020, current or less than 30 days past due. However, in order to include these payments, the servicer must waive any late charges and fees associated with these missed payments.

VA recognizes that some borrowers may not have been immediately aware of the availability of forbearance under the CARES Act, but nevertheless missed their guaranteed loan payment(s) due to circumstances related to the COVID-19 national emergency before requesting forbearance. The effect of the above requirements would be to enable veterans, whose loans meet the criteria, to bring their guaranteed loans current via the COVID-VAPCP. In that circumstance, the servicer would include, if applicable, certain payments not paid between March 1, 2020, and the date the veteran entered the CARES Act forbearance in the amount of the partial claim payment. Additionally, under proposed paragraph (e)(3)(iii), VA would require servicers to include the actual amount of recording fees, recording taxes, or other charges levied by the recording authority, that must be paid in order to record the security instrument described in proposed § 36.4806.

In proposed paragraph (e)(4), VA would clarify that servicers shall not include any amounts in the partial claim total that are not listed by paragraph (e)(2) or (3). This means servicers could not include any amounts, for example, for fees, penalties, or interest, beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the guaranteed loan, or any late charges and fees that the veteran incurred between March 1, 2020, and the date the veteran entered the CARES Act forbearance.³⁹

In proposed paragraph (e)(5), VA would state that nothing in proposed § 36.4805 shall preclude a veteran from making an optional payment or a servicer from waiving a veteran's indebtedness, such that the amount of partial claim payment would not exceed

³⁸ See 38 U.S.C. 3732(a)(2)(A) (stating that VA's refund authority includes ability to "pay the holder of the obligation the unpaid balance of the obligation plus accrued interest").

³⁹ See Public Law 116-136, section 4022(b)(3) (Mar. 27, 2020) (expressly prohibiting a servicer from charging any "fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract").

the 15 percent cap described in proposed paragraph (b).

As explained above, VA's initial analysis of guaranteed loans in forbearance suggests that a 15 percent cap (based on the unpaid principal balance as of the date the veteran entered into a CARES Act forbearance) would provide enough room for servicers to bring the guaranteed loans current, even if a veteran invokes the maximum period of forbearance; that is, 360 days, under the CARES Act. In the event that the amount needed to bring an eligible veteran's guaranteed loan current exceeds 15 percent of the unpaid principal balance, VA would allow a veteran to make an optional payment or a servicer to waive the veteran's indebtedness, such that the partial claim payment would not exceed the 15 percent cap.

In proposed paragraph (e)(6), VA would explain that if the servicer miscalculates the partial claim amount, resulting in an overpayment to the servicer, the amount of such overpayment shall constitute a liability of the servicer to the United States. The servicer would be required to remit the overpaid amount immediately to VA. In paragraph (e)(7), VA would state that if the servicer miscalculates the partial claim amount, resulting in underpayment (*i.e.*, an amount insufficient to bring the guaranteed loan current), the servicer would be required to waive the difference.

Finally, proposed paragraph (e)(8) would prohibit servicers from including any amounts for a monthly payment that is scheduled to be paid on a date that is more than 31 days after the veteran executes the note and security instrument described in § 36.4806.

Under proposed paragraph (f), the servicer would be required to prepare a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". Using the "Department of Veterans Affairs" or the "United States" is legally incorrect. Furthermore, certain states have their own Departments of Veterans Affairs, and without the explicit distinction made here, confusion could result. Therefore, it is critical that the note and

security instrument read in favor of "the Secretary of Veterans Affairs, an Officer of the United States".

VA would require that the note be consistent with the terms described in proposed § 36.4806 and include all borrowers who are obligated on the guaranteed loan. The security instrument would also be required to include all persons (borrowers, as well as non-borrowers) who hold a title interest in the property securing the guaranteed loan. In proposed paragraph (g), subject to the requirement that the servicer submit the application for a partial claim payment to VA not later than 90 days after the date the veteran exits the CARES Act forbearance, VA would require all loan documents to be fully executed not later than 90 days after the veteran exits the CARES Act forbearance. Proposed paragraph (h) would require the servicer to record the security instrument timely, as prescribed in § 36.4807. Finally, in paragraph (i), the servicer would be prevented from charging, or allowing to be charged, to the veteran any fee in connection with the COVID-VAPCP.

G. Section 36.4806 Terms of the Assistance to the Veteran

If a veteran chooses to accept VA's assistance (*i.e.*, a partial claim payment to the servicer, on the veteran's behalf), the veteran, and all co-borrowers on the guaranteed loan, would be required to execute a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". In addition, all non-borrowers holding a title interest in the property would be required to sign the security instrument. VA would establish the terms of the note and security instrument. Specifically, VA would require the note and security instrument to include the amount to be repaid to the Secretary, by the veteran, to be the amount calculated under § 36.4805(e). The interest rate on the loan created by the note and security instrument would be required to be fixed at 1.00 percent per annum. VA would automatically defer monthly payments for the first 60 months of the loan, meaning that there would be no payment due to the Secretary during the

period of deferment. Interest would accrue on the loan during such deferment and a borrower could, without premium or fee, make payments during such deferment for the entire indebtedness, or any portion thereof, provided that such portion is not less than what would be due for one monthly payment as calculated based on a 60-month term. VA would require the term of the loan to be 120 months. The loan would be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments. VA would require repayment in full immediately upon the veteran's transfer of title to the property, the refinancing, or payment in full otherwise, of the guaranteed loan with which the partial claim payment is associated.

H. Section 36.4807 Application for Partial Claim Payment

In proposed § 36.4807, VA would require the veteran and the servicer to complete an application form prescribed by the Secretary.

Along with a complete application form, the original note (required by proposed § 36.4805) must be included when the servicer submits a request for a partial claim. Not later than 180 days following the date the security instrument (as required by § 36.4805) is fully executed, the servicer would be required to provide VA with the original security instrument and evidence that the servicer recorded such instrument. If the recording authority causes a delay, the servicer could request an extension of time, in writing, from VA.

Servicers would utilize VA's existing loan servicing platform, the VA Loan Electronic Reporting Interface (VALERI) system, to report the partial claim payment event. Servicers would need to report the event within seven days of the borrower's execution of the note required by § 36.4805. Below, VA has identified the specific data elements that servicers must input into VALERI when reporting the partial claim event.

DATA ELEMENT DEFINITIONS

Event name	Data elements	Business definition of data element
Partial claim	Principal amount	Total dollar amount of all scheduled but missed monthly payments of principal, as described in § 36.4805(e)(2)(i) and (e)(3)(ii), and all scheduled monthly payments of principal due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.
Partial claim	Interest amount	Total dollar amount of all scheduled but missed monthly payments of interest, as described in § 36.4805(e)(2)(i) and (e)(3)(ii), and all scheduled monthly payments of interest due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.

DATA ELEMENT DEFINITIONS—Continued

Event name	Data elements	Business definition of data element
Partial claim	Tax payments missed amount	Total dollar amount of all scheduled but missed monthly escrow payments for real estate taxes, as described in § 36.4805(e)(2)(ii) and (e)(3)(ii), and all scheduled monthly escrow payments for real estate taxes due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.
Partial claim	Insurance payments missed amount	Total dollar amount of all scheduled but missed monthly escrow payments for insurance premiums, as described in § 36.4805(e)(2)(ii) and (e)(3)(ii), and all scheduled monthly escrow payments for insurance premiums due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.
Partial claim	Tax advance amount	Total dollar amount of all payments the servicer made to real estate tax authorities on the veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim	Tax advance date	The date on which the servicer made the tax advance on the veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim	Insurance advance amount	Total dollar amount of all payments the servicer made to insurance providers on the veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim	Insurance advance date	The date on which the servicer made the insurance advance on veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim	Recording fees	Total dollar amount of recording fees, recording taxes, or other charges levied by the recording authority, that must be paid in order to record the security instrument, as described in § 36.4805(e)(3)(iii).
Partial claim	Partial claim origination date	The date the borrower executes the note required by § 36.4805.
Partial claim	Partial claim first payment due date	The date on which the first payment on the partial claim loan is due to the Secretary.
Partial claim	Partial claim maturity date	The date on which the final payment on the partial claim loan is due to the Secretary.
Partial claim	Partial claim P&I payment amount	The monthly payment corresponding to principal and interest on the partial claim loan.
Partial claim	Partial claim legal description	The legal description of the property.
Partial claim	Partial claim lien position	The lien position of the partial claim loan.
Partial claim	Second borrower birth date	The birth dates of all co-borrowers.

VA has proposed VA Standard Form 26–10213, *Application for a COVID–19 Veterans Assistance Partial Claim Payment (COVID–VAPCP)*, to collect basic information necessary to identify the borrower(s), the servicer, and the VA loan number for the guaranteed loan for which partial claim payment is being requested. This form would also collect information regarding the date the veteran entered into a CARES Act forbearance, along with the unpaid principal balance on that date, the latter of which is necessary to determine the maximum amount of the partial claim payment under proposed § 36.4805. VA proposes that the servicer must indicate, on the proposed form, the date on which the borrower will resume monthly guaranteed loan payments to the servicer, along with the amount of those monthly payments. The servicer would then provide the amount of partial claim payment being requested, along with the date the note and security instrument were executed, as required under proposed § 36.4805. Finally, both the borrower and servicer would sign statements certifying to the elements required under proposed § 36.4803.

Further documentation would only be reviewed under VA's existing auditing and oversight processes.

I. Section 36.4808 No Effect on the Servicing of the Guaranteed Loan

In § 36.4808, VA would require servicers to continue to service the guaranteed loan in accordance with subpart B of part 36. The liability of the United States for any guaranteed loan would decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the guaranteed loan. A partial claim payment would not affect the guaranty percentage established at the time the guaranteed loan was made. Receipt of a partial claim payment would not eliminate a servicer's option under 38 U.S.C. 3732, to convey to the Secretary the security for the guaranteed loan in the event such loan is foreclosed or if the veteran executes a deed-in-lieu of foreclosure.

J. Section 36.4809 Expiration of the COVID–19 Veterans Assistance Partial Claim Payment Program

In proposed § 36.4809, VA would note that the Secretary will not accept a request for a partial claim payment after the date that is 180 days after the date the COVID–19 national emergency ends (as provided under the National Emergencies Act), unless a veteran's CARES Act forbearance does not end until after such date. In cases where a veteran's CARES Act forbearance ends

after the subject date, the Secretary could still accept a request for a partial claim payment, provided that such request is submitted to the Secretary not later than 90 days after the date the veteran exits the CARES Act forbearance. However, in no event would the Secretary accept a request for a partial claim payment after September 9, 2021.

In proposing September 9, 2021, as the last date on which VA could accept a request for a partial claim payment, VA notes that this date is 180 days from the one-year anniversary of the President's March 13, 2020 COVID–19 national emergency declaration. Under the National Emergencies Act, any "national emergency declared by the President . . . not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the **Federal Register** and transmit to the Congress a notice stating that such emergency is to continue . . ." ⁴⁰ Without clear indication of whether the national emergency will be extended beyond its one-year anniversary, and the future state of the economy and lending

⁴⁰ 50 U.S.C. 1622(d).

industry, VA finds it prudent to publish a termination date that is tied to the one-year anniversary and also provides sufficient notice for VA and servicers to close out any actions related to the program. It also provides sufficient time for VA to extend the sunset date via rulemaking, depending on VA's continued monitoring of the national emergency and its impact on veterans.

K. Section 36.4810 Oversight of the COVID-19 Veterans Assistance Partial Claim Payment Program

In proposed § 36.4810, VA would set forth the parameters for oversight of the COVID-VAPCP. It is an almost verbatim restatement of 38 U.S.C. 3704(d). Specifically, subject to notice and opportunity for a hearing, whenever the Secretary finds with respect to a partial claim payment that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary could refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.⁴¹ Notwithstanding the above, but subject to § 36.4328, the Secretary would not refuse to pay a guaranty or insurance claim on guaranteed loans theretofore entered into in good faith between a veteran and such servicer.⁴² The Secretary could also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.⁴³

As noted above, VA would utilize its existing loan refund process to handle applications for partial claim payments via the VA Loan Electronic Report Interface (VALERI). Upon receipt of an application, VA would conduct a two-tier review and approval of the partial claim payment, utilizing information already in its VALERI systems to verify that the servicer has brought the veteran's guaranteed loan current, that the amount requested is consistent with other proposed requirements, and that VA has received all necessary documentation. Partial claim payments would also be subject to VA's oversight

and audit activities as part of VA's regular monitoring related to adequacy of loan servicing. If VA determines, during an audit, that a servicer did not follow VA's requirements when participating in the COVID-VAPCP, proposed § 36.4810 would expressly authorize appropriate enforcement actions.

L. Conforming Technical Amendments

VA proposes to add new section 38 CFR 36.4336 that would reiterate VA's parameters for oversight of loan servicing. This technical amendment is necessary to ensure that servicers adhere to the parameters outlined in § 36.4804, wherein the servicer must consider the partial claim payment option after evaluating loss-mitigation options in subpart B for feasibility. As with proposed § 36.4810, it would include an almost verbatim restatement of 38 U.S.C. 3704(d). Under this new section, subject to notice and opportunity for a hearing, whenever the Secretary finds that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.⁴⁴ Notwithstanding the above, but subject to § 36.4328, the Secretary would not refuse to pay a guaranty or insurance claim on guaranteed loans theretofore entered into in good faith between a veteran and such servicer.⁴⁵ The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.⁴⁶ VA also proposes to amend 38 CFR 36.4333(a)(2) to ensure that records referenced in proposed §§ 36.4336 and 36.4810 are included in VA's maintenance of record requirements. Currently, holders are required to "maintain records supporting their decision to approve any loss-mitigation option for which an incentive is paid in accordance with § 36.4319(a)." ⁴⁷ VA

proposes to delete the phrase "for which an incentive is paid in accordance with § 36.4319(a)." To ensure that VA's partial claim payment option is covered, VA would add a sentence noting that the holder would be required to maintain records supporting their decision to pursue a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program as established by proposed subpart F. Regarding the length of the recordkeeping requirement, VA proposes to retain an element of the status quo, namely that such records shall be retained a minimum of three years from the date of any incentive paid in accordance with § 36.4319(a) or the date the veteran's guaranteed loan is made current via the COVID-VAPCP, whichever is later. Finally, VA proposes to amend the specific authority for § 36.4333 to include 38 U.S.C. 3704(d), as this section requires the maintenance of adequate loan accounting records.

VI. Specific Questions for Comment

While VA welcomes comments on all aspects of this proposed rule, VA specifically requests comments on the following:

1. Is the servicer's 90-day deadline as proposed by § 36.4805 to submit the request for partial claim payment reasonable? If not, what would be a reasonable timeframe, recognizing VA's goal of ensuring that veterans exiting a CARES Act forbearance are evaluated and processed for home retention actions in a timely manner?
2. Is information collected as part of a complete loss-mitigation evaluation adequate to determine a borrower(s) monthly residual income as described by 38 CFR 36.4340(e)? If not, what additional information would be needed from the borrower(s)?
3. Understanding that many veterans and servicers are in need of VA's assistance, but also that veterans, servicers, and other stakeholders would need time to understand and implement VA's proposed regulatory requirements, VA seeks public comment as to how a final rule that is not effective for 30 or 60 days following publication might negatively impact veterans, servicers, and other stakeholders. VA also requests input as to whether there would be enough time for industry implementation of the partial claim payment program if VA were to publish a final rule that is effective 7 days after publication. Please be specific in communicating any concerns, including any additional costs associated with accelerated timetables for training, technology upgrades, etc.

⁴¹ 38 U.S.C. 3704(d).

⁴² Id.

⁴³ Id.

⁴⁴ 38 U.S.C. 3704(d).

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ 38 CFR 36.4333(a)(2).

4. In the case of a veteran who pays real estate taxes and/or insurance premiums directly to a tax authority or insurance provider, should VA allow the partial claim payment to include amounts corresponding to what will be due on tax and/or insurance bills, where the bills were not due and payable during the veteran's CARES Act forbearance? If so, should such amounts be prorated to correspond only to the months during which the veteran was under forbearance? How should servicers handle monies in cases where such future tax and insurance premium payments are not due and payable at the time of the partial claim payment, resulting in an excess of funds being paid to the servicer? Should servicers remit such amounts directly to the veteran? Or should servicers be required to hold such amounts in escrow until the bills become due and payable? How should VA conduct oversight of these activities?

VII. Explanation of Comment Period

VA is issuing this proposed rule with a 30-day public comment period. The Administrative Procedure Act (APA) does not specify the length of the comment period, requiring only that an agency give the public an "opportunity to participate."⁴⁸ Agencies commonly allow 30 to 60 days for comment on a proposed rule. VA is shortening the comment period to 30 days because this rule is proposed in response to heightened concerns surrounding the COVID-19 national emergency and outcomes for veterans as they exit CARES Act forbearance periods.

Under section 4022 of the CARES Act, enacted on March 27, 2020, borrowers may obtain up to 180 days of forbearance on their Federally backed loans.⁴⁹ VA-guaranteed loans are considered Federally backed. Section 4022 also provides borrowers the option of extending the forbearance for an additional 180 days.⁵⁰ Section 4022 allows borrowers to shorten their periods of forbearance. This means that some borrowers may have already exited CARES Act forbearances and more borrowers could do so at any time.

As initial CARES Act forbearance periods near their end, VA stakeholders confront numerous decisions that have far-reaching consequences. Many veterans, for example, must decide whether to request additional forbearance and watch their forbearance indebtedness grow, or attempt to resume

their regularly scheduled monthly payments, despite potential hardships and uncertainties caused by the national emergency. VA's partial claim assistance may well be the determining factor for certain veterans, affecting the extent to which they can recover financially from the crisis. Similarly, servicers must evaluate their liquidity positions and other factors to determine how to make the advances necessary for investor requirements. Some servicers may even be questioning whether they can stay afloat, which ultimately harms not just the servicer, but also the veterans whose guaranteed loans are being serviced. Many of these servicers will find that the assistance VA is proposing for veterans may simultaneously be the servicer's lifeline, thereby affording veterans prudent and uninterrupted loan servicing.

Despite the urgency noted above, VA strongly believes that the novelty of this program, including the differences between VA's proposed partial claim payment program and other federal agencies' partial claim programs, necessitates an opportunity for public input before finalization and implementation. VA did consider implementing this program via an interim final rule but decided stakeholder feedback was needed in advance of implementation in a number of specific areas, as addressed in section VI above. Further, VA recognizes that allowing for servicers to communicate potential concerns with VA's rule ahead of implementation would ensure veterans are better served when the final rule goes into effect. Balancing the need for a final regulation against the need for public input on this new partial claim option, VA believes that a 30-day public comment period is appropriate to ensure VA can gather input from interested parties while accelerating the process toward a final rule to assist veterans.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has

determined that this rule is an economically significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its Regulatory Impact Analysis (RIA) are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). To assess whether the proposed rule can be expected to have a "significant economic impact" on small entities, VA considers the annual cost of the rule for small entities compared to their annual revenue. VA was able to determine the size of 89 out of 108 companies that service VA-guaranteed loans in CARES Act forbearances, where the borrowers could likely qualify for assistance via a partial claim. VA made this determination using the size standards from the Small Business Administration (SBA).⁵¹ ⁵² VA used data from InfoUSA and Factiva (two business data providers) along with data from the Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA). Out of the 89 servicers for which VA has sufficient data to determine their size, 26 (or 29.21 percent) are considered small by SBA standards. The average annual revenue of those 26 small servicers is \$11.98 million.⁵³

⁵¹ VA uses data from InfoUSA and Factiva to determine the industry (as identified by the primary NAICS code) for the active VA-guaranteed loan servicers. For industries where size standards are determined by the average annual revenue, VA compares the revenue of each servicer in these industries, as reported in InfoUSA and Factiva, to the SBA annual revenue threshold for small businesses. For industries where size standards are determined by assets, VA compares the relevant SBA threshold for small businesses to asset data from the FDIC for servicers with primary NAICS codes 522110 (Commercial Banking) and 522120 (Savings Institutions), and asset data from the NCUA for lenders with a primary NAICS code of 522130 (Credit Unions).

⁵² U.S. Small Business Administration, *SBA Table of Size Standards*, (2019), https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.

⁵³ VA averages the sales volumes from Factiva for all servicers considered small, including those primarily considered commercial banks, savings institutions, and credit unions.

⁴⁸ 5 U.S.C. 553(c).

⁴⁹ Public Law 116–136, section 4022(b)(2) (Mar. 27, 2020).

⁵⁰ *Id.*

To determine the economic burden of the proposed rule on small entities, VA compares the average annual costs of the rule that fall on small servicers to the average annual revenue of the small servicers. The costs of the rule come from rule familiarization and the Paperwork Reduction Act (PRA) costs, which include the costs for servicers to complete the VA form 26–10213 and prepare and execute the original note and security instrument. The cost of rule familiarization is \$99.90 for each guaranteed loan servicer, including the small servicers. The PRA cost estimates vary across servicers depending on how many CARES Act forbearance loans they service that either meet or could potentially meet COVID–VAPCP requirements.

As described in the impact analysis, the lower and upper bound estimates for the number of borrowers who will likely qualify for assistance via a partial claim are 33,644 and 60,512, respectively. VA estimates that 28.538 percent of those loans are serviced by small entities, or between 9,601 and 17,269 loans. Given the total PRA cost for servicers of \$54.96 per loan, the total PRA cost per average small servicer is \$20,295.04 at the lower bound and \$36,504.01 at the upper bound.

The total cost of this rule per average small VA-guaranteed loan servicer ranges from \$20,395 (\$99.90 + \$20,295.04) to \$36,604 (\$99.90 + \$36,504.01), while the average annual revenue to small servicers is \$11.98 million. VA considers a rule to have a “significant economic impact” when the total annual cost associated with the rule for a small entity is equal to or exceeds 1 percent of annual revenue. The total upper bound cost to small servicers is 0.30 percent of the average annual revenue to small servicers. This ratio is calculated using the total costs on small servicers, rather than the total annual costs. In subsequent years, absent the rule familiarization costs and with the dispersion of the PRA costs, the average annual cost to small servicers is even below that level. Thus, the rule is not expected to have a significant economic impact on the small servicers.

To assess whether the rule can be expected to affect a “substantial number of small entities,” VA considers a ratio that captures the incidence of small VA servicers in the potential universe of servicers. Specifically, VA uses the ratio of small VA servicers with guaranteed loans in CARES Act forbearance that are likely to participate in the partial claim program to the total number of VA servicers with guaranteed loans in CARES Act forbearance that are likely to

participate in the partial claim program. As described above, 26 VA servicers out of the 89 servicers with sufficient data available are small (29.21 percent). Therefore, the proposed rule is expected to affect a substantial number of small entities.

While the proposed rule is expected to affect a substantial number of small entities, the impact will not be economically significant. On this basis, the Secretary certifies that the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

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

Paperwork Reduction Act

This proposed rule includes provisions constituting both revised and new collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA 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. Proposed §§ 36.4333, 36.4336, 36.4803, 36.4805, 36.4806, 36.4807, and 36.4810 contain collections of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of

Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503 or submitted through www.Regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900–AR05.”

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department’s estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections 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, such as permitting electronic submission of responses.

The collections of information contained in 38 CFR 36.4333, 36.4336, and 36.4810 are described immediately following this paragraph, under its respective title.

Title: Maintenance of Records.
OMB Control No.: 2900–0515.
CFR Provisions: 38 CFR 36.4333, 36.4336, and 36.4810.

Summary of collection of information: These requirements are covered under OMB control number 2900–0515. VA proposes to revise this information collection to include the proposed revisions to § 36.4333 and new proposed §§ 36.4336 and 36.4810. Under current 38 CFR 36.4333, VA requires holders to maintain and lenders to retain all records pertaining to loans guaranteed by VA. Under this same authority, VA has a right to inspect, examine, or audit, at a reasonable time and place, such records to ensure program participants are in compliance with applicable laws, regulations, policies, procedures, and contract provisions. The revised collection of information in proposed 38 CFR

36.4333 would require holders to maintain records supporting their decision to approve any home retention option exercised by the servicer and borrower. The holder would also be required to maintain records supporting their decision to pursue a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program. VA would require those records to be retained a minimum of 3 years from the date of any incentive paid in accordance with § 36.4319(a) or, in the case of a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program, the date the veteran's guaranteed loan is made current under such program, whichever is later, and shall include, but not be limited to, credit reports, verifications of income, employment, assets, liabilities, and other factors affecting the obligor's credit worthiness, worksheets, and other documents supporting the holder's decision. In § 36.4336, VA would be authorized to take action if it found that a servicer failed to maintain adequate loan accounting records, to demonstrate proper ability to service loans adequately, to exercise proper credit judgment, or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government. In § 36.4810, VA would extend that authority to a partial claim payment.

Description of need for information and proposed use of information: The information collected as a result of revisions associated with this rulemaking will be used by VA to conduct servicer oversight, including the COVID-19 Veteran Assistance Partial Claim Payment program.

Description of likely respondents: The respondent population under the current information collection is comprised of holders and lenders, particularly, the individuals with oversight roles in the company, such as a compliance officer. There is no change to this section as a result of this rulemaking.

Estimated number of respondents: Under the current information collection, VA estimates an ongoing hour burden associated with holders and lenders submitting files to VA in association with normal audit activities. VA also estimates an hour burden associated with lenders who may voluntarily submit loan records to VA in a computable data format as it begins to pilot that technology. VA does not anticipate additional submissions as a result of the proposed revisions to §§ 36.4333, 36.4336, and 36.4810.

Estimated frequency of responses: Under the current information collection, VA estimates a one-time response to an audit request or voluntary electronic submission. VA does not anticipate an increase in the frequency of responses.

Estimated average burden per response: The revisions proposed in this rule would neither increase nor decrease the average burden per response, which in this case would be the time a servicer spends uploading records requested by VA in conjunction with servicer audit and oversight activities. Similarly, VA notes that recordkeeping requirements related to servicing and loss-mitigation activities are consistent with customary and usual business practices for loan holders (servicers); VA therefore assigns no additional time burden to servicers in maintaining such records, including those contemplated by the revisions proposed in this rule.

Estimated total annual reporting and recordkeeping burden: VA does not, with this proposed rulemaking, anticipate any change in the total annual reporting and recordkeeping burden. In that regard, VA's proposed revisions to this existing information collection merely expand the documentation/information that servicers must keep in their records in regard to existing VA-guaranteed loans and loss-mitigation activities associated with those loans, the cost of which falls within customary and usual business practices. Moreover, VA would request such records for the purpose of conducting oversight of VA's proposed COVID-VAPCP under existing audit and oversight programs with no anticipated impact in the number of loans for which servicers will have to provide VA with additional information.

Estimated cost to respondents per year: VA anticipates no additional costs to respondents based on proposed revisions associated with this rulemaking.

The collections of information contained in 38 CFR 36.4803, 36.4805, 36.4806, and 36.4807 are described immediately following this paragraph, under its respective title.

Title: Application for a COVID-19 Veterans Assistance Partial Claim Payment (COVID-VAPCP).

OMB Control No.: 2900-XXXX (NEW).

CFR Provisions: 38 CFR 36.4803, 36.4805, 36.4806, and 36.4807.

Summary of collection of information: The new collection of information in proposed 38 CFR 36.4803 would require the veteran to certify that the veteran

can resume making scheduled monthly payments, on time and in full, and that the veteran occupies, as the veteran's residence, the property securing the guaranteed loan for which the partial claim is requested. In § 36.4803, the servicer would be required to certify that the veteran's monthly residual income, as described in § 36.4340(e), will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and other monthly obligations have been met. In § 36.4805, the servicer would be required to prepare a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". VA would require that the note be consistent with the terms described in § 36.4806 and include all borrowers who are obligated on the guaranteed loan. The security instrument would be required to include all persons (borrowers, as well as non-borrowers) who have a title interest in the property securing the guaranteed loan. The servicer would be required to record the security instrument timely, as prescribed in § 36.4807.

In § 36.4806, VA would require the veteran, and all co-borrowers on the guaranteed loan, to execute a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". VA would require specific terms in the note and security instrument. Specifically, VA would require the note and security instrument to include the amount to be repaid to the Secretary, by the veteran, to be the amount calculated under § 36.4805(e). The interest rate on the loan created by the note and security instrument would be required to be fixed at 1.00 percent per annum. VA would automatically defer monthly payments for the first 60 months of the loan, meaning that there would be no payment due to the Secretary during the period of deferment. A borrower could, without premium or fee, make payments during such deferment for the entire indebtedness, or any portion thereof, provided that such portion is not less than what would be due for one monthly payment as calculated based on a 60-month term. VA would require the term of the loan to be 120 months. The loan would be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments. VA would require repayment in full immediately upon the veteran's transfer of title to the property, the refinancing, or payment in full

otherwise, of the guaranteed loan with which the partial claim payment is associated.

In § 36.4807, VA would require the veteran and the servicer to complete an application form prescribed by the Secretary. VA would also state that along with the completed form, the servicer must provide VA with the original note required by § 36.4805. Not later than 180 days following the date the security instrument, required by § 36.4805, is fully executed, the servicer would be required to provide VA with the original security instrument and evidence that the servicer recorded such instrument. If the recording authority causes a delay, VA would allow the servicer to request an extension of time, in writing, from VA. The servicer would also be required to report information related to the partial claim application to VA electronically.

VA proposes to collect information for the partial claim payment application, including the certifications outlined in 36.4803, through use of a new standardized form. Proposed VA form 26–10213, *Application for a COVID–19 Veterans Assistance Partial Claim Payment (COVID–VAPCP)*, would collect basic information necessary to identify the borrower(s), the servicer, and the VA loan number for the guaranteed loan for which partial claim payment is being requested. This form would also collect information regarding the date the veteran entered into a CARES Act forbearance, along with the unpaid principal balance on that date, the latter of which is necessary to determine the maximum amount of the partial claim payment under § 36.4805. VA proposes on this form that the servicer must indicate, on the proposed form, the date on which the borrower will resume monthly guaranteed loan payments to the servicer, along with the amount of those monthly payments. The servicer would then provide the amount of partial claim payment being requested, along with the date the note and security instrument were executed, as required under § 36.4805. Finally, both the borrower and servicer would sign statements certifying to those elements required under § 36.4803.

Description of need for information and proposed use of information: The information will be used by VA to determine if the veteran qualifies for a partial claim payment and, if qualified, to administer the payment.

Description of likely respondents: Veterans and servicers pursuing a partial claim payment.

Estimated number of respondents: VA notes that due to the unprecedented

nature of the current national emergency and the novelty of VA's partial claim payment program, there is some uncertainty as to how many respondents would be impacted by this proposed rulemaking. As discussed in VA's regulatory impact analysis, VA has estimated a lower/upper bound of estimated partial claim payments associated with this temporary program that corresponds directly to those who would be subject to the paperwork requirements associated with this rulemaking. VA has further estimated a distribution of these partial claim payments (or respondents) over fiscal years 2021 and 2022. Given that this proposed temporary program is limited to help veterans recover financially from the COVID–19 national emergency, VA does not anticipate any partial claim payments (or applications) will be received in FY 2023 and beyond. To ensure that VA's paperwork burden estimate coincides with its regulatory impact analysis, VA has presented a range of paperwork burden estimates. However, for purposes of calculating annual reporting and recordkeeping costs, VA will utilize the average of these estimates, annualized over two years (FY 2021 and 2022).

Using the lower/upper bound from VA's regulatory impact analysis, VA estimates the total number of respondents would fall between 33,644 and 60,512. Over the two-year period of this information collection, the annual number of respondents is therefore estimated to fall between 16,822 and 30,256, with an average annual number of respondents equal to 23,539.

Estimated frequency of responses: One time per application for partial claim payment.

Estimated average burden per response: 60 minutes for veterans (includes 15 minutes to complete VA form 26–10213, 15 minutes to gather and submit any additional financial information needed to enable the servicer to make an assessment under 38 CFR 36.4340(e), and 30 minutes to understand and execute the original note and security instrument). 90 minutes for servicers (includes 15 minutes to complete VA form 26–10213, 15 minutes to review additional financial information provided by the veteran to assess residual income under 38 CFR 36.4340(e), and 1 hour to prepare and execute the original note and security instrument).

Estimated total annual reporting and recordkeeping burden: VA estimates the total annual reporting and recordkeeping burden falls between 42,055 and 75,640 burden hours. Using VA's average annual number of

respondents (23,539), VA estimates a total annual reporting and recordkeeping burden of 58,847 hours (23,539 hours for veterans; 35,308 hours for servicers).

Estimated cost to respondents per year: VA estimates the annual cost to respondents falls between \$1,357,198 and \$2,441,053. Using VA's average annual number of respondents, VA estimates the total cost to all respondents to be \$1,899,108 per year.⁵⁴ (23,539 burden hours for veterans × \$25.72 per hour) + (35,308 burden for servicers × \$36.64 per hour).

Title: VA Loan Electronic Reporting Interface (VALERI) System.

OMB Control No.: 2900–0021.

CFR provisions: 38 CFR part 36, subpart B, and 38 CFR 36.4807.

Summary of collection of information: The information collection requirements under 38 CFR part 36, subpart B, which include reporting requirements for servicers, are currently assigned OMB control number 2900–0021 and set to expire on November 30, 2020. In proposed § 36.4807, VA would require servicers to report a partial claim event to VA through its existing electronic loan servicing system. This new reporting requirement therefore requires revisions to the existing information collection under control number 2900–0021. VA therefore seeks to renew and revise this information collection, to include proposed revisions to § 36.4807.

The servicer is already required to report information associated with reinstating the loan as current, as outlined at 38 CFR 36.4317(c)(15), and covered by the existing information collection. VA proposes to revise its information collection to collect new data elements specific to the servicer executing a partial claim. This new information would be transmitted through a VALERI Events Bulk Upload template.

Description of need for information and proposed use of information: Regarding the information requested under proposed 38 CFR 36.4807, the information will be used by VA to determine if the veteran qualifies for a partial claim option and, if qualified, to administer the payment to the servicer on behalf of the veteran. It will also serve as a way for VA to track the occurrence of the partial claim home retention event.

⁵⁴ To estimate costs associated with servicer respondent burden, VA used the Bureau of Labor Statistics (BLS) median hourly wage for loan officers (occupation code 13–2072) of \$36.64 per hour. To estimate costs associated with veteran respondent burden, VA used the median hourly wage for all occupations of \$25.72 per hour. This information is available at https://www.bls.gov/oes/current/oes_nat.htm#13-0000.

Description of likely respondents: The renewal encompasses all servicers reporting servicing activity on loans to VA. The revisions encompass a subset of this group; specifically, servicers requesting a partial claim payment on behalf of a veteran.

Estimated number of respondents: VA does not anticipate any change in the estimated number of respondents based on VA's renewal request or proposed revisions to this information collection requirement. The current estimated number of respondents reflects the estimated number of VA servicers required to submit loan servicing information to VA annually. As such, the servicers who will submit information in conjunction with the partial claim payment option are contemplated in the current estimated respondent population.

Estimated frequency of responses: VA does not anticipate any change in the estimated frequency of responses based on VA's renewal request or proposed revisions to this information collection as servicers are required to report activity on every VA-guaranteed loan in their servicing portfolio, regardless of the home retention options pursued.

Estimated average burden per response: VA does not anticipate any change in the average burden per response based on VA's renewal request or proposed revisions to this information collection. Under the existing information collection, VA estimates a one-minute respondent burden as the information reported through VALERI is automated.

Estimated total annual reporting and recordkeeping burden: VA does not anticipate any change in the total annual reporting and recordkeeping burden currently associated with this information collection. VA's proposed revisions to this existing information collection merely expand the list of possible home retention events to be reported by servicers to include the partial claim option.

Estimated cost to respondents per year: There are no new or increased costs to respondents based on this renewal request or proposed revisions to this information collection. As noted above, there is no change in the estimated average number of respondents and average burden per response for reporting activities associated with this information collection. VA acknowledges that servicers will be required to incorporate new information into the VALERI Events Bulk Upload template within their current servicing platforms. However, VA estimates a de minimis cost for servicers because servicers

already utilize VALERI and the Events Bulk Upload template format to report all servicing activity to VA.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.114, Veterans Housing—Guaranteed and Insured Loans.

List of Subjects in 38 CFR Part 36

Condominiums, Housing, Individuals with disabilities, Loan programs—housing and community development, Loan programs—veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

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 October 15, 2020, for publication.

Jeffrey M. Martin,

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

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 36 as set forth below:

PART 36—LOAN GUARANTY

■ 1. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

■ 2. Amend § 36.4333 by revising paragraph (a)(2) and the two parenthetical sentences at the end of the section to read as follows:

§ 36.4333 Maintenance of records.

(a) * * *

(2) The holder shall maintain records supporting their decision to approve any loss mitigation option. The holder shall maintain records supporting their decision to pursue a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program established under subpart F of this part. Such records shall be retained a minimum of 3 years from the date of any incentive paid in accordance with § 36.4319(a) or, in the case of a partial

claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program, the date the veteran's guaranteed loan is made current under such program, whichever is later, and shall include, but not be limited to, credit reports, verifications of income, employment, assets, liabilities, and other factors affecting the obligor's credit worthiness, work sheets, and other documents supporting the holder's decision.

* * * * *

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c)(1), 3704(d))

■ 3. Add § 36.4336 to read as follows:

§ 36.4336 Oversight of servicing.

(a) Subject to notice and opportunity for a hearing, whenever the Secretary finds that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.

(b) Notwithstanding paragraph (a) of this section, but subject to § 36.4328, the Secretary will not refuse to pay a guaranty or insurance claim on guaranteed loans theretofore entered into in good faith between a veteran and such servicer.

(c) The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0515)

(Authority: 38 U.S.C. 3703, 3704(d), 3720)

■ 4. Add subpart F to read as follows:

Subpart F—COVID-19 Recovery Measures

Sec.

36.4800 Applicability.

36.4801 Definitions.

36.4802 General purpose of the COVID-19 Veterans Assistance Partial Claim Payment program.

- 36.4803 General requirements of the COVID-19 Veterans Assistance Partial Claim Payment program.
- 36.4804 Partial claim payment as last resort.
- 36.4805 Terms of the partial claim payment.
- 36.4806 Terms of the assistance to the veteran.
- 36.4807 Application for partial claim payment.
- 36.4808 No effect on the servicing of the guaranteed loan.
- 36.4809 Expiration of the COVID-19 Veterans Assistance Partial Claim Payment program.
- 36.4810 Oversight of the COVID-19 Veterans Assistance Partial Claim Payment program.

§ 36.4800 Applicability.

This subpart applies to all loans guaranteed by VA, to the extent such loans are affected by the COVID-19 national emergency.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4801 Definitions.

The following definitions of terms apply to this subpart:

Alternative to foreclosure means an alternative to foreclosure for which the Secretary may pay an incentive under § 36.4319. These alternatives include compromise sale (sometimes called a short sale) and deed-in-lieu of foreclosure.

CARES Act forbearance means forbearance of scheduled monthly guaranteed loan payments, as granted to a veteran under section 4022 of the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136).

CARES Act indebtedness means the dollar amount the veteran is obligated to pay under the guaranteed loan terms, but that is not collected during a CARES Act forbearance.

Guaranteed loan means a loan guaranteed under chapter 37 of title 38, United States Code.

Loss-mitigation option means a loss-mitigation option for which the Secretary may pay an incentive under § 36.4319. These options include a repayment plan, special forbearance, and loan modification.

Secretary means the Secretary of Veterans Affairs, or any employee of the Department of Veterans Affairs (VA) authorized to act in the Secretary's stead.

Servicer means, for the purposes of this subpart, the holder, servicer, or servicing agent, as defined in § 36.4301. The terms can apply jointly or severally, or jointly and severally.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4802 General purpose of the COVID-19 Veterans Assistance Partial Claim Payment program.

The COVID-19 Veterans Assistance Partial Claim Payment program is a temporary program to help veterans who have suffered a COVID-19 financial hardship. Notwithstanding the requirements elsewhere in this part regarding payment of a guaranty claim or refunding a loan, VA may assist a veteran exiting a CARES Act forbearance by purchasing from the servicer the veteran's CARES Act indebtedness. Such a purchase is called a partial claim payment. In exchange for VA's partial claim payment on behalf of the veteran, the veteran must agree to repay the Secretary, in the amount of such partial claim payment, upon loan terms established by the Secretary.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4803 General requirements of the COVID-19 Veterans Assistance Partial Claim Payment program.

The following general requirements must be met before the Secretary will allow for participation in the COVID-19 Veterans Assistance Partial Claim Payment program:

(a) The loan for which a partial claim payment is requested must be a guaranteed loan that was, on March 1, 2020, either current or less than 30 days past due;

(b) The veteran on whose behalf VA will pay a partial claim payment both received a CARES Act forbearance and missed at least one scheduled monthly payment;

(c) There remains unpaid at least one scheduled monthly payment that the veteran did not make while under a CARES Act forbearance;

(d) The veteran certifies that the veteran can resume making scheduled monthly payments, on time and in full, and that the veteran occupies, as the veteran's residence, the property securing the guaranteed loan for which the partial claim payment is requested;

(e) The servicer determines and certifies that the veteran's monthly residual income, as described in § 36.4340(e), will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and other monthly obligations have been met; and

(f) The veteran executes, in a timely manner, all loan documents necessary to establish an obligation to repay the Secretary for the partial claim payment.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4804 Partial claim payment as last resort.

(a) The Veterans Assistance Partial Claim Payment program is designed to address the financial hardships due, directly or indirectly, to the COVID-19 national emergency. Servicers must consider all possible loss-mitigation options. VA expects that the partial claim payment option will be considered only as a last resort, after a servicer has evaluated loss-mitigation options for feasibility.

(b) If the veteran notifies the servicer that the veteran does not want to retain ownership of the property securing the guaranteed loan, the servicer may immediately proceed to offering an alternative to foreclosure.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4805 Terms of the partial claim payment.

(a) In order for a partial claim payment to be payable, the servicer must submit to the Secretary, not later than 90 days after the date the veteran exits the CARES Act forbearance, a request for such payment, as prescribed in § 36.4807.

(b) The amount of the partial claim payment that VA will pay to the servicer, as calculated under paragraph (e) of this section, shall not exceed 15 percent of the unpaid principal balance of the guaranteed loan. For the purposes of this paragraph (b), the unpaid principal balance of the guaranteed loan means such balance as of the date the veteran entered into a CARES Act forbearance.

(c) VA will pay only one partial claim payment per guaranteed loan.

(d) VA will pay only one partial claim payment per veteran.

(e)(1) Because VA will pay only one partial claim payment per guaranteed loan, and only one partial claim payment per veteran, a servicer must, when calculating the amount of partial claim payment to be paid by VA to the servicer, include the full amount of indebtedness that is necessary to bring the guaranteed loan current.

(2) To bring the guaranteed loan current, servicers must include the full CARES Act indebtedness, comprising—

(i) All scheduled but missed monthly payments of principal and interest; and

(ii) As applicable, all scheduled but missed monthly escrow payments for real estate taxes and insurance premiums, or where the guaranteed loan documents do not provide for monthly escrowing, all payments the servicer made to real estate tax authorities and insurance providers, on the veteran's behalf, during the CARES Act forbearance.

(3) Also in bringing the guaranteed loan current, servicers must include—

(i) All scheduled monthly payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806;

(ii) If applicable, all scheduled monthly payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) that were missed after March 1, 2020, but before the veteran was granted the CARES Act forbearance; and

(iii) The actual amount of recording fees, recording taxes, or other charges levied by the recording authority, that must be paid in order to record the security instrument described in § 36.4806.

(4) Except for amounts identified in paragraphs (e)(2) and (3) of this section, servicers shall not include any amounts (e.g., fees, penalties, or interest) beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the guaranteed loan.

(5) Nothing in this section shall preclude a veteran from making an optional payment or a servicer from waiving a veteran's indebtedness, such that the amount of partial claim payment would not exceed the 15 percent cap described in paragraph (b) of this section.

(6) If the servicer miscalculates the partial claim amount, resulting in an overpayment to the servicer, the amount of such overpayment shall constitute a liability of the servicer to the United States. The servicer must remit the overpaid amount immediately to VA.

(7) If the servicer miscalculates the partial claim amount, resulting in underpayment (i.e., an amount insufficient to bring the guaranteed loan current), the servicer must waive the difference.

(8) Servicers shall not include any amounts for a monthly payment that is scheduled to be paid on a date that is more than 31 days after the veteran executes the note and security instrument described in § 36.4806.

(f) The servicer must prepare a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States".

(1) The note must be consistent with the terms described in § 36.4806 and include all borrowers who are obligated on the guaranteed loan; and

(2) The security instrument must include all persons (borrowers, as well as non-borrowers) who hold a title

interest in the property securing the guaranteed loan.

(g) Subject to paragraph (a) of this section, all loan documents must be fully executed not later than 90 days after the veteran exits the CARES Act forbearance.

(h) The servicer must record the security instrument timely, as prescribed in § 36.4807.

(i) The servicer must not charge, or allow to be charged, to the veteran any fee in connection with the COVID-19 Veterans Assistance Partial Claim Payment program.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4806 Terms of the assistance to the veteran.

(a) If a veteran chooses to accept VA's assistance (i.e., a partial claim payment to the servicer, on the veteran's behalf), the veteran, and all co-borrowers on the guaranteed loan, must execute a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States".

(b) Specific terms of the note and security instrument shall include the following:

(1) The amount to be repaid to the Secretary, by the veteran, is the amount calculated under § 36.4805(e);

(2) The interest rate on the loan created by the note and security instrument must be fixed at 1.00 percent per annum;

(3)(i) Monthly payments are automatically deferred for the first 60 months of the loan, meaning that there is no payment due to the Secretary during the period of deferment;

(ii) Interest will accrue on the loan during such deferment; and

(iii) A borrower may, without premium or fee, make payments during such deferment for the entire indebtedness, or any portion thereof provided that such portion is not less than what would be due for one monthly payment as calculated based on a 60-month term;

(4) The term of the loan must be 120 months;

(5) The loan shall be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments; and

(6) Repayment in full is required immediately upon—

(i) The veteran's transfer of title to the property; or

(ii) The refinancing, or payment in full otherwise, of the guaranteed loan with which the partial claim payment is associated.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4807 Application for partial claim payment.

(a) The veteran and the servicer must complete an application form prescribed by the Secretary.

(b) Along with a complete application form, the servicer must provide VA with the original note required by § 36.4805. Not later than 180 days following the date the security instrument, required by § 36.4805, is fully executed, the servicer must provide VA with the original security instrument and evidence that the servicer recorded such instrument. If the recording authority causes a delay, the servicer may request an extension of time, in writing, from VA.

(c) Servicers must report a partial claim event to VA through VA's existing electronic loan servicing system within seven days of the borrower's execution of the note required by § 36.4805.

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers XXXX-XXXX and XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4808 No effect on the servicing of the guaranteed loan.

(a) Servicers must continue to service the guaranteed loan in accordance with subpart B of this part.

(b) The liability of the United States for any guaranteed loan shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the guaranteed loan. A partial claim payment does not affect the guaranty percentage established at the time the guaranteed loan was made.

(c) Receipt of a partial claim payment shall not eliminate a servicer's option under 38 U.S.C. 3732 to convey to the Secretary the security for the guaranteed loan.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4809 Expiration of the COVID-19 Veterans Assistance Partial Claim Payment program.

(a) Subject to paragraph (b) of this section, the Secretary will not accept a request for a partial claim payment after the date that is 180 days after the date the COVID-19 national emergency ends (as provided under the National Emergencies Act).

(b) If a veteran's CARES Act forbearance does not end until after the date described in paragraph (a) of this section, the Secretary may still accept a request for a partial claim payment, provided that such request is submitted to the Secretary not later than 90 days after the date the veteran exits the CARES Act forbearance.

(c) Notwithstanding paragraphs (a) and (b) of this section, the Secretary will not accept a request for a partial claim payment after September 9, 2021.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

§ 36.4810 Oversight of the COVID-19 Veterans Assistance Partial Claim Payment program.

(a) Subject to notice and opportunity for a hearing, whenever the Secretary

finds with respect to a partial claim payment that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.

(b) Notwithstanding paragraph (a) of this section, but subject to § 36.4328, the Secretary will not refuse to pay a guaranty or insurance claim on

guaranteed loans theretofore entered into in good faith between a veteran and such servicer.

(c) The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703, 3704(d), 3720)

[FR Doc. 2020-26964 Filed 12-8-20; 8:45 am]

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Notices

Federal Register

Vol. 85, No. 237

Wednesday, December 9, 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

Virtual Public Listening Session; Natural Resources Conservation Service Programs and Western Water Quantity

Correction

In notice document 2020–26525 appearing on pages 78114–78115 in the issue of December 3, 2020, make the following correction:

On page 78114, in the third column, under the DATES heading, in the 9th line, “December 18, 2020” should read “December 8, 2020.”

[FR Doc. C1–2020–26525 Filed 12–7–20; 11:15 am]

BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Service Annual Survey

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 21, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: U.S. Census Bureau.

Title: Service Annual Survey.

OMB Control Number: 0607–0422.

Form Number(s): There are 91 individual forms, too numerous to list here.

Type of Request: Regular submission, Request for a Revision of a Currently Approved Collection.

Number of Respondents: 93,722.

Average Hours per Response: 1.5305.

Burden Hours: 143,437.

Needs and Uses: Over 50 percent of all economic activity is generated by businesses in the services sectors, defined to exclude retail and wholesale trade. The U.S. Census Bureau currently measures the total output of most of the service industries annually in the Service Annual Survey (SAS). This survey currently covers all or portions of: Utilities; Transportation and Warehousing; Information; Finance and Insurance; Real Estate and Rental and Leasing; Professional, Scientific, and Technical Services; Administrative and Support and Waste Management and Remediation Services; Educational Services; Health Care and Social Assistance; Arts, Entertainment, and Recreation; Accommodation and Food Services; and Other Services (except Public Administration) as defined by the North American Industry Classification System (NAICS). The SAS provides the only official source of annual revenue estimates for the service industries.

Estimates from the SAS are essential to measurement of economic growth, real output, prices, and productivity for our nation's economy. A broad spectrum of government and private stakeholders use these estimates in analyzing economic activity; forecasting economic growth; and compiling data on productivity, prices and the gross domestic product (GDP). In addition, trade and professional organizations use these estimates to analyze industry trends, benchmark their own statistical products and develop forecasts. Private businesses use these estimates to measure market share, analyze business potential, and plan investments.

Collected data include operating revenue for both taxable and tax-exempt firms and organizations, sources of revenue and expenses by type for selected industries, operating expenses, and selected industry-specific items. In addition, e-commerce data is collected for all industries, and export and inventory data are collected for selected industries. The availability of these data

greatly improves the quality of the intermediate inputs and value-added estimates in the annual input-output and GDP by industry accounts produced by the Bureau of Economic Analysis (BEA).

Beginning in survey year 2020, the operating expenses content on all SAS questionnaires will change to a version that will be used in Economic Census years and non-Economic Census years. This change will aid in creating a consistent survey experience for respondents from year to year and better meet the needs of our data users. The proposed expense questions are shown in Attachment 2. This spreadsheet shows the different versions of the expense questions that will appear on each SAS form variation.

Minor changes will also be made to various forms to increase clarity of what is being asked of respondents (*e.g.*, improving instructions or removing parts of a question), improve the quality of data the Census Bureau receives, and further reduce respondent burden.

To improve data quality, harmonize survey content, and reduce respondent burden, the Service Annual Survey will alter a question asking about organizational change within a company. This question appears as question 3 for respondents in all industries SAS covers. The question inquires about any organizational changes a company experienced during the given year and currently refers to acquisitions, mergers, sales, and divestitures. The revision will alter the question text to include instances where a company ceased operations and would add “ceased operation” as an answer choice. This change would provide additional information about a company's activity in a given year, having the potential to improve data quality. Additionally, the revision would synchronize SAS content with the relevant questions on the Annual Retail Trade Survey (ARTS) and the Annual Wholesale Trade Survey (AWTS), making the surveys more consistent for respondents.

In addition, with the increased use of telemedicine services during this public health emergency, the Service Annual Survey proposes expanding the scope of questions on telemedicine beyond ambulatory health care providers to include hospitals and nursing homes. Telemedicine is an important mode of

service delivery for the healthcare industry, and its importance has increased during the current pandemic. Expanding the collection of data on telemedicine use will support measurement on changes in its adoption during this unprecedented public health emergency. SAS currently asks ambulatory health care providers (NAICS 621) about telemedicine services in relation to patient visits. This proposal will add a question about revenues from telemedicine services for hospitals (NAICS 622) and nursing homes (NAICS 623). Furthermore, to standardize content across industries and provide consistency for respondents, the current telemedicine question asked of the ambulatory health care providers would be revised to match the question being added to the other industries.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, United States Code, Sections 131 and 182 authorize the collection. Sections 224 and 225 make reporting mandatory.

This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function and entering either the title of the collection or the OMB Control Number 0607–0422.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–27041 Filed 12–8–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–980]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017

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

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers/exporters of crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (China) during the period of review (POR) January 1, 2017 through December 31, 2017.

DATES: Applicable December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Gene H. Calvert, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–3586.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of this administrative review in the **Federal Register** on February 11, 2020.¹ We invited interested parties to comment on the *Preliminary Results*. Between March 12, 2020 and October 26, 2020, we received timely case briefs from the following interested parties: Trina Solar Co., Ltd. (formerly known as Changzhou Trina Solar Energy Co., Ltd.); the Government of China (GOC); BYD Shangluo Industrial Co., Ltd. and Shanghai BYD Co., Ltd. (the BYD Companies); JA Solar Technology Yangzhou, Co., Ltd. (JA Solar); Risen Energy Co., Ltd. (Risen Energy); and SunPower Manufacturing Oregon LLC. On November 2, 2020, we received timely rebuttal briefs from the following companies: JA Solar; the BYD Companies; and Risen Energy.

On April 24, 2020, Commerce tolled the due date for these final results by 50

days.² On July 21, 2020, Commerce tolled the due date for these final results an additional 60 days.³ On September 25, 2020, Commerce extended the deadline for issuing the final results of this review by 60 days, until November 27, 2020.⁴

Scope of the Order

The products covered by the order are solar cells from China. A full description of the scope of the order is contained in the Issues and Decision Memorandum.⁵

Analysis of Comments Received

All issues raised in interested parties' briefs are addressed in the Issues and Decision Memorandum accompanying this notice. A list of the issues raised by interested parties and to which Commerce responded in the Issues and Decision Memorandum is provided in Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/>. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on comments in case briefs and record evidence, Commerce made certain changes from the *Preliminary Results*, with regard to the ocean freight benchmark used to measure the remuneration of inputs for less than adequate remuneration, and corrected various ministerial errors for the respondent companies, JA Solar and

² See Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19," dated April 24, 2020.

³ See Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020.

⁴ See Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Extension of Deadline for the Final Results of the Administrative Review," dated September 25, 2020.

⁵ See Memorandum, "Issues and Decision Memorandum for the Final Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2017," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

¹ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017*, 85 FR 7727 (February 11, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

Risen Energy. These changes are explained in the Issues and Decision Memorandum.

Methodology

Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each subsidy program found to be countervailable, Commerce finds that there is a subsidy, *i.e.*, a financial contribution from a government or public entity that gives rise to a benefit to the recipient, and that the subsidy is specific.⁶ For a full description of the methodology underlying all of Commerce's conclusions, including any determination that relied upon the use of adverse facts available pursuant to section 776(a) and (b) of the Act, *see* the Issues and Decision Memorandum.

Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(5), Commerce calculated a countervailable subsidy rate for the mandatory company respondents, JA Solar and Risen Energy. For the non-selected companies subject to this review,⁷ Commerce followed its practice, which is to base the subsidy rates on a weighted average of the subsidy rates calculated for those companies selected for individual examination, excluding rates of zero, *de minimis*, or rates determined entirely based on adverse facts available.⁸ To this end, Commerce calculated a rate by weight-averaging the calculated subsidy rates of JA Solar and Risen Energy using their publicly-available sales data for exports of subject merchandise to the United States during the POR. Commerce finds the countervailable subsidy rates for the producers/exporters under review to be as follows:

Company	Subsidy rate (<i>ad valorem</i>) (percent)
JA Solar Technology Yangzhou, Co., Ltd. (JA Solar) ⁹	14.86
Risen Energy Co., Ltd. (Risen Energy) ¹⁰	11.68
Non-Selected Companies Under Review ¹¹	12.67

⁶ See sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

⁷ See Appendix II.

⁸ See, e.g., *Certain Pasta from Italy: Preliminary Results of the 13th (2008) Countervailing Duty Administrative Review*, 75 FR 18806, 18811 (April 13, 2010), unchanged in *Certain Pasta from Italy: Final Results of the 13th (2008) Countervailing Duty Administrative Review*, 75 FR 37386 (June 29, 2010).

Disclosure

Commerce will disclose to the parties in this proceeding the calculations performed for these final results within five days of the date of publication of this notice in the **Federal Register**.¹²

Assessment Rates

Consistent with 19 CFR 351.212(b)(2), Commerce intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the publication of these final results of review, to liquidate shipments of subject merchandise entered, or withdrawn from warehouse, for consumption, on or after January 1, 2017 through December 31, 2017, at the *ad valorem* rates listed above.

Cash Deposit Instructions

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above. These cash deposits, when imposed,

⁹ As discussed in the *Preliminary Results* PDM, JA Solar is cross-owned with JA (Hefei) Renewable Energy Co., Ltd.; Hefei JA Solar Technology Co., Ltd.; JA Solar Investment China Co., Ltd.; JA Solar Technology Yangzhou Co., Ltd.; Jing Hai Yang Semiconductor Material (Donghai) Co., Ltd.; Donghai JingAo The Solar Energy Science and Technology Co., Ltd.; Solar Silicon Valley Electronic Science and Technology Co., Ltd.; Jingwei Electronic Materials Co., Ltd.; Hebei Yujing Electronic Science and Technology Co., Ltd.; Solar Silicon Peak Electronic Science and Technology Co., Ltd.; Beijing Jinfeng Investment Co., Ltd.; Jinglong Technology Holdings Co., Ltd.; JingAo Solar Co., Ltd.; Ningjin Songgong Electronic Materials Co., Ltd.; Jinglong Industry and Commerce Group Co., Ltd.; Ningjin Guiguang Electronic Investment Co., Ltd.; Ningjin County Jinyuan New Energy Investment Co., Ltd.; Hebei Jinglong Fine Chemicals Co., Ltd.; Ningjin Sunshine New Energy Co., Ltd.; Hebei Jinglong Sunshine Equipment Co., Ltd.; Hebei Jingle Optoelectronic Technology Co., Ltd.; Hebei Ningjin Songgong Semiconductor Co., Ltd.; Ningjin Jingxing Electronic Material Co., Ltd.; Ningjin Jingfeng Electronic Materials Co., Ltd.; Ningjin Saimei Ganglong Electronic Materials Co., Ltd.; Hebei Ningtong Electronic Materials Co., Ltd.; Ningjin Changlong Electronic Materials Manufacturing Co., Ltd.; JA Solar (Xingtai) Co., Ltd.; Xingtai Jinglong Electronic Material Co., Ltd.; Xingtai Jinglong PV Materials Co., Ltd.; Taicang Juren PV Material Co., Ltd.; JA PV Technology Co., Ltd.; Ningjin Longxin Investment Co., Ltd.; and Ningjin Jinglong PV Industry Investment Co., Ltd.

¹⁰ As discussed in the *Preliminary Results* PDM, Risen Energy is cross-owned with Changzhou Sveck Photovoltaic New Material Co., Ltd.; Changzhou Sveck New Material Technology Co., Ltd.; Jiujiang Shengchao Xinye Technology Co., Ltd.; Jiangsu Sveck New Material Co., Ltd.; Ninghai Risen Energy Power Development Co., Ltd.; Risen (Luoyang) New Energy Co., Ltd.; Risen (Ningbo) Electric Power Development Co., Ltd.; Risen (Wuhai) New Energy Co., Ltd.; Zhejiang Boxin Investment Co., Ltd.; and Zhejiang Twinsel Electronic Technology Co., Ltd.

¹¹ See Appendix II.

¹² See 19 CFR 351.224(b).

shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 27, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. List of Comments from Interested Parties
- IV. Scope of the Order
- V. Changes Since the Preliminary Results
- VI. Subsidies Valuation Information
 - A. Allocation Period
 - B. Cross-Ownership and Attribution of Subsidies
 - C. Denominators
 - D. Benchmarks and Discount Rates
- VII. Use of Facts Available and Adverse Inferences
- VIII. Programs Determined to be Countervailable
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- X. *Ad Valorem* Rate for Non-Selected Companies Under Review
- XI. Analysis of Comments

Comment 1: Whether Commerce Appropriately Applied the Use of Adverse Facts Available (AFA) Regarding Responses from the GOC

Comment 2: Whether Input Suppliers That Are Wholly Owned by Individuals Are "Government Authorities"

Comment 3: Whether Commerce Should Apply AFA to the Export Buyer's Credit Program (EBCP)

Comment 4: The Provision of Electricity

Comment 5: Whether the Income Tax Deduction for Research and Development (R&D) Expenses is Specific

Comment 6: Whether Commerce Should Revise the Benchmark for the Provision of Aluminum Extrusions

Comment 7: The Benchmark for the Provision of Solar Glass

Comment 8: The Benchmark for the Provision of Land

Comment 9: The Benchmark for Ocean Freight
 Comment 10: Commerce's Use of "Zeroing" in Benefit Calculations
 Comment 11: Whether Commerce Should Correct Errors to Sales Denominators and the Attribution of Subsidies
 XII. Recommendation

Appendix II

Non-Selected Companies Under Review

1. Anji DaSol Solar Energy Science & Technology Co., Ltd.
2. Baoding Jiasheng Photovoltaic Technology Co., Ltd.
3. Baoding Tianwei Yingli New Energy Resources Co., Ltd.
4. Beijing Tianneng Yingli New Energy Resources Co., Ltd.
5. BYD (Shangluo) Industrial Co., Ltd.
6. Canadian Solar (USA) Inc.
7. Canadian Solar Inc.
8. Canadian Solar International Ltd.
9. Canadian Solar Manufacturing (Changshu) Inc.
10. Canadian Solar Manufacturing (Luoyang) Inc.
11. Changzhou Trina Solar Yabang Energy Co., Ltd.
12. CSI Cells Co., Ltd.
13. CSI-GCL Solar Manufacturing (Yancheng) Co., Ltd.
14. De-Tech Trading Limited HK
15. Dongguan Sunworth Solar Energy Co., Ltd.
16. Eoply New Energy Technology Co., Ltd.
17. ERA Solar Co., Ltd.
18. ET Solar Energy Limited
19. Hainan Yingli New Energy Resources Co., Ltd.
20. Hangzhou Sunny Energy Science and Technology Co., Ltd.
21. Hengdian Group DMEGC Magnetics Co., Ltd.
22. Hengshui Yingli New Energy Resources Co., Ltd.
23. Hubei Trina Solar Energy Co., Ltd.
24. JA Technology Yangzhou Co., Ltd.
25. Jiangsu High Hope Int'l Group
26. Jiawei Solarchina (Shenzhen) Co., Ltd.
27. Jiawei Solarchina Co., Ltd.
28. Jinko Solar (U.S.) Inc.
29. Jinko Solar Co., Ltd.
30. Jinko Solar Import and Export Co., Ltd.
31. Jinko Solar International Limited
32. LERRI Solar Technology Co., Ltd.
33. Lightway Green New Energy Co., Ltd.
34. Lixian Yingli New Energy Resources Co., Ltd.
35. Luoyang Suntech Power Co., Ltd.
36. Nice Sun PV Co., Ltd.
37. Ningbo ETDZ Holdings, Ltd.
38. Ningbo Qixin Solar Electrical Appliance Co., Ltd.
39. Shanghai BYD Co., Ltd.
40. Shenzhen Sungold Solar Co., Ltd.
41. Shenzhen Yingli New Energy Resources Co., Ltd.
42. Sumec Hardware & Tools Co., Ltd.
43. Sunpreme Solar Technology (Jiaxing) Co., Ltd.
44. Systemes Versilis, Inc.
45. Taizhou BD Trade Co., Ltd.
46. TenKsolar (Shanghai) Co., Ltd.
47. Tianjin Yingli New Energy Resources Co., Ltd.

48. Tianneng Yingli New Energy Resources Co., Ltd.
49. Toenergy Technology Hangzhou Co., Ltd.
50. Trina Solar (Changzhou) Science & Technology Co., Ltd.
51. Trina Solar Energy Co., Ltd. (formerly known as Changzhou Trina Solar Energy Co., Ltd.)
52. Turpan Trina Solar Energy Co., Ltd.
53. Wuxi Suntech Power Co., Ltd.
54. Wuxi Tianran Photovoltaic Co., Ltd.
55. Yancheng Trina Solar Energy Technology Co., Ltd.
56. Yingli Energy (China) Co., Ltd.
57. Yingli Green Energy Holding Company Limited
58. Yingli Green Energy International Trading Company Limited
59. Zhejiang ERA Solar Technology Co., Ltd.
60. Zhejiang Jinko Solar Co., Ltd.

[FR Doc. 2020-27037 Filed 12-8-20; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-979]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Notice of Correction to the Final Results of the 2017-2018 Antidumping Duty Administrative Review

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

SUMMARY: The Department of Commerce (Commerce) is correcting its notice of the final results of the sixth administrative review of the antidumping duty (AD) order on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (China). The period of review (POR) is December 1, 2017 through November 30, 2018.

DATES: Applicable December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-2769.

SUPPLEMENTARY INFORMATION:

Background

On October 2, 2020, Commerce published the final results of the 2017-2018 administrative review of the AD order on solar cells from China in the *Federal Register*.¹ On September 30,

¹ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the*

2020, one company claiming that it had no shipments under review contended that in the *Final Results* Commerce incorrectly identified it as "LERRI Solar Technology Co., Ltd" (LERRI) and that its correct name is "LONGi Solar Technology Co. Ltd. (a.k.a. LERRI Solar Technology Co., Ltd.)."² On October 6, 2020, Trina³ and Risen⁴ submitted timely ministerial error comments.⁵ Specifically, Trina and Risen allege that we applied the incorrect amount in valuing their tempered glass inputs. Risen also alleges that we incorrectly valued its junction box inputs and incorrectly calculated the surrogate financial ratios. On October 12, 2020, SunPower Manufacturing Oregon LLC (the petitioner) submitted a timely rebuttal proposing an alternative to Trina and Risen's suggest valuation of tempered glass, arguing that there was no ministerial error in the valuation of Risen junction boxes, and asserting that labor was omitted from the calculation of surrogate financial ratios.⁶

Scope of the Order

The merchandise covered by the order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building

People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018, 85 FR 62275 (October 2, 2020) (Final Results), and accompanying Issues and Decision Memorandum (IDM).

² See LERRI's Letter, "LONGi Request for Correction of Clerical Error in the Final Results including Customs Instructions," dated September 30, 2020.

³ As noted in the *Final Results*, we are treating Trina Solar Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd.; Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd (formerly, Yancheng Trina Solar Energy Technology Co., Ltd.); Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; Trina Solar (Hefei) Science and Technology Co., Ltd.; and Changzhou Trina Hezhong Photoelectric Co., Ltd. (collectively Trina) as a single entity.

⁴ As noted in the *Final Results*, we are treating Risen Energy Co., Ltd.; Risen (Wuhai) New Energy Co., Ltd.; Zhejiang Twinsel Electronic Technology Co., Ltd.; Risen (Luoyang) New Energy Co., Ltd.; Jiujiang Shengchao Xinye Technology Co., Ltd.; Jiujiang Shengchao Xinye Trade Co., Ltd. Ruichang Branch, and Risen Energy (HongKong) Co., Ltd. (collectively Risen) as a single entity.

Barcode.

⁵ See Risen's Letter, "Risen Ministerial Error Comments," dated October 6, 2020; see also Trina's Letter, "Ministerial Error Allegation," dated October 6, 2020.

⁶ See Petitioner's Letter "Response to Ministerial Error Allegations," dated October 12, 2020.

integrated materials.⁷ Merchandise covered by the order is classifiable under subheading 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Ministerial Errors

Section 351.224(e) of Commerce's regulations provides that Commerce will analyze any comments received and, if appropriate, correct any ministerial error by amending the final determination or the final results of the review. Section 751(h) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.224(f) define a "ministerial error" as an error "in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial."

We analyzed the ministerial error comments and determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e) and (f), that we made the following ministerial errors:⁸

(1) In the *Final Results*, we stated our intention to value tempered glass using Romanian imports of HTS 7007.19.80.⁹ However, we incorrectly applied a value of 2.19 euros per kilogram (kg). Record evidence demonstrates the average unit value of Romanian imports of HTS

7007.19.80 to be 1.87 euros per kg, and we have corrected for this error in our calculation by valuing tempered glass using the 1.87 euros per kg amount.

(2) As accurately noted by Risen, we determined in the *Final Results* that "Malaysian HTS 8544.42.9400 and HTS 8544.60.1100 most closely correspond with the various junction boxes used by Risen."¹⁰ However, we stated that data for Malaysian imports of HTS 8544.42.9400 were not on the record and so it was not possible to average the values under Malaysian HTS 8544.42.9400 with the values under Malaysian HTS 8544.60.1100. We thus relied solely on Malaysian imports of HTS 8544.60.1100 to value Risen's junction box consumption. However, data for Malaysian imports of HTS 8544.42.9400 were in fact on the record and so we have corrected this error by relying on an simple average of Malaysian imports of HTS 8544.42.9400 and HTS 8544.60.1100 to value Risen's consumption of junction boxes.

(3) We failed to identify that the Risen collapsed entity included Risen Energy (Changzhou) Co., Ltd. in the rate section of the *Final Results*. We have corrected for this by adding Risen Energy (Changzhou) Co., Ltd. to the Risen collapsed entity in the rate section.

(4) We failed to include, in the calculation of Trina's normal value, the cost of the silver paste consumed by Trina. We have corrected for this error by including this cost in the calculation of Trina's normal value.

We found that we did not commit a ministerial error by not including "LONGi Solar Technology Co. Ltd." in

the name that we used to identify LERRI. Because a review was requested and initiated under the name LERRI,¹¹ our no shipments determination applies with respect to that name and we used that name in the *Final Results*. Thus, our omission of the other company name was correct.

We also disagree with Risen's contention that we committed a ministerial error by incorrectly classifying certain expenses in calculating the surrogate financial ratios. Risen's argument is methodological in nature.

Separate Rates

In the *Final Results* we found that Trina, Risen, and 16 other companies/company groups were eligible for a separate rate. Commerce assigned a dumping margin to the separate rate companies that it did not individually examine, but which demonstrated their eligibility for a separate rate, based on the mandatory respondents' dumping margins.¹² Because Trina's and Risen's margins have changed due to the correction of ministerial errors, we have recalculated the rate assigned to the non-individually examined separate rate companies.¹³

Amended Final Results of Review

As a result of correcting the four ministerial errors discussed above, we determine that the following weighted-average dumping margins exist for the POR:

Producers/exporters	Weighted-average dumping margin (percent)
Trina Solar Co., Ltd./Trina Solar (Changzhou) Science and Technology Co., Ltd./Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd./Changzhou Trina Solar Yabang Energy Co., Ltd./Turpan Trina Solar Energy Co., Ltd./Hubei Trina Solar Energy Co., Ltd./Trina Solar (Hefei) Science and Technology Co., Ltd./Changzhou Trina Hezhong Photoelectric Co., Ltd.	92.52
Risen Energy Co. Ltd./Risen (Wuhai) New Energy Co., Ltd./Zhejiang Twinsel Electronic Technology Co., Ltd./Risen (Luoyang) New Energy Co., Ltd./Jiujiang Shengchao Xinye Technology Co., Ltd./Jiujiang Shengzhao Xinye Trade Co., Ltd./Ruichang Branch, Risen Energy (HongKong) Co., Ltd./Risen Energy (Changzhou) Co., Ltd.	100.79
Review-Specific Average Rate Applicable to the Following Companies:	
Anji DaSol Solar Energy Science & Technology Co., Ltd.	95.50
Canadian Solar International Limited/Canadian Solar Manufacturing (Changshu), Inc./Canadian Solar Manufacturing (Luoyang) Inc./CSI Cells Co., Ltd./CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd./CSI Solar Power (China) Inc. (Canadian Solar)	95.50
JA Solar Technology Yangzhou Co., Ltd.	95.50
Jiawei Solarchina Co., Ltd.	95.50
JingAo Solar Co., Ltd.	95.50
Jinko Solar Co., Ltd. (Jinko)	95.50
Jinko Solar Import and Export Co., Ltd. (Jinko I&E)	95.50

⁷ For a complete description of the scope of the order, see *Final Results* IDM.

⁸ See Memorandum, "Allegations of Ministerial Errors in the *Final Results*," dated concurrently with this notice.

⁹ See *Final Results* IDM at Comment 3.

¹⁰ See *Final Results* IDM at Comment 8.

¹¹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 FR 9297 (March 14, 2019).

¹² See *Final Results*, 85 at 62276.

¹³ This rate is based on the rates for the respondents that were selected for individual review, excluding rates that are zero, de minimis,

or based entirely on facts available. See section 735(c)(5)(A) of the Act. See Memorandum, "Amended Calculation of the Cash Deposit Rate for Non-Reviewed Companies," dated concurrently with this notice.

Producers/exporters	Weighted-average dumping margin (percent)
Jinko Solar International Limited (Jinko Int'l)	95.50
Shanghai BYD Co., Ltd	95.50
Shanghai JA Solar Technology Co., Ltd	95.50
Shenzhen Portable Electronic Technology Co., Ltd	95.50
Shenzhen Sungold Solar Co., Ltd	95.50
Wuxi Tianran Photovoltaic Co., Ltd	95.50
Yingli Energy (China) Company Limited/Baoding Tianwei Yingli New Energy Resources Co., Ltd./Tianjin Yingli New Energy Resources Co., Ltd./Hengshui Yingli New Energy Resources Co., Ltd./Lixian Yingli New Energy Resources Co., Ltd./Baoding Jiaosheng Photovoltaic Technology Co., Ltd./Beijing Tianneng Yingli New Energy Resources Co., Ltd./Hainan Yingli New Energy Resources Co., Ltd./Shenzhen Yingli New Energy Resources Co., Ltd	95.50
Zhejiang Jinko Solar Co., Ltd	95.50
Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company	95.50

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.¹⁴ Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the China-wide entity, and we did not self-initiate a review of the entity, the entity is not under review, and the entity's dumping margin (*i.e.*, 238.95 percent) is not subject to change as a result of this review.¹⁵

Assessment

We will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. We intend to issue assessment instructions to CBP 15 days after the publication date of these amended final results of review. In accordance with 19 CFR 351.212(b)(1), we are calculating importer- or customer-specific assessment rates for the merchandise subject to this review. For any individually examined respondent whose weighted-average dumping margin is above *de minimis* (*i.e.*, 0.50 percent), we will calculate importer- or customer-specific assessment rates for merchandise subject to this review. Where the respondent reported reliable entered values, we calculated importer- or customer-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to the

importer or customer and dividing this amount by the total entered value of the sales to the importer or customer.¹⁶ Where we calculated an importer- or customer-specific weighted-average dumping margin by dividing the total amount of dumping for reviewed sales to the importer or customer by the total sales quantity associated with those transactions, we will direct CBP to assess importer- or customer-specific assessment rates based on the resulting per-unit rates.¹⁷ Where an importer- or customer- specific *ad valorem* or per-unit rate is greater than *de minimis*, we will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondent's weighted average dumping margin is zero or *de minimis*, or an importer or customer-specific *ad valorem* or per-unit rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties.¹⁸

For merchandise whose sale/entry was not reported in the U.S. sales database submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.*, at the individually-examined exporter's cash deposit rate), we will instruct CBP to liquidate such entries at the China-wide rate. Additionally, if we determine that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number will be liquidated at the China-wide rate.¹⁹

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the amended final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register**, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed in the table in the "Amended Final Results of Review" section above, the cash deposit rate will be the rate listed for each exporter in the table, except if the rate is zero or *de minimis* (*i.e.*, less than 0.5 percent), then the cash deposit rate will be zero; (2) for previously investigated Chinese and non-Chinese exporters that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate previously established for the China-wide entity (*i.e.*, 238.95 percent); and (4) for all non-China exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied the non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure

We intend to disclose the calculations performed for these amended final results within five days of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Notification to Importers

This notice also serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement

¹⁴ See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65969–70 (November 4, 2013).

¹⁵ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015–2016*, 83 FR 35616 (July 27, 2018).

¹⁶ See 19 CFR 351.212(b)(1).

¹⁷ *Id.*

¹⁸ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101, 8103 (February 14, 2012).

¹⁹ See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

These corrections to the final results and notice are issued and published in accordance with sections 751(a) and 777(i) of the Act.

Dated: November 2, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020-27030 Filed 12-8-20; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-886]

Polyethylene Retail Carrier Bags From the People's Republic of China: Rescission of Antidumping Duty Administrative Review; 2019-2020

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

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from the People's Republic of China (China) covering the period of review (POR) August 1, 2019, through July 31, 2020, based on the timely withdrawal of the request for review.

DATES: Applicable December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Christopher Williams, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue

NW, Washington, DC 20230; telephone: (202) 482-5166.

SUPPLEMENTARY INFORMATION:

Background

On August 4, 2020, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on PRCBs from China for the POR August 1, 2019, through July 31, 2020.¹ On August 31, 2020, the petitioners² timely requested an administrative review of the antidumping duty order with respect to Dongguan Nozawa Plastics Products Co., Ltd. and United Power Packaging, Ltd. (collectively, Nozawa), and Crown Polyethylene Products (International) Ltd. (Crown).³ Commerce received no other requests for an administrative review of the antidumping duty order. On October 6, 2020, pursuant to section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i), we published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on PRCBs from China with respect to Nozawa and Crown (the respondents).⁴ On November 16, 2020, the petitioners timely withdrew their administrative review request for Nozawa and Crown.⁵

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The petitioners withdrew their request for review within 90 days of the publication date of the *Initiation Notice*. No other parties requested an administrative review of the antidumping duty order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding the administrative review of the antidumping order on PRCBs from China for the period August 1, 2019, through July 31, 2020, in its entirety.

¹ See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 85 FR 47167 (August 4, 2020).

² The petitioners are the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC and Superbag Corporation.

³ See Petitioners' Letter, "Polyethylene Retail Carrier Bags from the People's Republic of China: Request for Administrative Review," dated August 31, 2020.

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 FR 63081 (October 6, 2020) (*Initiation Notice*).

⁵ See Petitioners' Letter, "Polyethylene Retail Carrier Bags from the People's Republic of China: Withdrawal of Request for Administrative Review," dated November 16, 2020.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of PRCBs from China during the POR at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice in the **Federal Register**.

Notification to Importers

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

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: December 4, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020-27026 Filed 12-8-20; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0648–XA702]

Marine Mammals and Endangered Species

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

ACTION: Notice; issuance of permits and permit amendments.

SUMMARY: Notice is hereby given that permits and permit amendments have been issued to the following entities under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as applicable.

ADDRESSES: The permits and related documents are available for review upon written request via email to NMFS.Pr1Comments@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Shasta McClenahan (Permit No. 21045–01, 21476–01 and 23802) and Erin Markin (Permit No. 23807–01); at (301) 427–8401.

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** on the dates listed below that requests for a permit or permit amendment had been submitted by the below-named applicants. To locate the **Federal Register** notice that announced our receipt of the application and a complete description of the research, go to www.federalregister.gov and search on the permit number provided in Table 1 below.

TABLE 1—ISSUED PERMITS AND PERMIT AMENDMENTS

Permit No.	RTID	Applicant	Previous Federal Register notice	Issuance date
21045–01 ...	0648–XA560 ..	Matson Laboratory, LLC, 135 Wooden Shoe Lane, Manhattan, MT 59741 (Responsible Party: Carolyn Nistler).	85 FR 65029; October 14, 2020	November 18, 2020.
21476–01 ...	0648–XA442 ..	Lars Bejder, Ph.D., University of Hawaii at Manoa, 46–007 Lilipuna Road, Kaneohe, HI 96744.	85 FR 53797; August 31, 2020	November 6, 2020.
23802	0648–XA539 ..	University of Florida, Aquatic Animal Health Program, College of Veterinary Medicine, 2015 SW 16th Avenue, Gainesville, FL 32608 (Responsible Party: Michael Walsh, DVM).	85 FR 63104; October 6, 2020	November 16, 2020.
23807–01 ...	0648–XA500 ..	Plimsoll Productions Limited, 51–55 Whiteladies Road, Bristol, BS8 2LY, United Kingdom (Responsible Party: Anuschka Schofield).	85 FR 60767; September 28, 2020	November 5, 2020.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permit was based on a finding that such permits: (1) Were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in Section 2 of the ESA.

Authority: The requested permits have been issued under the MMPA of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Dated: December 3, 2020.

Julia Marie Harrison,
Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.

[FR Doc. 2020–26979 Filed 12–8–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0183]

Agency Information Collection Activities; Comment Request; Application for the U.S. Presidential Scholars Program

AGENCY: Office of Communications and Outreach (OCO), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before February 8, 2021.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2020–SCC–0183. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the [regulations.gov](http://www.regulations.gov) site is not available to the public for any reason, ED will temporarily accept comments at

ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Simone Olson, 202–205–8719.

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: Application for the U.S. Presidential Scholars Program.

OMB Control Number: 1860–0504.

Type of Review: A revision of a currently approved collection.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 3,300.

Total Estimated Number of Annual Burden Hours: 52,800.

Abstract: The United States Presidential Scholars Program is a national recognition program to honor outstanding graduating high school seniors. Candidates are invited to apply based on academic achievements on the SAT or ACT assessments, through nomination from Chief State School Officers, other recognition program partner organizations, on artistic merits based on participation in a national talent program and achievement in career and technical education programs. This program was established by Presidential Executive Orders 11155, 12158 and 13697.

Dated: December 4, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–27056 Filed 12–8–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0182]

Agency Information Collection Activities; Comment Request; Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation

AGENCY: Office of Postsecondary Education (OPE), 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 February 8, 2021.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2020–SCC–0182. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the www.regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Freddie Cross, (202) 453–7224.

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: Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation.

OMB Control Number: 1840–0744.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 1,794.

Total Estimated Number of Annual Burden Hours: 267,588.

Abstract: This request is a revision that includes COVID–19 guidance and to approve the state report card and institution and program report cards required by the Higher Education Act of 1965, as amended in 2008 by the Higher Education Opportunity Act (HEOA). States must report annually on criteria and assessments required for initial teacher credentials using a State Report Card (SRC), and institutions of higher education (IHEs) with teacher preparation programs (TPP), and TPPs outside of IHEs, must report on key program elements on an Institution and Program Report Card (IPRC). IHEs and TPPs outside of IHEs report annually to their states on program elements, including program numbers, type, enrollment figures, demographics, completion rates, goals and assurances to the state. States, in turn, must report on TPP elements to the Secretary of Education in addition to information on assessment pass rates, state standards, initial credential types and requirements, numbers of credentials issued, TPP classification as at-risk or low-performing. The information from states, institutions, and programs is published annually in The Secretary's Report to Congress on Teacher Quality.

The Department plans to use the SRC and IPRC current instruments, unchanged, for the FY21 through FY23 data collections, in order to maintain continuity in the information available. There is no change in burden due to the addition of Institutions with Teacher Preparation Programs. The Department has included additional instruction to aid institutions in reporting data that may differ from usual data due to COVID restrictions.

Dated: December 4, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020-27013 Filed 12-8-20; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

[Case Number 2020-008; EERE-2020-BT-WAV-0024]

Energy Conservation Program: Decision and Order Granting a Waiver to CNA International, Inc. From the Department of Energy Dishwashers Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of decision and order.

SUMMARY: The U.S. Department of Energy ("DOE") gives notice of a Decision and Order (Case Number 2020-008) that grants to CNA International, Inc. ("CNA") a waiver from specified portions of the DOE test procedure for determining the energy and water consumption of specified dishwashers. Under the Decision and Order CNA is required to test and rate the specified basic model of its dishwasher in accordance with the alternate test procedure specified in the Decision and Order.

DATES: The Decision and Order is effective on December 9, 2020. The Decision and Order will terminate upon the compliance date of any future amendment to the test procedure for dishwashers located at title 10 of the Code of Federal Regulations ("CFR"), part 430, subpart B, appendix C1 that addresses the issues presented in this waiver. At such time, CNA must use the relevant test procedure for this product for any testing to demonstrate compliance with the applicable standards, and any other representations of energy use.

FOR FURTHER INFORMATION CONTACT: Ms. Lucy deButts, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue SW, Washington, DC 20585-0121. Email: AS_Waiver_Requests@ee.doe.gov.

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC-33, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585-0103. Telephone: (202) 586-7796. Email: Elizabeth.Kohl@hq.doe.gov.

SUPPLEMENTARY INFORMATION: By letter dated June 30, 2020, CNA filed a petition for waiver and a petition for interim waiver from the DOE test procedure applicable to dishwashers set forth in Appendix C1. CNA sought a waiver for a non-soil-sensing, compact (countertop) dishwasher because CNA asserted that the product contains a design characteristic that prevents testing according to the prescribed test procedure. In its petition for waiver, CNA stated that the subject dishwasher does not have a water hookup but that water is provided by manually pouring 5 liters of tap water into a built-in tank. CNA requested DOE waive sections of the dishwasher test procedure requiring water inflow and water pressure criteria based on a water hookup that allows automatic water inflow into the machine during the test cycle. Instead, CNA suggested an alternate test procedure in which the water tank is manually filled before the test is run and water consumption is stipulated.

On September 4, 2020, DOE published a notice that announced its receipt of the petition for waiver and granted CNA an interim waiver. 85 FR 55268 ("Notice of Petition for Waiver"). In the Notice of Petition for Waiver, DOE stated that, based on review of CNA's petition, certain requirements in Appendix C1 are not applicable to the basic model for which CNA sought a waiver and DOE granted CNA an interim waiver that specified an alternate test procedure that would be appropriate for testing the subject basic model. 85 FR 55268, 55270-55271.

In the Notice of Petition for Waiver, DOE also solicited comments from interested parties on all aspects of the petition and the specified alternate test procedure. 85 FR 55268. DOE received two comments in response to the Notice of Petition for Waiver, and an additional comment response on behalf of CNA.

After reviewing these comments, DOE has concluded that absent a waiver, the basic model identified by CNA in its petition cannot be tested and rated for

energy and water consumption on a basis representative of its true energy and water consumption characteristics. DOE has determined that the alternate test procedure granted in the interim waiver, with additional clarifying modifications, will allow for the accurate measurement of the energy and water use of the product while alleviating the problems CNA identified regarding testing the specified basic model according to DOE's applicable dishwashers test procedure.

In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(f)(2)), DOE gives notice of the issuance of its Decision and Order as set forth below. The Decision and Order grants CNA a waiver from the applicable test procedure at 10 CFR part 430, subpart B, appendix C1 for a specified basic model of dishwashers, and provides that CNA must test and rate such products using the alternate test procedure specified in the Decision and Order. CNA's representations concerning the energy and water consumption of the specified basic models must be based on testing according to the provisions and restrictions in the alternate test procedure set forth in the Decision and Order, and the representations must fairly disclose the test results. Distributors, retailers, and private labelers are held to the same requirements when making representations regarding the energy and water consumption of these products. (42 U.S.C. 6293(c))

Consistent with 10 CFR 430.27(j), not later than February 8, 2021, any manufacturer currently distributing in commerce in the United States products employing a technology or characteristic that results in the same need for a waiver from the applicable test procedure must submit a petition for waiver. Manufacturers not currently distributing such products in commerce in the United States must petition for and be granted a waiver prior to the distribution in commerce of those products in the United States. 10 CFR 430.27(j). Manufacturers may also submit a request for interim waiver pursuant to the requirements of 10 CFR 430.27.

Signing Authority

This document of the Department of Energy was signed on December 4, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative

purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 4, 2020.

Treena V. Garrett,

*Federal Register Liaison Officer, U.S.
Department of Energy.*

Case #2020-008 Decision and Order

I. Background and Authority

The Energy Policy and Conservation Act, as amended (“EPCA”),¹ authorizes the U.S. Department of Energy (“DOE”) to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B² of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain types of consumer products. These products include dishwashers, the focus of this document. (42 U.S.C. 6292(a)(6))

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) Certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making representations about the efficiency of that product (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the product complies with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE is required to follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which reflect energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and requires that test procedures not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for dishwashers is contained at 10 CFR part 430, subpart B, appendix C1, “Uniform Test Method for Measuring the Energy Consumption of Dishwashers” (“Appendix C1”).

Any interested person may submit a petition for waiver from DOE’s test procedure requirements. 10 CFR 430.27(a)(1). DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(f)(2). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. *Id.*

II. CNA’s Petition for Waiver: Assertions and Determinations

By letter dated June 30, 2020, CNA filed a petition for waiver and a petition for interim waiver from the DOE test procedure applicable to dishwashers set forth in Appendix C1. CNA sought a waiver for a non-soil-sensing, compact (countertop) dishwasher because CNA asserted that the product contains a design characteristic that prevents testing according to the prescribed test procedure. In its petition for waiver, CNA stated that the subject dishwasher does not have a water hookup but that water is provided by manually pouring 5 liters of tap water into a built-in tank. CNA requested DOE waive sections of the dishwasher test procedure requiring water inflow and water pressure criteria based on a water hookup that allows automatic water inflow into the machine during the test cycle. Instead, CNA suggested an alternate test procedure in which the water tank is manually filled before the test is run and water consumption is stipulated.

On September 4, 2020, DOE published a notice that announced its

receipt of the petition for waiver and granted CNA an interim waiver. 85 FR 55268 (“Notice of Petition for Waiver”). In the Notice of Petition for Waiver, DOE reviewed CNA’s application for an interim waiver and the alternate test procedure requested by CNA. DOE stated that, based on review of CNA’s petition, the requirements for automatic filling of water into the dishwasher tub that are currently specified in Appendix C1 are not applicable to the basic model for which CNA sought a waiver and instead specified requirements for manually filling the water. 85 FR 55268, 55270. In particular, DOE stated that the water pressure, water meter, water pressure gauge, and water consumption requirements specified in sections 2.4, 3.3, 3.4, and 4.1.3 of Appendix C1 are not applicable because these requirements are for automatic filling of water into the dishwasher. *Id.* Additionally, DOE prescribed an alternate test procedure specifying that for the basic model of compact dishwasher for which CNA sought a waiver, which does not have a direct water line, the built-in reservoir must be manually filled to the full 5-liter reservoir capacity stated by the manufacturer using water at a temperature in accordance with section 2.3.3 of Appendix C1. 85 FR 55268, 55271. DOE also specified modifications to the detergent requirements in section 2.9 and 2.10.2 of Appendix C1; for section 2.9 of Appendix C1, the alternate test procedure provides that the measurement of the prewash and main wash fill water volumes need not be taken, and for section 2.10.2 of Appendix C1, DOE specified that the main wash water volume for detergent dose measurement is 0.396 gallons. *Id.* Finally, in section 5.4.1 of Appendix C1, DOE specified that for the compact dishwasher basic model that is the subject of the waiver that does not have a direct water line, the water consumption is equal to 4.8 liters, which is the volume of water used in the test cycle. *Id.*

In the Notice of Petition for Waiver, DOE also solicited comments from interested parties on all aspects of the petition and the specified alternate test procedure. 85 FR 55268. DOE received comments in response to the Notice of Petition for Waiver, one from Whirlpool Corporation (“Whirlpool”) and one from Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison, collectively known as the California Investor-Owned Utilities (“CA IOUs”).³

³ Whirlpool’s comment can be accessed at: <https://beta.regulations.gov/comment/EERE-2020->

¹ All references to EPCA in this document refer to the statute as amended through America’s Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

² For editorial reasons, upon codification in the U.S. Code, Part B was redesignated as Part A.

Whirlpool questioned the specification in the Notice of Petition for Waiver to fill the built-in water reservoir to the full 5-liter reservoir capacity stated by the manufacturer. (Whirlpool, No. 0003, at p. 1).⁴ Instead, Whirlpool recommended that the alternate test procedure state, “manually fill the built-in water reservoir to the full reservoir capacity stated by the manufacturer.” Whirlpool commented that using the manufacturer-stated reservoir capacity (as opposed to the specific, 5-liter volume) would address any future variation in reservoir capacity and would also ensure that future manually filled dishwashers with reservoirs are not bound to a 5-liter capacity. *Id.* Whirlpool additionally commented that the Notice of Petition for Waiver should not stipulate that the water consumption is equal to 4.8 liters for manually filled compact dishwashers. (Whirlpool, No. 0003, at p. 2) Instead, Whirlpool recommended measuring the actual water consumption as the difference, in terms of water volume or weight, between water in the reservoir before the test cycle and after the test cycle. *Id.*

The CA IOUs commented that they generally agree with the alternate test procedure provided in the Notice of Petition for Waiver but that the test procedure would allow water in the tank to deviate from Appendix C1 temperature tolerances, possibly resulting in a more efficient measured wash cycle than would exist under standard test tolerances. (CA IOUs, No. 0004, at p. 1, 2) The CA IOUs further stated that the interim waiver test procedure only requires that water at 50 degrees Fahrenheit (“°F”) ± 2 °F be filled in the tank at the start of the test, but does not include any provisions to maintain the water temperature over the duration of the test. (CA IOUs, No. 0004, at p. 2) The CA IOUs commented that if the temperature is not maintained over the duration of the test, the worst-case scenario would be that the water in the built-in reservoir could warm up by potentially 20 °F, to the room temperature in the test lab. *Id.* The CA IOUs recommended using a direct water-cooling system to keep the water in the reservoir at 50 °F ± 2 °F for the duration of the test to ensure that the energy consumption results are comparable to those of other compact dishwashers and reflect the performance

of the unit under the Appendix C1 test procedure conditions. *Id.* On October 15, 2020, Harris, Wiltshire & Grannis LLP submitted a letter to DOE providing CNA’s response to the CA IOUs’ comments. CNA noted that the proposed test procedure in the Notice of Petition for Waiver requires the supply water to be introduced and maintained at 50 °F ± 2 °F, in accordance with section 2.3.3 of Appendix C1. (CNA, No. 0005 at p. 1) CNA stated that the test procedure proposed in the Notice of Petition for Waiver would therefore not allow the manually filled water in the built-in reservoir to warm up to the extent that its temperature exceeds the prescribed tolerance of Appendix C1. *Id.* CNA did not describe the type of equipment or methods that would be used to maintain the temperature within the specified tolerance over the course of the test cycle.

In response to Whirlpool’s comments, DOE notes that the waiver granted in this Decision and Order is for the specific basic model specified by CNA, which has a built-in reservoir capacity of 5 liters and consumes 4.8 liters during a test cycle. If there were to be any future variation in reservoir capacity, or if in the future other manually-filled dishwashers with reservoirs are available on the market, this Decision and Order would not be applicable to those basic models and a new waiver petition would need to be submitted to DOE. See 10 CFR 430.27(g) and (j). Therefore, DOE is maintaining the specific water volumes in this Decision and Order for the specific basic model to which this waiver is applicable, and clarifying that the manual fill volume applies to each preconditioning cycle as well as the test cycle. As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. 10 CFR 430.27(l). As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. *Id.* At such time, DOE will consider specifying generally applicable requirements regarding water volume capacity.

Additionally, DOE is not requiring the measurement of the actual water consumption as suggested by Whirlpool, because a procedure to weigh the remaining water in the reservoir may be unduly burdensome. As indicated by the materials reviewed, the water reservoir of the basic model specified in CNA’s petition is integrated into the dishwasher (*i.e.*, it cannot be removed). DOE is unaware of a method to remove the remaining water completely without

introducing potential variability between tests. The additional burden of removing the remaining water from the reservoir would not ensure any more accurate of a result than that specified in the Notice of Petition for Waiver and specified in this Decision and Order.

In response to the comments from the CA IOUs and CNA regarding maintaining water temperature over the duration of the test, the referenced test procedure provision requires maintaining the water temperature of the input water. See section 2.3.3. of Appendix C1. This test condition reflects the typical installation for dishwashers connected to a water source that remains at a constant temperature during operation. In the present case, as during actual consumer use, the water is introduced to the built-in reservoir at the supply temperature and then held briefly in the internal reservoir subject to ambient conditions prior to initiation of a usage cycle. Requiring during testing that the water in the reservoir maintain a constant temperature of 50° ± 2 °F throughout the cycle would not be representative of the average use of the dishwasher in actual use.

While DOE does not have data to support any particular length of time during which the water in the reservoir would warm up beyond the ± 2 °F specified in the test procedure, DOE notes that the user manual⁵ for this basic model provides a sequence of operations for initiating a wash cycle as follows:

- (1) Press the power button;
- (2) Open the tank lid on the top of the dishwasher and pour 5 liters of water into the water tank;
- (3) Select the desired function using the Wash Mode buttons, and then push the Start/Pause button; if the [Start/Pause button] is not pressed, the unit will start the wash cycle automatically after 10 seconds.

NOTE: If no buttons are pressed after the power is turned on, the unit will automatically go back to Standby mode after 2 minutes.

Given these user manual specifications, DOE is including in the alternate test procedure a 2-minute maximum duration for starting the test cycle after preparing the unit for testing, including filling the built-in reservoir. The specified 2-minute duration from powering on the dishwasher to reverting to standby mode shows that users would start a wash cycle within this time period during typical use. Starting a test cycle within this 2-minute period

BT-WAV-0024-0003 and CA IOU’s comment can be accessed at: <https://beta.regulations.gov/comment/EERE-2020-BT-WAV-0024-0004>.

⁴ The parenthetical reference provides a reference for the comment as follows (commenter name, comment docket ID number, page of that document).

⁵ Available online at <https://mcappliance.com/media/manuals/MCSCD3W.pdf>.

would produce results that are representative of actual use.

Therefore, the alternate test procedure specified in this Decision and Order requires that the test cycle must begin within two minutes after powering on the dishwasher, as specified in the manufacturer instructions. This time period includes filling water in the built-in reservoir, consistent with the manufacturer instructions.

For the reasons explained here and in the Notice of Petition for Waiver, absent a waiver the basic model identified by CNA in its petition cannot be tested and rated for energy and water consumption on a basis representative of its true energy and water consumption characteristics. DOE has reviewed the recommended procedure suggested by CNA and concludes that, as modified in this Decision and Order, it will allow for the accurate measurement of the energy and water use of the product, while alleviating the testing problems associated with CNA's implementation of DOE's applicable dishwashers test procedure for the specified basic model. DOE specifies a minor modification to CNA's recommended test procedure, which is to begin the test cycle within two minutes after powering on the dishwasher and filling water in the built-in reservoir. This update is expected to produce a representative measure of energy efficiency.

Thus, DOE is requiring that CNA test and rate the specified dishwasher basic model according to the alternate test procedure specified in this Decision and Order, which is similar to the procedure provided in the interim waiver, but includes minor modifications following consideration of stakeholder comments.

This Decision and Order is applicable only to the basic model listed and does not extend to any other basic models. DOE evaluates and grants waivers for only those basic models specifically set out in the petition, not future models that may be manufactured by the petitioner. CNA may request that DOE extend the scope of this waiver to include additional basic models that employ the same technology as those listed in this waiver. 10 CFR 430.27(g). CNA may also submit another petition for waiver from the test procedure for additional basic models that employ a different technology and meet the criteria for test procedure waivers. 10 CFR 430.27(a)(1).

DOE notes that it may modify or rescind the waiver at any time upon DOE's determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the

basic models' true energy consumption characteristics. 10 CFR 430.27(k)(1). Likewise, CNA may request that DOE rescind or modify the waiver if the company discovers an error in the information provided to DOE as part of its petition, determines that the waiver is no longer needed, or for other appropriate reasons. 10 CFR 430.27(k)(2).

As set forth above, the test procedure specified in this Decision and Order is not the same as the test procedure offered by CNA. If CNA believes that the alternate test method it suggested provides representative results and is less burdensome than the test method required by this Decision and Order, CNA may submit a request for modification under 10 CFR 430.27(k)(2)/431.401(k)(2) that addresses the concerns that DOE has specified with that procedure. CNA may also submit another less burdensome alternative test procedure not expressly considered in this notice under the same provision.

III. Consultations With Other Agencies

In accordance with 10 CFR 430.27(f)(2), DOE consulted with the Federal Trade Commission staff concerning the CNA petition for waiver.

IV. Order

After careful consideration of all the material that was submitted by CNA, and comments received, in this matter, it is ORDERED that:

(1) CNA must, as of the date of publication of this Order in the **Federal Register**, test and rate the following dishwasher basic model with the alternate test procedure as set forth in paragraph (2):

Brand	Basic model
Magic Chef	MCSCD3W

(2) The alternate test procedure for the CNA basic model listed in paragraph (1) of this Order is the test procedure for dishwashers prescribed by DOE at 10 CFR part 430, subpart B, appendix C1, with the modifications provided below. All other requirements of Appendix C1 and DOE's other relevant regulations remain applicable.

In section 2.4, *Water pressure*, add at the end of the section:

For compact dishwashers that do not have a direct water line, these water pressure conditions do not apply because the water will be added manually according to section 2.6.2.1.

Following section 2.6.2, *Non-soil-sensing dishwashers to be tested at a nominal inlet temperature of 50°F or 120°F*, add section 2.6.2.1 to read:

2.6.2.1 For compact dishwashers that do not have a direct water line, power on the dishwasher and then manually fill the built-in water reservoir to the full 5-liter reservoir capacity stated by the manufacturer, using water at a temperature in accordance with section 2.3.3 of this appendix. Begin the test cycle within two minutes after powering on the dishwasher, as specified in the manufacturer instructions.

In section 2.9, *Preconditioning requirements*, add at the end of the section:

For compact dishwashers that do not have a direct water line, for each preconditioning cycle as defined in section 1.15 of this appendix, manually fill the built-in water reservoir to the full 5-liter reservoir capacity stated by the manufacturer, using water at a temperature in accordance with section 2.3.3 of this appendix. Measurement of the prewash fill water volume, V_{pw} , if any, and measurement of the main wash fill water volume, V_{mw} , are not taken.

In section 2.10.2, *Main Wash Detergent Dosing*, add at the end of the section:

For compact dishwashers that do not have a direct water line, the V_{mw} is equal to 0.396 gallons (1.5 liters), which is the water capacity used in the main wash stage of the test cycle.

In section 3.3, *Water meter*, add at the end of the section:

For compact dishwashers that do not have a direct water line, these water meter conditions do not apply. Water is added manually pursuant to section 2.6.2.1 of this appendix.

In section 3.4, *Water pressure gauge*, add at the end of the section:

For compact dishwashers that do not have a direct water line, these water pressure gauge conditions do not apply. Water is added manually pursuant to section 2.6.2.1 of this appendix.

In section 4.1.3, *Water consumption*, add at the end of the section:

For compact dishwashers that do not have a direct water line, these water consumption measurement requirements do not apply. Water is added manually pursuant to section 2.6.2.1 of this appendix.

In section 5.4.1, *Water consumption for non-soil-sensing electric dishwashers using electrically heated, gas-heated, or oil-heated water*, add at the end of the section:

For compact dishwashers that do not have a direct water line, the water consumption is equal to 4.8 liters, which is the volume of water used in the test cycle.

(3) *Representations*. CNA may not make representations about the energy and water use of the basic model listed in paragraph (1) of this Order for compliance or marketing, unless the basic model has been tested in

accordance with the provisions set forth above and such representations fairly disclose the results of such testing.

(4) This waiver shall remain in effect according to the provisions of 10 CFR 430.27.

(5) DOE issues this waiver on the condition that the statements, representations, and information provided by CNA are valid. If CNA makes any modifications to the controls or configurations of the basic model, such modifications will render the waiver invalid with respect to that basic model, and CNA will either be required to use the current Federal test method or submit a new application for a test procedure waiver. DOE may rescind or modify this waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect, or the results from the alternate test procedure are unrepresentative of a basic model's true energy consumption characteristics. 10 CFR 430.27(k)(1). Likewise, CNA may request that DOE rescind or modify the waiver if CNA discovers an error in the information provided to DOE as part of its petition, determines that the waiver is no longer needed, or for other appropriate reasons. 10 CFR 430.27(k)(2).

(6) CNA remains obligated to fulfill any certification requirements set forth at 10 CFR part 429.

Signed in Washington, DC, on December 4, 2020.

Daniel R Simmons,

Assistant Secretary for Energy Efficiency and Renewable Energy.

[FR Doc. 2020-27039 Filed 12-8-20; 8:45 am]

BILLING CODE 6450-01-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: ER15-2028-009.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Compliance Filing in Response to Order issued in ER15-2028-005 (NIMECA) to be effective N/A.

Filed Date: 12/3/20.

Accession Number: 20201203-5046.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER19-1553-000.

Applicants: Southern California Edison Company.

Description: Annual Formula Transmission Rate Update Filing

(TO2021) of Southern California Edison Company.

Filed Date: 11/20/20.

Accession Number: 20201120-5217.

Comments Due: 5 p.m. ET 12/11/20.

Docket Numbers: ER20-391-001;

ER20-391-002; ER20-391-003.

Applicants: J. Aron & Company LLC.

Description: Supplement to Updated Market Power Analysis for the Northwest Region and Notices of Non-Material Change in Status of J. Aron & Company LLC.

Filed Date: 12/2/20.

Accession Number: 20201202-5281.

Comments Due: 5 p.m. ET 12/23/20.

Docket Numbers: ER20-2654-000.

Applicants: Clear Power LLC.

Description: Supplement to August 12, 2020 Clear Power LLC tariff filing.

Filed Date: 12/2/20.

Accession Number: 20201202-5278.

Comments Due: 5 p.m. ET 12/23/20.

Docket Numbers: ER20-3008-001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: Amended Filing—Revisions to Modify Schedule 1—A and Formula Rate Template to be effective 1/1/2021.

Filed Date: 12/3/20.

Accession Number: 20201203-5079.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21-539-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1895R9 Evergy Kansas Central, Inc. NITSA NOA—Wathena to be effective 9/1/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5009.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-540-000.

Applicants: Techren Solar III LLC.

Description: Baseline eTariff Filing: Certificate of Concurrence Filing to be effective 12/4/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5012.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-541-000.

Applicants: Techren Solar IV LLC.

Description: Baseline eTariff Filing: Certificate of Concurrence Filing to be effective 12/4/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5015.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-542-000.

Applicants: Techren Solar V LLC.

Description: Baseline eTariff Filing: Certificate of Concurrence Filing to be effective 12/4/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5017.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-543-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 2066R9 Evergy Kansas Central, Inc. NITSA NOA—Muscotah to be effective 9/1/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5022.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-544-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 2491R8 Evergy Kansas Central, Inc. NITSA NOA—Scranton to be effective 9/1/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5026.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-545-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of ISA, Service Agreement No. 4756; Queue No. W4-005 to be effective 12/21/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5049.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-546-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of ISA, SA No. 5744; Queue No. AF1-324 to be effective 12/3/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5050.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-547-000.

Applicants: Southwest Power Pool, Inc., Tri-State Generation and Transmission Association, Inc.

Description: § 205(d) Rate Filing: Tri-State Generation and Transmission Association, Inc. Formula Rate to be effective 2/1/2021.

Filed Date: 12/3/20.

Accession Number: 20201203-5052.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-548-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of ISA, SA No. 5736; Queue No. AF1-326 to be effective 12/3/2020.

Filed Date: 12/3/20.

Accession Number: 20201203-5107.

Comments Due: 5 p.m. ET 12/24/20.

Docket Numbers: ER21-550-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of ISA, SA No. 5738; Queue No. AF1-327 to be effective 12/3/2020.

Filed Date: 12/3/20.
Accession Number: 20201203–5109.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–551–000.
Applicants: Brunswick Cellulose LLC.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5110.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–552–000.
Applicants: GP Big Island, LLC.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5111.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–553–000.
Applicants: Georgia-Pacific Brewton LLC.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5112.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–554–000.
Applicants: Ameren Illinois Company.
Description: § 205(d) Rate Filing:
 Reimbursement Agreement, RS 153, Prairie Power Shelbyville to be effective 2/2/2021.
Filed Date: 12/3/20
Accession Number: 20201203–5115.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–555–000.
Applicants: Georgia-Pacific Cedar Springs LLC.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5117.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–556–000.
Applicants: Georgia-Pacific Consumer Operations LLC, Green Bay.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5120.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–557–000.
Applicants: Georgia-Pacific Monticello LLC.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5122.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–558–000.
Applicants: Georgia-Pacific Consumer Operations LLC, Green Bay.

Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5131.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–559–000.
Applicants: Georgia-Pacific Consumer Operations LLC, Green Bay.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5132.
Comments Due: 5 p.m. ET 12/24/20.
Docket Numbers: ER21–560–000.
Applicants: Georgia-Pacific Consumer Operations LLC, Green Bay.
Description: Tariff Cancellation:
 Notice of Electric Tariff Cancellation to be effective 12/31/2020.
Filed Date: 12/3/20.
Accession Number: 20201203–5134.
Comments Due: 5 p.m. ET 12/24/20.
 The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.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: December 3, 2020.

Kimberly D. Bose,
Secretary.

[FR Doc. 2020–27036 Filed 12–8–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5912–003]

Town of Dover-Foxcroft; Notice of Application for Amendment of Exemption Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed

with the Commission and is available for public inspection:

- a. *Application Type:* Non-capacity Amendment of Exemption.
- b. *Project No:* 5912–003.
- c. *Date Filed:* November 23, 2020.
- d. *Applicant:* Town of Dover-Foxcroft.
- e. *Name of Project:* Moosehead Hydroelectric Project.
- f. *Location:* The project is located on the Piscataquis River in Piscataquis County, Maine.
- g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.
- h. *Applicant Contact:* Jack Clukey, Town of Dover-Foxcroft, 43 Morton Avenue, Suite A, Dover-Foxcroft, ME 04426; phone: (207) 564–3318; email jclukey@dover-foxcroft.org.
- i. *FERC Contact:* Elizabeth Moats, (202) 502–6632, elizabeth.osiermoats@ferc.gov.
- j. *Deadline for filing comments, motions to intervene, and protests:* January 4, 2021.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–5912–003. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a

particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The exemptee requests to amend its exemption by replacing the two authorized, non-operational units (total capacity of 300 kilowatt) with a single unit of the same capacity. The exemptee also proposes to replace and upgrade powerhouse equipment and infrastructure, repair the existing dam and fish ladder, and add a new intake structure with movable fish screens and bypass channel for downstream fish passage. The proposal will not change the nameplate capacity or discharge at the project. The exemptee has consulted with the resource agencies on the proposed amendment. The work would require a drawdown of the reservoir and would begin in July 2021.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at <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. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must: (1) Bear in all capital letters the title COMMENTS, PROTEST, or MOTION TO INTERVENE as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone

number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 3, 2020.

Kimberly D. Bose,
Secretary.

[FR Doc. 2020-27035 Filed 12-8-20; 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: RP20-1111-002.

Applicants: Transcontinental Gas Pipe Line Company.

Description: Compliance filing GT&C Section 49—Bid Evaluation—Compliance Filing to be effective 1/2/2021.

Filed Date: 12/2/20.

Accession Number: 20201202-5097.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-241-001.

Applicants: Southern Star Central Gas Pipeline, Inc.

Description: Compliance filing Annual Cash-Out Activity Report 2020—Correction to be effective N/A.

Filed Date: 12/2/20.

Accession Number: 20201202-5129.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-287-000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: Compliance filing Abandon Tenneco X-Rate Schedules Compliance Filing to be effective 2/1/2021.

Filed Date: 12/2/20.

Accession Number: 20201202-5013.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-288-000.

Applicants: Rover Pipeline LLC.

Description: § 4(d) Rate Filing: Summary of Negotiated Rate Capacity Release Agreements on 12-2-20 to be effective 12/1/2020.

Filed Date: 12/2/20.

Accession Number: 20201202-5044.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-289-000.

Applicants: Northwest Pipeline LLC.
Description: § 4(d) Rate Filing: Non Conforming Service Agreements—XTO, Citadel, Cascade to be effective 1/2/2021.

Filed Date: 12/2/20.

Accession Number: 20201202-5073.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-290-000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate—Yankee Gas 510802 eff 12-3-2020 to be effective 12/3/2020.

Filed Date: 12/2/20.

Accession Number: 20201202-5100.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-291-000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 120220 Negotiated Rates—Castleton Commodities Merchant Trading R-4010-28 to be effective 12/3/2020.

Filed Date: 12/2/20.

Accession Number: 20201202-5111.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-292-000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 120220 Negotiated Rates—Castleton Commodities Merchant Trading R-4010-27 to be effective 12/3/2020.

Filed Date: 12/2/20.

Accession Number: 20201202-5113.

Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: RP21-293-000.

Applicants: Rockies Express Pipeline LLC.

Description: § 4(d) Rate Filing: REX 2020-12-02 Negotiated Rate Agreements to be effective 12/2/2020.

Filed Date: 12/2/20.

Accession Number: 20201202-5176.

Comments Due: 5 p.m. ET 12/14/20.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.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: December 3, 2020.

Kimberly D. Bose,
Secretary.

[FR Doc. 2020–27033 Filed 12–8–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–619–171]

Pacific Gas and Electric Company, City of Santa Clara, California; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Non-capacity amendment of license..

b. *Project No.:* 619–171.

c. *Date Filed:* November 24, 2020.

d. *Applicants:* Pacific Gas and Electric Company, and City of Santa Clara, California.

e. *Name of Project:* Bucks Creek Hydroelectric Project.

f. *Location:* The project is located on the North Fork Feather River and Bucks and Grizzly creeks in Plumas County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contacts:* Ms. Elisabeth Rossi, Pacific Gas & Electric Company, 245 Market Street, San Francisco, CA 94105, (415) 531–5186, Mr. Chris Karwick, Silicon Valley Power/City of Santa Clara, 1705 Martin Avenue, Santa Clara, CA 95054, (408) 615–6554.

i. *FERC Contact:* Mr. Korede Olagbegi, (202) 502–6268, Korede.Olagbegi@ferc.gov.

j. *Deadline for filing comments, motions to intervene, and protests* is 30 days from the issuance of this notice. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/doc-sfiling/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may send a paper copy. Submissions

sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–619–171. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The applicants propose to reconnect the Grizzly Powerhouse to the grid. The Grizzly Powerhouse connects to the grid at Pacific Gas and Electric Company's (PG&E) Caribou-Palermo transmission line, via the project's 115-kV transmission line referred to as the Grizzly Tap. In November 2018, the Caribou-Palermo transmission line was de-energized as a result of damage from the Camp Fire, forcing the Grizzly Powerhouse out of service. Following the Camp Fire, PG&E committed to permanently de-energizing the Caribou-Palermo line. The applicants propose to reconnect the Grizzly Powerhouse to the grid by removing the connection from the Caribou-Palermo line and interconnecting the Grizzly Tap at the 230-kV Bucks Creek-Cresta transmission line instead, which begins in the Bucks Creek substation yard (substation yard), and is part of the project.

The applicants propose a 3-phase process in order to facilitate the reconnection to the grid. In the first phase, which it has already completed, the applicants removed a 900-foot-long section of the Grizzly Tap, spanning from the substation yard to the Caribou-Palermo line. The applicants report that they did not engage in any ground-disturbing activity to remove the section. The applicants state that they are currently finalizing the design of the reconnection, but propose in the second and third phase to reinforce an existing access bridge with steel plates to support the weight of vehicles transporting new electrical equipment, remove a lattice tower in the substation yard, and to reconfigure the substation

yard, largely to incorporate a new transformer, so that the 115-kV Grizzly Tap may be stepped up to 230-kV and connected to the existing Bucks Creek-Cresta 230-kV line. The applicants state that all activities associated with its non-capacity amendment application would occur within the existing footprint of the previously disturbed areas of the substation yard, the adjacent parking areas and roads, and the Grizzly Tap transmission right of way, and included an Exhibit E (environmental assessment) along with the application.

l. *Locations of the Applications:* The Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's website at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. Agencies may obtain copies of the application directly from the applicants. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll free, (866) 208–3676 or TTY, (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Motions to Intervene, or Protests:* Anyone may submit comments, a motion to intervene, or a protest in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, motions to intervene, or protests must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title COMMENTS, MOTION TO INTERVENE, or PROTEST as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to

which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005.

All comments, motions to intervene, or protests must set forth their evidentiary basis. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 3, 2020.

Kimberly D. Bose,
Secretary.

[FR Doc. 2020-27034 Filed 12-8-20; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-10017-41-OA]

Notification of a Closed Meeting of the Science Advisory Board 2020 Scientific and Technological Achievement Awards Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a meeting of the Scientific and Technological Achievement Awards (STAA) Committee. The purpose of the meeting is to review the 2020 STAA nominations and to make recommendations for awards. The meeting is closed to the public.

DATES: The meeting of the SAB STAA Committee will be held on Monday, January 11, 2021 and Tuesday, January 12, 2021, from 11 a.m. to 6 p.m. (Eastern Time) each day.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information concerning this notice may contact Dr. Zaida Figueroa, Designated Federal Officer (DFO), via email at figueroa.zaida@epa.gov. General information about the SAB as well as any updates concerning the meetings announced in this notice can be found on the SAB website at <http://www.epa.gov/sab>.

SUPPLEMENTARY INFORMATION:

Background: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), codified at 42 U.S.C. 4365,

to provide independent scientific and technical advice to the EPA Administrator on the scientific and technical basis for agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to FACA and EPA policy, notice is hereby given that the Science Advisory Board Scientific and Technological Achievement Awards (STAA) Committee, will hold a closed meeting to review the 2020 STAA nominations and to make recommendations for awards and recommendations for improvement of the Agency's STAA program.

The STAA awards are established to honor and recognize EPA employees who have made outstanding contributions in the advancement of science and technology through their research and development activities, as exhibited in publication of their results in peer reviewed journals. In conducting its review, the SAB considers each nomination in relation to the following four award levels:

- Level I awards are for those who have accomplished an exceptionally high-quality research or technological effort. The awards recognize the creation or general revision of a scientific or technological principle or procedure, or a highly significant improvement in the value of a device, activity, program, or service to the public. Awarded research is of national significance or has high impact on a broad area of science/technology. The research has far reaching consequences and is recognizable as a major scientific/technological achievement within its discipline or field of study.

- Level II awards are for those who have accomplished a notably excellent research or technological effort that has qualities and values similar to, but to a lesser degree, than those described under Level I. Awarded research has timely consequences and contributes as an important scientific/technological achievement within its discipline or field of study.

- Level III awards are for those who have accomplished an unusually notable research or technological effort. The awards are for a substantial revision or modification of a scientific/technological principle or procedure, or an important improvement to the value of a device, activity, program, or service to the public. Awarded research relates to a mission or organizational component of the EPA, or significantly

affects a relevant area of science/technology.

- Honorable Mention awards acknowledge research efforts that are noteworthy but do not warrant a Level I, II or III award. Honorable Mention applies to research that: (1) May not quite reach the level described for a Level III award; (2) show a promising area of research that the Subcommittee wants to encourage; or (3) show an area of research that the Subcommittees feels is too preliminary to warrant an award recommendation at this time.

The SAB reviews the STAA nomination packages according to the following five evaluation factors:

- The extent to which the work reported in the nominated publication(s) resulted in either new or significantly revised knowledge. The accomplishment is expected to represent an important advancement of scientific knowledge or technology relevant to environmental issues and EPA's mission.

- The extent to which environmental protection has been strengthened or improved, whether of local, national, or international importance.

- The degree to which the research is a product of the originality, creativeness, initiative, and problem-solving ability of the researchers, as well as the level of effort required to produce the results.

- The extent of the beneficial impact of the research and the degree to which the research has been favorably recognized from outside EPA.

- The nature and extent of peer review, including stature and quality of the peer-reviewed journal or the publisher of a book for a review chapter published therein.

I have determined that the meetings of the STAA Committee and Chartered SAB will be closed to the public because they are concerned with selecting employees deserving of awards. In making these recommendations, the Agency requires full and frank advice from the SAB. This advice will involve professional judgments on the relative merits of various employees and their respective work. Such personnel matters involve the discussion of information that is of a personal nature and the disclosure of which would be a clearly unwarranted invasion of personal privacy and, therefore, are protected from disclosure by section 10(d) of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and sections (c)(2) and (c)(6) of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (6). Minutes of the meetings of the STAA Committee and

the Chartered SAB will be kept and certified by the chair of those meetings.

Andrew Wheeler,
Administrator.

[FR Doc. 2020-26996 Filed 12-8-20; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-XXXX; FRS 17285]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it can further reduce the information collection burden for small business concerns with fewer than 25 employees.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before January 8, 2021.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into www.reginfo.gov per the above instructions for it to be considered. In addition to submitting in www.reginfo.gov also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to PRA@fcc.gov and to Cathy.Williams@fcc.gov. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418-2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called

"Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

OMB Control No.: 3060-XXXX.

Title: 3.7 GHz Service Licensee and Earth Station Operator Agreements; 3.7 GHz Service Licensee Engineering Analysis.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit entities; not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents and

Responses: 30 Respondents and 30 responses.

Estimated Time per Response: 2 hours-5 hours.

Frequency of Response:

Recordkeeping requirement; on occasion reporting requirement; third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in sections 1, 2, 4(i), 4(j), 5(c), 201, 302, 303, 304, 307(e), 309, and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 155(c), 201, 302, 303, 304, 307(e), 309, and 316.

Total Annual Burden: 120 hours.

Annual Cost Burden: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality:

The information collected under this collection will be made publicly available. However, to the extent information submitted pursuant to this information collection is determined to be confidential, it will be protected by the Commission. If a respondent seeks to have information collected pursuant to this information collection withheld from public inspection, the respondent may request confidential treatment pursuant to section 0.459 of the Commission's rules for such information.

Needs and Uses: On February 28, 2020, in furtherance of the goal of releasing more mid-band spectrum into the market to support and enabling next-generation wireless networks, the Commission adopted a Report and Order, FCC 20-22, (3.7 GHz Report and Order), in which it reformed the use of the 3.7-4.2 GHz band, also known as the C-band. Currently, the 3.7-4.2 GHz band is allocated in the United States exclusively for non-Federal use on a primary basis for Fixed Satellite Service (FSS) and Fixed Service. The 3.7 GHz Report and Order calls for the relocation of existing FSS operations in the band into the upper 200 megahertz of the band (4.0-4.2 GHz) and making the lower 280 megahertz (3.7-3.98 GHz) available for flexible use throughout the contiguous United States through a Commission-administered public auction of overlay licenses that is scheduled to occur later this year.

The Commission concluded in the 3.7 GHz Report and Order that, once this transition is complete, coordination measures are needed to protect incumbent C-band operations in the upper portion of the 3.7-4.2 GHz band. 3.7 GHz Service licensees are required to comply with certain technical rules and coordination practices designed to reduce the risk of interference to incumbent operations. Specifically, 3.7 GHz Service licensees are required to

comply with specific power flux density (PFD) limits to protect incumbent earth stations from out-of-band emissions and blocking and to coordinate frequency usage with incumbent Telemetry, Tracking, and Command (TT&C) earth stations. The 3.7 GHz Report and Order allows 3.7 GHz Service licensees and C-Band earth station operators to modify these PFD limits, but it requires a 3.7 GHz Service licensee that is a party to such an agreement to maintain a copy of the agreement in its station files and disclose it, upon request, to prospective license assignees, transferees, or spectrum lessees, and to the Commission. The Commission also required any 3.7 GHz Service licensee with base stations located within the appropriate coordination distance to provide upon request an engineering analysis to the TT&C operator to demonstrate their ability to comply with the applicable -6 dB I/N criteria.

The information that will be collected under this new information collection is designed to ensure that 3.7 GHz Service licensees operate in a manner that ensures incumbent C-band operations in the upper portion of the 3.7–4.2 GHz band and TT&C operations in the 3700–3980 MHz band are protected. By requiring 3.7 GHz Service licensees to provide a copy of any private agreement with 3.7 GHz earth station operators to prospective license assignees, transferees, or spectrum lessees, and to the Commission, the Commission ensures that such agreements continue to protect incumbent C-band operations in the event a 3.7 GHz service license is subsequently transferred to a new licensee. This collection promotes the safety of operations in the band and reduces the risk of harmful interference to incumbents. It also ensures that relevant stakeholders have access to coordination agreements between 3.7 GHz Service licensees and entities operating earth stations or TT&C operations.

The information provided by the 3.7 GHz Service licensee to the TT&C operator ensures the protection of TT&C operations. The information collection will facilitate an efficient and safe transition by requiring 3.7 GHz Service licensees to demonstrate their ability to comply with the -6 dB I/N criteria, thereby minimizing the risk of interference.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–26984 Filed 12–8–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0745; FRS 17292]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 8, 2021. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email PRA@fcc.gov and to Nicole.Ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0745.

Title: Implementation of the Local Exchange Carrier Tariff Streamlining Provisions in the Telecommunications Act of 1996, CC Docket No. 96–187.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 50 respondents; 1,536 responses.

Estimated Time per Response: 0.25–6 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement, and third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in sections 1, 4(i), and 204(a)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 204(a)(3).

Total Annual Burden: 4,054 hours.

Total Annual Cost: \$727,800.

Privacy Act Impact Assessment: No impact.

Nature and Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: This collection will be submitted as an extension to the Office of Management and Budget (OMB) in order to obtain the full three-year clearance.

In CC Docket 96–187, the Commission adopted measures to streamline tariff filing requirements for local exchange carriers (LECs) pursuant to the Telecommunications Act of 1996. In order to achieve a streamlined and deregulatory environment for LEC tariff filings, LECs are required to file tariffs electronically. The information collected under the electronic filing program will facilitate access to tariffs and associated documents by the public, as well as by state and federal regulators. Ready electronic access to carrier tariffs will also facilitate the compilation of aggregate data for industry analysis purposes without imposing new reporting requirements on carriers.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–26985 Filed 12–8–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1122; FRS 17264]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority**AGENCY:** Federal Communications Commission.**ACTION:** Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 8, 2021. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email PRA@fcc.gov and to Nicole.Ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1122.

Title: Preparation of Annual Reports to Congress for the Collection and Expenditure of Fees or Charges for Enhanced 911 (E911) Services under the NET 911 Improvement Act of 2008.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: State, local and tribal governments.

Number of Respondents and

Responses: 56 Respondents; 56 Responses.

Estimated Time per Response: 55 hours.

Frequency of Response: Annual reporting requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in New and Emerging Technologies 911 Improvement Act of 2008, Public Law 110–283, 122 Stat. 2620 (2008) (NET 911 Act).

Total Annual Burden: 3,080 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No Impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Federal Communications Commission (Commission) is directed by statute (New and Emerging Technologies 911 Improvement Act of 2008, Public Law 110–283, 122 Stat. 2620 (2008) (NET 911 Act)) to submit an annual “Fee Accountability Report” to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representative “detailing the status in each State of the collection and distribution [of] fees or charges” for “the support or implementation of 911 or enhanced 911 services,” including “findings on the amount of revenues obligated or expended by each State or political subdivision thereof for any purpose other than the purpose for which any such fees or charges are specified.” (NET 911 Act, 122 Stat. at 2622). The statute directs the Commission to submit its first annual report within one year after the date of enactment of the NET 911 Act. Given that the NET 911 Act was enacted on July 23, 2008, the first annual report was due to Congress on July 22, 2009.

Description of Information Collection: The Commission will collect information for the annual preparation of the Fee Accountability Report via a web-based survey that appropriate State officials (e.g., State 911 Administrators and Budget Officials) will be able to access to submit data pertaining to the collection and distribution of fees or charges for the support or

implementation of 911 or enhanced 911 services, including data regarding whether their respective state collects and distributes such fees or charges, the nature (e.g., amount and method of assessment or collection) and the amount of revenues obligated or expended for any purpose other than the purpose for which any such 911 or enhanced 911 service fees or charges are specified. Consistent with Sections 6(f) of the NET 911 Act, the Commission will request that state officials report this information with respect to the fees and charges in connection with implementation of 911 or E–911 services within their state, including any political subdivision, Indian tribe and/or village and regional corporation serving any region established pursuant to the Alaska Native Claims Settlement Act that otherwise lie within their state boundaries. In addition, consistent with the definition of “State” set out in Section 3(40) of the Communications Act, the Commission will collect this information from, states as well as the District of Columbia and the inhabited U.S. Territories and possessions.

Federal Communications Commission.

Marlene Dortch,*Secretary, Office of the Secretary.*

[FR Doc. 2020–26982 Filed 12–8–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1030; FRS 17271]

Information Collection Being Reviewed by the Federal Communications Commission**AGENCY:** Federal Communications Commission.**ACTION:** Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize

the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 8, 2021. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to PRA@fcc.gov and to Cathy.Williams@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418-2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-1030.

Title: Service Rules for Advanced Wireless Services (AWS) in the 1.7 GHz and 2.1 GHz Bands.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; state, local, or tribal government; Federal Government and not for profit institutions.

Number of Respondents: 232

Respondents: 6,812 responses.

Estimated Time per Response: 0.25 to 5 hours.

Frequency of Response: Annual, semi-annual, one time, and on occasion reporting requirements, recordkeeping requirement, third-party disclosure requirements, and every ten years reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in sections 1, 2, 4(i), 201, 301, 302, 303, 307, 308, 309, 310, 316, 319, 324, 332, and 333 of the Communications Act of 1934, as amended, and sections 6003, 6004, and 6401 of the Middle Class Tax Relief Act of 2012, Public Law 112-96, 126 Stat. 156, 47 U.S.C. 151, 152, 154(i), 201, 301, 302(a), 303, 307, 308, 309, 310, 316, 319, 324, 332, 333, 1403, 1404, and 1451.

Total Annual Burden: 13,866 hours.

Total Annual Cost: \$782,618.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The currently approved information collections under Control No. 3060-1030 relate to three groups of Advanced Wireless Service ("AWS") spectrum, commonly referred to as AWS-1, AWS-3, and AWS-4. The FCC's policies and rules apply to application, licensing, operating and technical rules for this spectrum. The respondents are AWS licensees, incumbent Fixed Microwave Service (FS) and Broadband Radio Service (BRS) licensees that relocate out of the AWS bands, and AWS Clearinghouses that keep track of cost sharing obligations. AWS licensees also have coordination requirements with certain Federal Government incumbents.

Recordkeeping, reporting, and third-party disclosure requirements associated with the FCC items listed in item 1 will be used by incumbent licensees and new entrants to negotiate relocation agreements and to coordinate operations to avoid interference. The information also will be used by the clearinghouses to maintain a national database, determine reimbursement obligations of entrants pursuant to the Commission's rules, and notify such entrants of their reimbursement obligations. Additionally, the information will be used to facilitate dispute resolution and for FCC oversight of the clearinghouses and the cost-sharing plan.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020-26983 Filed 12-8-20; 8:45 am]

BILLING CODE 6712-01-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 23, 2020.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Trudy M. Durfee Revocable Trust, Trudy M. Durfee, as trustee, both of Sundance, Wyoming;* to acquire voting shares of Sundance Bankshares, Inc., and thereby indirectly acquire voting shares of Sundance State Bank, both in Sundance, Wyoming.

In addition, The Danny K. Hopson and Janice Dee Hopson Family Trust, Danny K. Hopson and Janice Dee Hopson, as co-trustees, all of San Tan Valley, Arizona; to become members of the Richard Durfee Family Group, a group acting in concert, and to retain voting shares of Sundance Bankshares, Inc., and indirectly retain voting shares of Sundance State Bank.

Board of Governors of the Federal Reserve System, December 3, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020-26980 Filed 12-8-20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Centers for Disease Control and Prevention Sexually Transmitted Infection Treatment Guidelines Update; Webinar

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of public webinar.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and

Human Services (HHS), announces a webinar entitled, "CDC STI Treatment Guidelines Update". The purpose of the webinar is for CDC to receive comments from potential users on the proposed updated guidelines. This webinar is an opportunity for all interested parties to ask questions and provide feedback, but is specifically directed toward clinicians, such as medical doctors, nurse practitioners, and physician's assistants. CDC will consider comments made during the webinar prior to finalizing the updated STI Treatment Guidelines for publication.

DATES: The webinar will be held on December 18, 2020 from 2 p.m. to 4 p.m. EST. Registration instructions can be found on the website, <https://www.cdc.gov/std/treatment/default.htm>.

ADDRESSES: The webinar will be broadcast from the Centers for Disease Control and Prevention, 1600 Clifton Road NE, Atlanta, Georgia 30329.

FOR FURTHER INFORMATION CONTACT: Quinn Haaga, Public Health Advisor, CDC, 1600 Clifton Road NE, MS-US 12-2, Atlanta, GA 30329, stdtxguidelines@cdc.gov.

SUPPLEMENTARY INFORMATION: The CDC's STI Treatment Guidelines Webinar is a public presentation of proposed updates to the CDC's 2015 STD Treatment Guidelines. The webinar will include discussions of proposed changes to CDC's 2015 STD Treatment Guidelines focusing on (1) changes to testing, management, and/or treatment recommendations for *Neisseria gonorrhoeae*, *Chlamydia trachomatis*, *Trichomonas vaginalis* treatment; (2) role of metronidazole in pelvic inflammatory disease treatment; (3) alternative treatment options for bacterial vaginosis; (4) management of *Mycoplasma genitalium*; and (5) two step testing for serologic diagnosis of genital HSV2. Physicians and other health-care providers can use these guidelines to assist in the prevention and treatment of STIs. Comments and questions on the proposed changes may be made during the webinar only.

Please refer to the posted agenda for updates about the webinar one week prior to the meeting. Information will be provided on the following website when it becomes available. <https://www.cdc.gov/std/treatment/default.htm>. A recording of the webinar and accompanying transcripts will be available by January 17, 2021 on the website listed above. In addition, CDC's responses to questions from the webinar will also be available February 15, 2021 on this website.

Participants must register by December 17, 2020. This is a webinar-

only event and there will be no on-site participation at the CDC broadcast facility.

Sandra Cashman,

Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2020-26974 Filed 12-8-20; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC-2020-0122]

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. The meeting will be webcast live via the World Wide Web.

DATES: The meeting will be held on December 11, 2020 from 12:00 p.m. to 5:00 p.m. EST and December 13, 2020 from 12:00 p.m. to 4:00 p.m. EST (times subject to change, see the ACIP website for any updates: <http://www.cdc.gov/vaccines/acip/index.html>).

Written comments must be received on or before December 14, 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-2020-0122 by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.

- **Mail:** Docket No. CDC-2020-0122, c/o Attn: December 11 and 13, 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>.

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: 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. The Secretary of Health and Human Services has determined that COVID-19 is a Public Health Emergency. A notice of this ACIP meeting has also been posted on CDC's ACIP website at: <http://www.cdc.gov/vaccines/acip/index.html>. In addition, CDC has sent notice of this ACIP meeting by email to those who subscribe to receive email updates about ACIP.

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 vaccine. A recommendation vote(s) is scheduled. 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.

Written Public Comment: Written comments must be received on or before December 14, 2020. **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 December 13, 2020 ACIP meeting must submit a request at <http://www.cdc.gov/vaccines/acip/meetings/> no later than 11:59 p.m., EST, December 11, 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 12:00 p.m., EST, December 12, 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.

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. 2020-27133 Filed 12-7-20; 4:15 pm]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No. 0970-0234]

Proposed Information Collection Activity; Social Services Block Grant (SSBG) Post-Expenditure Report, Pre-Expenditure Report, and Intended Use Plan

AGENCY: Office of Community Services, Administration for Children and Families, HHS.

ACTION: Request for Public Comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a revision to the Social Services Block Grant (SSBG) Post-Expenditure Report, Pre-Expenditure Report, and Intended Use Plan (OMB #0970-0234), previously titled, "Social Services Block Grant (SSBG) Post-Expenditure Report". ACF is proposing to expand the information collection to include the collection of states' Intended Use Plans and retitle the information collection to clarify the role of the Pre-Expenditure Report.

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 above.

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: On an annual basis, states and territories are required to submit the following reports: (1) An Intended Use Plan that provides data and narrative descriptions related to the state's SSBG program. The Intended Use Plan includes details about the delivery of SSBG services and the state agency administering the SSBG Program. ACF is proposing to expand the currently approved information collection to include collection of states' Intended Use Plans. Grantees are required to submit their Intended Use Plans no less than 30 days prior to the start of the budget period covered by the report. (2) A Pre-Expenditure Report that demonstrates the state's anticipated allocation of SSBG funding among the 29 pre-defined SSBG service categories. Historically, states have submitted this report using the Post-Expenditure Report Form, and the associated burden is included in the currently approved information collection. Grantees are required to submit their Pre-Expenditure Report no less than 30 days prior to the start of the budget period covered by the report. (3) A Post-Expenditure Report that details the state's actual use of SSBG funding among each of the 29 service categories. Grantees are required to submit their Post-Expenditure Report within 6 months of the end of the period covered by the report.

Respondents: Agencies that administer the SSBG at the state or territory level, including the 50 states; District of Columbia; Puerto Rico; and the territories of American Samoa, Guam, the Virgin Islands, and the Commonwealth of Northern Mariana Islands.

Annual Burden Estimates

This request is specific to the Intended Use Plan. Currently approved materials and associated burden can be found at: https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202011-0970-006.

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Total/annual burden hours
Intended Use Plan	56	1	40	2,240

Estimated Total Annual Burden Hours: 2,240.

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: 42 U.S.C. 1397 through 1397e.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020-27015 Filed 12-8-20; 8:45 am]

BILLING CODE 4184-24-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2014-N-1076]

Agency Information Collection Activities; Proposed Collection; Comment Request; Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection pertaining to Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice.

DATES: Submit either electronic or written comments on the collection of information by February 8, 2021.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 8, 2021. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 8, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2014-N-1076 for "Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry on Formal Dispute

Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3521), Federal

Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on

respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice OMB Control Number 0910-0563—Extension

Section 562 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360bbb-1) directs FDA to establish adequate dispute resolution (DR) procedures to ensure appropriate review of scientific controversies between FDA and members of regulated industry, including possible review by a scientific advisory committee. To implement this provision, we amended the general appeal regulation applicable across all FDA components (21 CFR 10.75), Internal agency review of decisions) to provide for advisory committee review (§ 10.75(b)(2)). At the same time and consistent with the mandates of section 562 of the FD&C Act, we adopted an approach whereby specific implementation procedures regarding scientific controversy associated with review of certain FDA decisions are detailed in center-issued guidance.

Accordingly, we developed the guidance for industry "Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice." We intend that the guidance inform manufacturers of veterinary and human

drugs, including human biological drug products, on how to resolve disputes about scientific and technical issues relating to current good manufacturing practice (CGMP).

Disputes related to scientific and technical issues may arise during FDA inspections of pharmaceutical manufacturers to determine compliance with CGMP requirements or during FDA's assessment of corrective actions undertaken as a result of such inspections. The guidance recommends procedures that we believe encourage open and prompt discussion of disputes and lead to their resolution. The guidance describes procedures for raising such disputes to the Office of Regulatory Affairs and Center levels and procedures for requesting review by the DR panel. The guidance is available on our website at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, along with additional information regarding the resolution of scientific disputes at FDA.

We estimate only a nominal burden for the information collection and assume that one manufacturer will submit one request annually for tier-one DR and that it will take manufacturers approximately 30 hours to prepare and submit each tier-one DR request. Since our last request for OMB approval of the information collection, we have received no tier-two DRs.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Requests for tier-one DR	1	1	1	30	30

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimated burden for the information collection reflects a decrease of 38 hours and a decrease of 1 request. This adjustment corresponds to a decrease in the number of submissions we have received over the last few years.

Dated: December 2, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-27060 Filed 12-8-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2020-D-0770]

Best Practices in Developing Proprietary Names for Human Nonprescription Drug Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled "Best Practices in Developing Proprietary

Names for Human Nonprescription Drug Products." FDA is issuing this draft guidance to help sponsors develop human nonprescription drug product proprietary names. This draft guidance describes best practices to help minimize medication errors and otherwise avoid adoption of proprietary names that contribute to violations of the Federal Food, Drug, and Cosmetic Act (FD&C Act) and its implementing regulations. The draft guidance also describes the framework FDA uses in evaluating proposed proprietary names for nonprescription drug products, which is available to sponsors to use before marketing a nonprescription drug product bearing a particular proprietary name. This draft guidance is issued in

response to industry stakeholders' requests to specifically address the approaches for naming of human nonprescription drug products.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 8, 2021.

ADDRESSES: You may submit comments 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-2020-D-0770 for "Best Practices in Developing Proprietary Names for Human Nonprescription Drug

Products." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send

one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Danielle Harris, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4461, Silver Spring, MD 20993-0002, 301-796-4590; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Best Practices in Developing Proprietary Names for Human Nonprescription Drug Products." FDA has long recognized the importance of proprietary name confusion as a potential cause of medication errors, and has addressed this issue repeatedly in recent decades. Our focus has been to develop and communicate to sponsors a systematic, standardized, and transparent approach to proprietary name evaluation within the product development, review and approval process. FDA issued the draft guidance for industry "Best Practices in Developing Proprietary Names for Drugs" published in the **Federal Register** of May 29, 2014 (79 FR 30852). The 2014 draft guidance focused on the safety aspects in the development and selection of proposed proprietary names for all prescription and nonprescription human drug products. In the comments we received in response to the 2014 draft guidance on proprietary naming, industry stakeholders urged FDA to separate the content pertaining to nonprescription drug product proprietary names from that pertaining to prescription drug product proprietary names and issue a separate guidance to address the name development process for nonprescription drugs. Thus, to provide greater clarity on the considerations applicable to the products regulated as nonprescription, this draft guidance "Best Practices in Developing Proprietary Names for Human Nonprescription Drug Products" was developed as a separate draft guidance.

FDA is separately announcing the availability of a final guidance entitled "Best Practices in Developing Proprietary Names for Human

Prescription Drug Products,” which addresses prescription drug products.

This draft guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency’s current thinking on “Best Practices in Developing Proprietary Names for Human Nonprescription Drug Products.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001 and the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either <https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, or <https://www.regulations.gov>.

Dated: December 4, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27057 Filed 12–8–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–0622]

Best Practices in Developing Proprietary Names for Human Prescription Drug Products; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled “Best Practices in Developing Proprietary Names for Human Prescription Drug Products.” This document provides guidance to sponsors on the development and selection of proposed proprietary names. This guidance describes best practices to help minimize medication errors and otherwise avoid adoption of proprietary names that contribute to violations of the Federal Food, Drug, and Cosmetic Act (FD&C Act) and its implementing regulations and provides a voluntary framework for evaluating proposed proprietary names before submitting them for FDA review. This guidance finalizes the draft guidance issued in May 2014 entitled “Best Practices in Developing Proprietary Names for the Drugs.”

DATES: The announcement of the guidance is published in the **Federal Register** on December 9, 2020

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2014–D–0622 for “Best Practices in Developing Proprietary Names for Human Prescription Drug Products.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts

and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Lubna Merchant, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4418, Silver Spring, MD 20993-0002, 301-796-5162, or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled “Best Practices in Developing Proprietary Names for Human Prescription Drug Products.” This guidance describes best practices to help minimize proprietary name-related medication errors and otherwise avoid adoption of proprietary names that contribute to violations of the FD&C Act and its implementing regulations. This guidance also describes the framework FDA uses in evaluating proprietary names that sponsors could use before submitting names for FDA review if they wish.

FDA has long recognized the importance of proprietary name confusion as a potential cause of medication errors and has addressed this issue repeatedly in recent decades. Our focus has been to develop and communicate to sponsors a systematic, standardized, and transparent approach to proprietary name evaluation within the product development, review, and approval process.

In the **Federal Register** of May 29, 2014 (79 FR 30852), FDA announced the availability of a draft guidance entitled “Best Practices in Developing Proprietary Names for Drugs.” The guidance announced in this notice finalizes the draft guidance issued in May 2014. The Agency has carefully reviewed and considered the comments

it received in developing this final version of the guidance.

FDA received several comments on the guidance and revised the guidance in response to these comments. The revisions include (a) adding a note in the section discussing the United States Adopted Name (USAN) stating that FDA will no longer object to the use of two-letter USAN stems in names for products that do not share any association with the stem in question; (b) streamlining the name simulation study section based on the feedback received; (c) providing clarifications to the section that discusses medical abbreviations, modifiers, and computational methods; (d) separating the content pertaining to nonprescription proprietary names and issuing separate guidance to address the name development process for nonprescription drugs; (e) revising the misbranding discussion for greater clarity and included information on one possible study methodology that sponsors may consider to test proposed names for misbranding concerns; and (f) adding certain definitions and specific criteria for prescreening proprietary name candidates and updating definitions in the glossary and clarified terminology where needed. FDA also revised the document throughout to ensure consistency in terminology, clarified section headings, and reordered information for clarity where applicable.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a draft guidance entitled “Best Practices in Developing Proprietary Names for Human Nonprescription Drug Products.” That draft guidance is issued in response to industry stakeholders’ requests to specifically address the approaches for naming of human nonprescription drug products. The draft guidance is being issued to provide greater clarity on the considerations applicable to nonprescription drug products.

The guidance announced in this notice is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on “Best Practices in Developing Proprietary Names for Human Prescription Drug Products.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to

previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910-0001, and the collections of information in 21 CFR part 601 have been approved under OMB control number 0910-0338.

III. Electronic Access

Persons with access to the internet may obtain the document at <https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, or <https://www.regulations.gov>.

Dated: December 4, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020-27058 Filed 12-8-20; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration

ACTION: Notice of Amendment and Republished Declaration.

SUMMARY: The Secretary issues this amendment pursuant to section 319F-3 of the Public Health Service Act to amend his March 10, 2020 Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19.

DATES: The amendments to the Declaration are applicable as of February 4, 2020, except as otherwise specified in Section XII.

FOR FURTHER INFORMATION CONTACT:

Robert P. Kadlec, MD, MTM&H, MS, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue

SW, Washington, DC 20201; Telephone: 202-205-2882.

SUPPLEMENTARY INFORMATION: The Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. 247d-6d et. seq., authorizes the Secretary of Health and Human Services (the Secretary) to issue a declaration to provide liability protections to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from, the manufacture, distribution, administration, or use of certain medical countermeasures (Covered Countermeasures), except for claims involving “willful misconduct,” as defined in the PREP Act. Such declarations are subject to amendment as circumstances warrant.

The PREP Act was enacted on December 30, 2005, as Public Law 109-148, Division C, Section 2. It amended the Public Health Service (PHS) Act, adding Section 319F-3, which addresses liability immunity, and Section 319F-4, which creates a compensation program. These sections are codified at 42 U.S.C. 247d-6d and 42 U.S.C. 247d-6e, respectively. Section 319F-3 of the PHS Act has been amended by the Pandemic and All-Hazards Preparedness Reauthorization Act (PAHPRA), Public Law 113-5, enacted on March 13, 2013, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116-136, enacted on March 27, 2020, to expand Covered Countermeasures under the PREP Act.

On January 31, 2020, the Secretary declared a public health emergency pursuant to section 319 of the PHS Act, 42 U.S.C. 247d, effective January 27, 2020, for the entire United States to aid in the response to the Coronavirus Disease 2019 (COVID-19) outbreak, which subsequently became a global pandemic. Pursuant to section 319 of the PHS Act, the Secretary renewed that declaration on April 21, 2020, July 23, 2020, and October 2, 2020. On March 10, 2020, the Secretary issued a declaration under the PREP Act for medical countermeasures against COVID-19.¹ On April 10, the Secretary amended the Declaration to extend liability protections to Covered Countermeasures authorized under the CARES Act.² On June 4, the Secretary amended the Declaration to clarify that Covered Countermeasures under the Declaration include qualified pandemic and epidemic products that limit the harm that COVID-19 might otherwise

cause.³ On August 19, the Secretary amended the Declaration to add additional categories of Qualified Persons and to amend the category of disease, health condition, or threat for which he recommends the administration or use of Covered Countermeasures.⁴

The Secretary now further amends the Declaration pursuant to section 319F-3 of the Public Health Service Act. This Fourth Amendment to the Declaration:

(a) Clarifies that the Declaration must be construed in accordance with the Department of Health and Human Services (HHS) Office of the General Counsel (OGC) Advisory Opinions on the Public Readiness and Emergency Preparedness Act and the Declaration (Advisory Opinions).⁵ The Declaration incorporates the Advisory Opinions for that purpose.

(b) Incorporates authorizations that the HHS Office of the Assistant Secretary for Health (OASH) has issued as an Authority Having Jurisdiction.⁶

³ 85 FR 35100 (June 8, 2020).

⁴ 85 FR 52136 (Aug. 24, 2020).

⁵ See, e.g., Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration under the Act, Apr. 17, 2020, as Modified on May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-advisory-opinion-hhs-ogc.pdf> (last visited Dec. 1, 2020); Advisory Opinion 20-02 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> (last visited Dec. 1, 2020); Advisory Opinion 20-03 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO3.1.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Dec. 1, 2020); Advisory Opinion 20-04 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO%204.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Dec. 1, 2020).

⁶ See, e.g., Guidance for Licensed Pharmacists, COVID-19 Testing, and Immunity Under the PREP Act, OASH, Apr. 8, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/authorizing-licensed-pharmacists-to-order-and-administer-covid-19-tests.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for COVID-19 Screening Tests at Nursing Homes, Assisted-Living Facilities, Long-Term-Care Facilities, and other Congregate Facilities, OASH, Aug. 31, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-coverage-for-screening-in-congregate-settings.pdf> (last visited Dec. 1, 2020); Guidance for Licensed Pharmacists and Pharmacy Interns Regarding COVID-19 Vaccines and Immunity under the PREP Act, OASH, Sept. 3, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/licensed-pharmacists-and-pharmacy-interns-regarding-covid-19-vaccines-immunity.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for Qualified Pharmacy Technicians and State-Authorized Pharmacy Interns for Childhood Vaccines, COVID-19 Vaccines, and COVID-19 Testing, OASH, Oct. 20, 2020, available at <https://www.hhs.gov/sites/default/files/prep-act-guidance.pdf> (last visited Dec. 1, 2020); PREP Act Authorization for Pharmacies Distributing and Administering Certain Covered Countermeasures, Oct. 29, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-authorization-pharmacies-administering-covered-countermeasures.pdf> (last visited Dec. 1, 2020) (collectively, OASH PREP Act Authorizations).

(c) Adds an additional category of Qualified Persons under Section V of the Declaration and 42 U.S.C. 247d-6d(i)(8)(B), i.e., healthcare personnel using telehealth to order or administer Covered Countermeasures for patients in a state other than the state where the healthcare personnel are permitted to practice.⁷

(d) Modifies and clarifies the training requirements for certain licensed pharmacists and pharmacy interns to administer certain routine childhood or COVID-19 vaccinations.

(e) Makes explicit that Section VI covers all qualified pandemic and epidemic products under the PREP Act.

(f) Adds a third method of distribution under Section VII of the Declaration and 42 U.S.C. 247d-6d(a)(5) that would provide liability protections for, among other things, additional private-distribution channels.

(g) Makes explicit in Section IX that there can be situations where not administering a covered countermeasure to a particular individual can fall within the PREP Act and this Declaration's liability protections.

(h) Makes explicit in Section XI that there are substantial federal legal and policy issues, and substantial federal legal and policy interests, in having a unified, whole-of-nation response to the COVID-19 pandemic among federal, state, local, and private-sector entities. The world is facing an unprecedented pandemic. To effectively respond, there must be a more consistent pathway for Covered Persons to manufacture, distribute, administer or use Covered Countermeasures across the nation and the world.

⁷ *immunity.pdf* (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for Qualified Pharmacy Technicians and State-Authorized Pharmacy Interns for Childhood Vaccines, COVID-19 Vaccines, and COVID-19 Testing, OASH, Oct. 20, 2020, available at <https://www.hhs.gov/sites/default/files/prep-act-guidance.pdf> (last visited Dec. 1, 2020); PREP Act Authorization for Pharmacies Distributing and Administering Certain Covered Countermeasures, Oct. 29, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-authorization-pharmacies-administering-covered-countermeasures.pdf> (last visited Dec. 1, 2020) (collectively, OASH PREP Act Authorizations).

⁸ “Telehealth, telemedicine, and related terms generally refer to the exchange of medical information from one site to another through electronic communication to improve a patient's health.” Medicare Telemedicine Health Care Provider Fact Sheet, Mar. 17, 2020, available at <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet> (last visited on Dec. 2, 2020). For the Declaration and the Fourth Amendment, the term “telehealth” includes telehealth, telemedicine, and related terms as described by the Centers for Medicare & Medicaid (CMS).

¹ 85 FR 15198 (Mar. 17, 2020).

² 85 FR 21012 (Apr. 15, 2020).

(i) Revises the effective time period of the Declaration in light of the amendments to the Declaration.⁸

The Secretary republishes the Declaration, as amended, in full. Unless otherwise noted, all statutory citations are to the U.S. Code.

Description of This Amendment

Declaration

The Declaration has fifteen sections describing PREP Act coverage for medical countermeasures against COVID-19. OGC has issued Advisory Opinions interpreting the PREP Act and reflecting the Secretary's interpretation of the Declaration.⁹ The Secretary now amends the Declaration to clarify that the Declaration must be construed in accordance with the Advisory Opinions. The Secretary expressly incorporates the Advisory Opinions for that purpose.

Section V. Covered Persons

Section V of the Declaration describes Covered Persons, including additional qualified persons identified by the Secretary, as required under the PREP Act. The Secretary amends Section V to specify an additional category of qualified persons. Specifically, healthcare personnel who are permitted to order and administer a Covered Countermeasure through telehealth in a state may do so for patients in another state so long as the healthcare personnel comply with the legal requirements of the state in which the healthcare personnel are permitted to order and administer the Covered Countermeasure by means of telehealth.

Telehealth is widely recognized as a valuable tool to promote public health

during this pandemic. According to the Centers for Disease Control and Prevention (CDC),

Telehealth services can facilitate public health mitigation strategies during this pandemic by increasing social distancing. These services can be a safer option for [healthcare personnel (HCP)] and patients by reducing potential infectious exposures. They can reduce the strain on healthcare systems by minimizing the surge of patient demand on facilities and reduce the use of [personal protective equipment (PPE)] by healthcare providers.

Maintaining continuity of care to the extent possible can avoid additional negative consequences from delayed preventive, chronic, or routine care. Remote access to healthcare services may increase participation for those who are medically or socially vulnerable or who do not have ready access to providers. Remote access can also help preserve the patient-provider relationship at times when an in-person visit is not practical or feasible. Telehealth services can be used to:

- Screen patients who may have symptoms of COVID-19 and refer as appropriate
- Provide low-risk urgent care for non-COVID-19 conditions, identify those persons who may need additional medical consultation or assessment, and refer as appropriate
- Access primary care providers and specialists, including mental and behavioral health, for chronic health conditions and medication management
- Provide coaching and support for patients managing chronic health conditions, including weight management and nutrition counseling
- Participate in physical therapy, occupational therapy, and other modalities as a hybrid approach to in-person care for optimal health
- Monitor clinical signs of certain chronic medical conditions (e.g., blood pressure, blood glucose, other remote assessments)
- Engage in case management for patients who have difficulty accessing care (e.g., those who live in very rural settings, older adults, those with limited mobility)
- Follow up with patients after hospitalization
- Deliver advance care planning and counseling to patients and caregivers to document preferences if a life-threatening event or medical crisis occurs
- Provide non-emergent care to residents in long-term care facilities
- Provide education and training for HCP through peer-to-peer professional medical consultations (inpatient or outpatient) that are not locally available, particularly in rural areas.¹⁰

Similarly, CMS has stressed the importance of telehealth during this pandemic:

¹⁰ Using Telehealth to Expand Access to Essential Health Services during the COVID-19 Pandemic, CDC, updated June 10, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/telehealth.html> (last visited Dec. 1, 2020).

Telehealth, telemedicine, and related terms generally refer to the exchange of medical information from one site to another through electronic communication to improve a patient's health. Innovative uses of this kind of technology in the provision of healthcare is increasing. And with the emergence of the virus causing the disease COVID-19, there is an urgency to expand the use of technology to help people who need routine care, and keep vulnerable beneficiaries and beneficiaries with mild symptoms in their homes while maintaining access to the care they need. Limiting community spread of the virus, as well as limiting the exposure to other patients and staff members will slow viral spread.¹¹

Accordingly, CMS and other HHS components has substantially expanded the scope of services paid under Medicare when furnished using telehealth technologies during this pandemic.

Other HHS components have also taken steps to expand the use of telehealth during the pandemic.¹²

Moreover, to expand the use of telehealth during this pandemic, the Office for Civil Rights (OCR) at HHS is exercising enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the Health Insurance Portability and Accountability Act (HIPAA) Rules against covered healthcare providers that serve patients through everyday communications technologies during the COVID-19 nationwide public health emergency.¹³ This exercise of discretion

¹¹ Medicare Telemedicine Health Care Provider Fact Sheet, Mar. 17, 2020, available at <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet> (last visited Dec. 1, 2020).

¹² See, e.g., Trump Administration Drives Telehealth Services in Medicaid and Medicare, CMS, Oct. 14, 2020, available at <https://www.cms.gov/newsroom/press-releases/trump-administration-drives-telehealth-services-medicare-and-medicare> (last visited Dec. 1, 2020); Secretary Azar Announces Historic Expansion of Telehealth Access to Combat COVID-19, Mar. 17, 2020, available at <https://www.hhs.gov/about/news/2020/03/17/secretary-azar-announces-historic-expansion-of-telehealth-access-to-combat-covid-19.html> (last visited Nov. 30, 2020); OIG Policy Statement Regarding Physicians and Other Practitioners That Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services During the 2019 Novel Coronavirus (COVID-19) Outbreak, Mar. 17, 2020, available at <https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf> (last visited Nov. 30, 2020).

¹³ OCR Announces Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, Mar. 17, 2020, available at <https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html> (last visited Dec. 1, 2020). The PREP Act does not provide immunity against federal enforcement actions brought by the federal government. We refer to this exercise of

⁸ In addition, the Fourth Amendment makes certain non-substantive changes. Those should not be interpreted to change any substantive provisions.

⁹ See, e.g., Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration under the Act, Apr. 17, 2020, as Modified on May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-advisory-opinion-hhs-ogc.pdf> (last visited Dec. 1, 2020); Advisory Opinion 20-02 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> (last visited Dec. 1, 2020); Advisory Opinion 20-03 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO3.1.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Dec. 1, 2020); Advisory Opinion 20-04 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO%204.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Dec. 1, 2020).

applies to widely available communications apps, such as FaceTime or Skype, when used in good faith for any telehealth treatment or diagnostic purpose, regardless of whether the telehealth service is directly related to COVID-19.¹⁴

Many states have authorized out-of-state healthcare personnel to deliver telehealth services to in-state patients, either generally or in the context of COVID-19.¹⁵

To help maximize the utility of telehealth, the Secretary declares that the term “qualified person” under 42

enforcement discretion as another example of the Department’s desire to support the expanded use of telehealth during this pandemic.

¹⁴ *Id.*

¹⁵ See, e.g., 2020 Alaska Laws Ch. 10 (S.B. 241) Sec. 7 (healthcare provider can perform telehealth if, among other things, “the health care provider is licensed, permitted, or certified to provide healthcare services in another jurisdiction and is in good standing in the jurisdiction that issued the license, permit, or certification”); CT Exec. Order No. 7G, Sec. 5(b), Mar. 19, 2020, available at <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7G.pdf> (last visited Dec. 1, 2020) (“Subsection (a)(12)’s requirements for the licensure, certification or registration of telehealth providers shall be suspended for such telehealth providers that are Medicaid enrolled providers or in-network providers for commercial fully insured health insurance providing telehealth services to patients”); FL Emerg. Order, DOH No. 20–002, *In Re: Suspension of Statutes, Rules, and Orders, Made Necessary by COVID-19*, Mar. 16, 2020, available at http://www.flhealthsource.gov/pdf/emergencystatement-20-002.pdf?inf_contact_key=c1be7c474d297aa416752a23d2694901680f8914173f9191b1c0223e68310bb1 (last visited Dec. 1, 2020) (“For purposes of preparing for, responding to, and mitigating any effect of COVID-19, health care professionals not licensed in this state may provide health care services to a patient licensed in this state using telehealth, notwithstanding the requirements of section 456.47(4)(a) through (c), (h), and (i), Florida Statutes This exemption shall apply only to the following out of state health care professionals holding a valid, clear, and unrestricted license in another state or territory in the United States who are not currently under investigation or prosecution in any disciplinary proceeding in any of the states in which they hold a license: physicians, osteopathic physicians, physician assistants, and advanced practice registered nurses.”); IA Emer. Dec., Sec. 39 (Nov. 10, 2020), available at <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.11.10.pdf> (last visited Dec. 1, 2020) (temporarily suspending any statute or rule defining a doctor or medical staff as “requiring all doctors and medical staff be licensed to practice in this state, to the extent that individual is licensed to practice in another state”); NH Emer. Order # 15 Pursuant to Exec. Order 2020–4, Sec. 1, Mar. 23, 2020, available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-15.pdf> (last visited Dec. 1, 2020) (“any out-of-state medical provider whose profession is licensed within this State shall be allowed to perform any medically necessary service as if the medical provider were licensed to perform such service within the state of New Hampshire subject to,” among other things, the medical provider being “licensed and in good standing in another United States jurisdiction”).

U.S.C. 247d–6d(i)(8)(B) includes healthcare personnel using telehealth to order or administer Covered Countermeasures for patients in a state other than the state where the healthcare personnel are permitted to practice. When ordering and administering Covered Countermeasures through telehealth to patients in a state where the healthcare personnel are not already permitted to do so, the healthcare personnel must comply with all requirements for ordering and administering Covered Countermeasures to patients through telehealth in the state where the healthcare personnel are licensed or otherwise permitted to practice. Any state law that prohibits or effectively prohibits such a qualified person from ordering and administering Covered Countermeasures through telehealth is preempted.¹⁶ Nothing in this Declaration shall preempt state laws that permit additional persons to deliver telehealth services.

The Secretary also amends Section V to include several examples of Covered Persons who are Qualified Persons, because they are authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures. Those examples include certain pharmacists, pharmacy interns, and pharmacy technicians who order or administer certain COVID-19 tests and certain vaccines.¹⁷ These

¹⁶ Advisory Opinion 20–02 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> (last visited Dec. 1, 2020).

¹⁷ See, e.g., Guidance for Licensed Pharmacists, COVID-19 Testing, and Immunity Under the PREP Act, OASH, Apr. 8, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/authorizing-licensed-pharmacists-to-order-and-administer-covid-19-tests.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for COVID-19 Screening Tests at Nursing Homes, Assisted-Living Facilities, Long-Term-Care Facilities, and other Congregate Facilities, OASH, Aug. 31, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-coverage-for-screening-in-congregate-settings.pdf> (last visited Dec. 1, 2020); Guidance for Licensed Pharmacists and Pharmacy Interns Regarding COVID-19 Vaccines and Immunity under the PREP Act, OASH, Sept. 3, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/licensed-pharmacists-and-pharmacy-interns-regarding-covid-19-vaccines-immunity.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for Qualified Pharmacy Technicians and State-Authorized Pharmacy Interns for Childhood Vaccines, COVID-19 Vaccines, and COVID-19 Testing, OASH, Oct. 20, 2020, available at <https://www.hhs.gov/sites/default/files/prep-act-guidance.pdf> (last visited

examples are not an exclusive or exhaustive list of persons who are qualified persons identified by the Secretary in Section V.

The Secretary also amends Section V to make explicit that the requirement in that section for certain qualified persons to have a current certificate in basic cardiopulmonary resuscitation is satisfied by, among other things, a certification in basic cardiopulmonary resuscitation by an online program that has received accreditation from the American Nurses Credentialing Center, the Accreditation Council for Pharmacy Education (ACPE), or the Accreditation Council for Continuing Medical Education.

The Secretary also amends Section V’s training requirements for licensed pharmacists to order and administer certain childhood or COVID-19 vaccines. To order and administer vaccines, the licensed pharmacist must have completed the immunization training that the licensing State requires in order for pharmacists to administer vaccines. If the State does not specify training requirements for the licensed pharmacist to order and administer vaccines, the licensed pharmacist must complete a vaccination training program of at least 20 hours that is approved by the Accreditation Council for Pharmacy Education (ACPE) to order and administer vaccines. This training program must include hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines.

Other than the basic cardiopulmonary resuscitation requirement and the practical training program requirement, this Amendment does not change the requirements for a pharmacist, pharmacy intern, or pharmacy technician to be a “qualified person” under 42 U.S.C. 247d–6d(i)(8)(B) who can order or administer childhood or COVID-19 vaccines pursuant to the Declaration.

Section VI. Covered Countermeasures

The Secretary amends Section VI to make explicit that Section VI covers all qualified pandemic and epidemic products under the PREP Act.

Dec. 1, 2020); PREP Act Authorization for Pharmacies Distributing and Administering Certain Covered Countermeasures, Oct. 29, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-authorization-pharmacies-administering-covered-countermeasures.pdf> (last visited Dec. 1, 2020).

Section VII. Limitations on Distribution

The Secretary may specify that liability protections are in effect only for Covered Countermeasures obtained through a particular means of distribution. The Declaration previously stated that liability immunity is afforded to Covered Persons only for Recommended Activities related to (a) present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, or memoranda of understanding or other federal agreements; or (b) activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasures following a declaration of an emergency.

COVID-19 is an unprecedented global challenge that requires a whole-of-nation response that utilizes federal-, state-, and local- distribution channels as well as private-distribution channels. Given the broad scale of this pandemic, the Secretary amends the Declaration to extend PREP Act coverage to additional private-distribution channels, as set forth below.

The amended Section VII adds that PREP Act liability protections also extend to Covered Persons for Recommended Activities that are related to any Covered Countermeasure that is:

(a) Licensed, approved, cleared, or authorized by the Food and Drug Administration (FDA) (or that is permitted to be used under an Investigational New Drug Application or an Investigational Device Exemption) under the Federal Food, Drug, and Cosmetic (FD&C) Act or Public Health Service (PHS) Act to treat, diagnose, cure, prevent, mitigate or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom; or

(b) a respiratory protective device approved by the National Institute for Occupational Safety and Health (NIOSH) under 42 CFR part 84, or any successor regulations, that the Secretary determines to be a priority for use during a public health emergency declared under section 319 of the PHS Act to prevent, mitigate, or limit the harm from, COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom.

To qualify for this third distribution channel (but not necessarily to qualify for the other distribution channels), a Covered Person must manufacture, test, develop, distribute, administer, or use the Covered Countermeasure pursuant

to the FDA licensure, approval, clearance, or authorization (or pursuant to an Investigational New Drug Application or Investigational Device Exemption), or the NIOSH approval.

This third distribution channel may extend PREP Act coverage when there is no federal agreement or authorization in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a declaration of an emergency. For example, a manufacturer, distributor, program planner, or qualified person engages in manufacturing, testing, development, distribution, administration, or use of a COVID-19 test pursuant to an FDA Emergency Use Authorization for that COVID-19 test. If the Covered Person satisfies all other requirements of the PREP Act and Declaration, there will be PREP Act coverage even if there is no federal agreement to cover those activities and those activities are not part of the authorized activity of an Authority Having Jurisdiction.

Section IX. Administration of Covered Countermeasures

The Secretary amends Section IX to make explicit that there can be situations where not administering a covered countermeasure to a particular individual can fall within the PREP Act and this Declaration's liability protections.

Section XI. Geographic Area

The Secretary makes explicit in Section XI that there are substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Eng'g. & Mfg.*, 545 U.S. 308 (2005), in having a unified, whole-of-nation response to the COVID-19 pandemic among federal, state, local, and private-sector entities. The world is facing an unprecedented global pandemic. To effectively respond, there must be a more consistent pathway for Covered Persons to manufacture, distribute, administer or use Covered Countermeasures across the nation and the world. Thus, there are substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Eng'g. & Mfg.*, 545 U.S. 308 (2005), in having a uniform interpretation of the PREP Act. Under the PREP Act, the sole exception to the immunity from suit and liability of covered persons is an exclusive Federal cause of action against

a Covered Person for death or serious physical injury proximately caused by willful misconduct by such Covered Person. In all other cases, an injured party's exclusive remedy is an administrative remedy under section 319F-4 of the PHS Act. Through the PREP Act, Congress delegated to me the authority to strike the appropriate Federal-state balance with respect to particular Covered Countermeasures through PREP Act declarations.

Section XII. Effective Time Period

The Secretary amends Section XII to provide that liability protections for all Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, as identified in Section VII(b) of this Declaration, begins with a "Declaration of Emergency," as defined in Section VII (except that, with respect to qualified persons who order or administer a routine childhood vaccination that ACIP recommends to persons ages three through 18 according to ACIP's standard immunization schedule, PREP Act coverage began on August 24, 2020), and lasts through (a) the final day the Declaration of Emergency is in effect, or (b) October 1, 2024, whichever occurs first. This change is to conform the text of the Declaration to the Third Amendment.¹⁸

The Secretary also amends Section XII to provide that liability protections for all Covered Countermeasures identified in Section VII(c) of this Declaration begins on the date of this amended Declaration and lasts through (a) the final day the Declaration of Emergency is in effect, or (b) October 1, 2024, whichever occurs first. Because the Secretary is adding Section VII(c) to the Declaration in this Amendment, Section XII provides that Section VII(c) is effective as of the date this amended Declaration is published.

Additional Amendments

The Secretary also makes other, non-substantive amendments.

Declaration, as Amended, for Public Readiness and Emergency Preparedness Act Coverage for Medical Countermeasures Against COVID-19

To the extent any term previously in the Declaration, including its amendments, is inconsistent with any provision of this Republished Declaration, the terms of this Republished Declaration are controlling. This Declaration must be construed in accordance with the Advisory Opinions

¹⁸ See 85 FR 52136 (Aug. 24, 2020).

of the Office of the General Counsel (Advisory Opinions). I incorporate those Advisory Opinions as part of this Declaration.¹⁹ This Declaration is a “requirement” under the PREP Act.

I. Determination of Public Health Emergency

42 U.S.C. 247d–6d(b)(1)

I have determined that the spread of SARS–CoV–2 or a virus mutating therefrom and the resulting disease COVID–19 constitutes a public health emergency. I further determine that use of any respiratory protective device approved by NIOSH under 42 CFR part 84, or any successor regulations, is a priority for use during the public health emergency that I declared on January 31, 2020 under section 319 of the PHS Act for the entire United States to aid in the response of the nation’s healthcare community to the COVID–19 outbreak.

II. Factors Considered

42 U.S.C. 247d–6d(b)(6)

I have considered the desirability of encouraging the design, development, clinical testing, or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of the Covered Countermeasures.

III. Recommended Activities

42 U.S.C. 247d–6d(b)(1)

I recommend, under the conditions stated in this Declaration, the manufacture, testing, development,

distribution, administration, and use of the Covered Countermeasures.

IV. Liability Protections

42 U.S.C. 247d–6d(a), 247d–6d(b)(1)

Liability protections as prescribed in the PREP Act and conditions stated in this Declaration are in effect for the Recommended Activities described in Section III.

V. Covered Persons

42 U.S.C. 247d–6d(i)(2), (3), (4), (6), (8)(A) and (B)

Covered Persons who are afforded liability protections under this Declaration are “manufacturers,” “distributors,” “program planners,” and “qualified persons,” as those terms are defined in the PREP Act; their officials, agents, and employees; and the United States.

In addition, I have determined that the following additional persons are qualified persons:

(a) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction, as described in Section VII below, to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a Declaration of Emergency, as that term is defined in Section VII of this Declaration;²⁰

²⁰ See, e.g., Guidance for Licensed Pharmacists, COVID–19 Testing, and Immunity Under the PREP Act, OASH, Apr. 8, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/authorizing-licensed-pharmacists-to-order-and-administer-covid-19-tests.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for COVID–19 Screening Tests at Nursing Homes, Assisted-Living Facilities, Long-Term-Care Facilities, and other Congregate Facilities, OASH, Aug. 31, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-coverage-for-screening-in-congregate-settings.pdf> (last visited Dec. 1, 2020); Guidance for Licensed Pharmacists and Pharmacy Interns Regarding COVID–19 Vaccines and Immunity under the PREP Act, OASH, Sept. 3, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/licensed-pharmacists-and-pharmacy-interns-regarding-covid-19-vaccines-immunity.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for Qualified Pharmacy Technicians and State-Authorized Pharmacy Interns for Childhood Vaccines, COVID–19 Vaccines, and COVID–19 Testing, OASH, Oct. 20, 2020, available at <https://www.hhs.gov/sites/default/files/prep-act-guidance.pdf> (last visited Dec. 1, 2020); PREP Act Authorization for Pharmacies Distributing and Administering Certain Covered Countermeasures, Oct. 29, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-authorization-pharmacies-administering-covered-countermeasures.pdf> (last visited Dec. 1, 2020) (collectively, OASH PREP Act Authorizations). Nothing herein shall suggest that, for purposes of

(b) any person authorized to prescribe, administer, or dispense the Covered Countermeasures or who is otherwise authorized to perform an activity under an Emergency Use Authorization in accordance with Section 564 of the FD&C Act;

(c) any person authorized to prescribe, administer, or dispense Covered Countermeasures in accordance with Section 564A of the FD&C Act;

(d) a State-licensed pharmacist who orders and administers, and pharmacy interns who administer (if the pharmacy intern acts under the supervision of such pharmacist and the pharmacy intern is licensed or registered by his or her State board of pharmacy),²¹ (1) vaccines that the Advisory Committee on Immunization Practices (ACIP) recommends to persons ages three through 18 according to ACIP’s standard immunization schedule or (2) FDA-authorized or FDA-licensed COVID–19 vaccines to persons ages three or older. Such State-licensed pharmacists and the State-licensed or registered interns under their supervision are qualified persons only if the following requirements are met:

- i. The vaccine must be authorized, approved, or licensed by the FDA;
- ii. In the case of a COVID–19 vaccine, the vaccination must be ordered and administered according to ACIP’s COVID–19 vaccine recommendation(s).
- iii. In the case of a childhood vaccine, the vaccination must be ordered and administered according to ACIP’s standard immunization schedule;
- iv. The licensed pharmacist must have completed the immunization training that the licensing State requires in order for pharmacists to order and administer vaccines. If the State does not specify training requirements for the licensed pharmacist to order and administer vaccines, the licensed pharmacist must complete a vaccination training program of at least 20 hours that is approved by the Accreditation

the Declaration, the foregoing are the only persons authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction.

²¹ Some states do not require pharmacy interns to be licensed or registered by the state board of pharmacy. As used herein, “State-licensed or registered intern” (or equivalent phrases) refers to pharmacy interns authorized by the state or board of pharmacy in the state in which the practical pharmacy internship occurs. The authorization can, but need not, take the form of a license from, or registration with, the State board of pharmacy. See Guidance for PREP Act Coverage for Qualified Pharmacy Technicians and State-Authorized Pharmacy Interns for Childhood Vaccines, COVID–19 Vaccines, and COVID–19 Testing, OASH, Oct. 20, 2020 at 2, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-guidance.pdf> (last visited Dec. 1, 2020).

¹⁹ See, e.g., Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration under the Act, Apr. 17, 2020, as Modified on May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-advisory-opinion-hhs-ogc.pdf> (last visited Dec. 1, 2020); Advisory Opinion 20–02 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> (last visited Dec. 1, 2020); Advisory Opinion 20–03 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO3.1.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Dec. 1, 2020); Advisory Opinion 20–04 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO%204.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Dec. 1, 2020). This is not to suggest that other PREP Act declarations should be construed in a manner contrary to the interpretation provided in the Advisory Opinions.

Council for Pharmacy Education (ACPE) to order and administer vaccines. Such a training program must include hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines;

v. The licensed or registered pharmacy intern must complete a practical training program that is approved by the ACPE. This training program must include hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines;

vi. The licensed pharmacist and licensed or registered pharmacy intern must have a current certificate in basic cardiopulmonary resuscitation;²²

vii. The licensed pharmacist must complete a minimum of two hours of ACPE-approved, immunization-related continuing pharmacy education during each State licensing period;

viii. The licensed pharmacist must comply with recordkeeping and reporting requirements of the jurisdiction in which he or she administers vaccines, including informing the patient's primary-care provider when available, submitting the required immunization information to the State or local immunization information system (vaccine registry), complying with requirements with respect to reporting adverse events, and complying with requirements whereby the person administering a vaccine must review the vaccine registry or other vaccination records prior to administering a vaccine; and

ix. The licensed pharmacist must inform his or her childhood-vaccination patients and the adult caregiver accompanying the child of the

importance of a well-child visit with a pediatrician or other licensed primary care provider and refer patients as appropriate.

x. The licensed pharmacist and the licensed or registered pharmacy intern must comply with any applicable requirements (or conditions of use) as set forth in the Centers for Disease Control and Prevention (CDC) COVID-19 vaccination provider agreement and any other federal requirements that apply to the administration of COVID-19 vaccine(s).

(e) Healthcare personnel using telehealth to order or administer Covered Countermeasures for patients in a state other than the state where the healthcare personnel are licensed or otherwise permitted to practice. When ordering and administering Covered Countermeasures by means of telehealth to patients in a state where the healthcare personnel are not already permitted to practice, the healthcare personnel must comply with all requirements for ordering and administering Covered Countermeasures to patients by means of telehealth in the state where the healthcare personnel are permitted to practice. Any state law that prohibits or effectively prohibits such a qualified person from ordering and administering Covered Countermeasures by means of telehealth is preempted.²³ Nothing in this Declaration shall preempt state laws that permit additional persons to deliver telehealth services.

Nothing in this Declaration shall be construed to affect the National Vaccine Injury Compensation Program, including an injured party's ability to obtain compensation under that program. Covered Countermeasures that are subject to the National Vaccine Injury Compensation Program authorized under 42 U.S.C. 300aa-10 *et seq.* are covered under this Declaration for the purposes of liability immunity and injury compensation only to the extent that injury compensation is not provided under that Program. All other terms and conditions of the Declaration apply to such Covered Countermeasures.

VI. Covered Countermeasures

42 U.S.C. 247d-6b(c)(1)(B), 42 U.S.C. 247d-6d(i)(1) and (7)

Covered Countermeasures are:

²³ See, e.g., Advisory Opinion 20-02 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> (last visited Dec. 1, 2020).

(a) Any antiviral, any drug, any biologic, any diagnostic, any other device, any respiratory protective device, or any vaccine manufactured, used, designed, developed, modified, licensed, or procured:

i. To diagnose, mitigate, prevent, treat, or cure COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom; or

ii. To limit the harm that COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, might otherwise cause;

(b) a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in paragraph (a) above;

(c) a product or technology intended to enhance the use or effect of a product described in paragraph (a) or (b) above; or

(d) any device used in the administration of any such product, and all components and constituent materials of any such product.

To be a Covered Countermeasure under the Declaration, a product must also meet 42 U.S.C. 247d-6d(i)(1)'s definition of "Covered Countermeasure."

VII. Limitations on Distribution

42 U.S.C. 247d-6d(a)(5) and (b)(2)(E)

I have determined that liability protections are afforded to Covered Persons only for Recommended Activities involving:

(a) Covered Countermeasures that are related to present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other federal agreements;

(b) Covered Countermeasures that are related to activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a Declaration of Emergency; or

(c) Covered Countermeasures that are:

i. Licensed, approved, cleared, or authorized by the FDA (or that are permitted to be used under an Investigational New Drug Application or an Investigational Device Exemption) under the FD&C Act or PHS Act to treat, diagnose, cure, prevent, mitigate, or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom; or

²² This requirement is satisfied by, among other things, a certification in basic cardiopulmonary resuscitation by an online program that has received accreditation from the American Nurses Credentialing Center, the ACPE, or the Accreditation Council for Continuing Medical Education. The phrase "current certificate in basic cardiopulmonary resuscitation," when used in the September 3, 2020 or October 20, 2020 OASH authorizations, shall be interpreted the same way. See Guidance for Licensed Pharmacists and Pharmacy Interns Regarding COVID-19 Vaccines and Immunity under the PREP Act, OASH, Sept. 3, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/licensed-pharmacists-and-pharmacy-interns-regarding-covid-19-vaccines-immunity.pdf> (last visited Dec. 1, 2020); Guidance for PREP Act Coverage for Qualified Pharmacy Technicians and State-Authorized Pharmacy Interns for Childhood Vaccines, COVID-19 Vaccines, and COVID-19 Testing, OASH, Oct. 20, 2020, available at <https://www.hhs.gov/sites/default/files/prep-act-guidance.pdf> (last visited Dec. 1, 2020).

ii. a respiratory protective device approved by NIOSH under 42 CFR part 84, or any successor regulations, that the Secretary determines to be a priority for use during a public health emergency declared under section 319 of the PHS Act to prevent, mitigate, or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom.

To qualify for this third distribution channel, a Covered Person must manufacture, test, develop, distribute, administer, or use the Covered Countermeasure pursuant to the FDA licensure, approval, clearance, or authorization (or pursuant to an Investigational New Drug Application or Investigational Device Exemption), or the NIOSH approval.

As used in this Declaration, the terms “Authority Having Jurisdiction” and “Declaration of Emergency” have the following meanings:

(a) The Authority Having Jurisdiction means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (*e.g.*, city, county, tribal, state, or federal boundary lines) or functional (*e.g.*, law enforcement, public health) range or sphere of authority.

(b) A Declaration of Emergency means any declaration by any authorized local, regional, state, or federal official of an emergency specific to events that indicate an immediate need to administer and use the Covered Countermeasures, with the exception of a federal declaration in support of an Emergency Use Authorization under Section 564 of the FD&C Act unless such declaration specifies otherwise.

I have also determined that, for governmental program planners only, liability protections are afforded only to the extent such program planners obtain Covered Countermeasures through voluntary means, such as (a) donation; (b) commercial sale; (c) deployment of Covered Countermeasures from federal stockpiles; or (d) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from state, local, or private stockpiles.

VIII. Category of Disease, Health Condition, or Threat

42 U.S.C. 247d–6d(b)(2)(A)

The category of disease, health condition, or threat for which I recommend the administration or use of the Covered Countermeasures is not only COVID-19 caused by SARS-CoV-2, or a virus mutating therefrom, but also other diseases, health conditions, or

threats that may have been caused by COVID-19, SARS-CoV-2, or a virus mutating therefrom, including the decrease in the rate of childhood immunizations, which will lead to an increase in the rate of infectious diseases.

IX. Administration of Covered Countermeasures

42 U.S.C. 247d–6d(a)(2)(B)

Administration of the Covered Countermeasure means physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution and dispensing of the countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for the purpose of distributing and dispensing countermeasures.

Where there are limited Covered Countermeasures, *not* administering a Covered Countermeasure to one individual in order to administer it to another individual can constitute “relating to . . . the administration to . . . an individual” under 42 U.S.C. 247d–6d. For example, consider a situation where there is only one dose²⁴ of a COVID-19 vaccine, and a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional. In that situation, the healthcare professional administers the one dose to the person who is more vulnerable to COVID-19. In that circumstance, the failure to administer the COVID-19 vaccine to the person in a less-vulnerable population “relat[es] to . . . the administration to” the person in a vulnerable population. The person in the vulnerable population was able to receive the vaccine only because it was not administered to the person in the less-vulnerable population. Prioritization or purposeful allocation of a Covered Countermeasure, particularly if done in accordance with a public health authority’s directive, can fall within the PREP Act and this Declaration’s liability protections.

X. Population

42 U.S.C. 247d–6d(a)(4), 247d–6d(b)(2)(C)

The populations of individuals to whom the liability protections of this Declaration extend include any individual who uses or is administered the Covered Countermeasures in accordance with this Declaration.

²⁴ For simplicity, this example assumes a patient only requires one dose of the vaccine.

Liability protections are afforded to manufacturers and distributors without regard to whether the countermeasure is used by or administered to this population; liability protections are afforded to program planners and qualified persons when the countermeasure is used by or administered to this population, or the program planner or qualified person reasonably could have believed the recipient was in this population.

XI. Geographic Area

42 U.S.C. 247d–6d(a)(4), 247d–6d(b)(2)(D)

Liability protections are afforded for the administration or use of a Covered Countermeasure without geographic limitation.

Liability protections are afforded to manufacturers and distributors without regard to whether the Covered Countermeasure is used by or administered in any designated geographic area; liability protections are afforded to program planners and qualified persons when the countermeasure is used by or administered in any designated geographic area, or the program planner or qualified person reasonably could have believed the recipient was in that geographic area.

COVID-19 is a global challenge that requires a whole-of-nation response. There are substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308 (2005), in having a unified, whole-of-nation response to the COVID-19 pandemic among federal, state, local, and private-sector entities. The world is facing an unprecedented pandemic. To effectively respond, there must be a more consistent pathway for Covered Persons to manufacture, distribute, administer or use Covered Countermeasures across the nation and the world. Thus, there are substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308 (2005), in having a uniform interpretation of the PREP Act. Under the PREP Act, the sole exception to the immunity from suit and liability of covered persons under the PREP Act is an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct by such covered person. In all other cases, an injured party’s exclusive remedy is an administrative

remedy under section 319F–4 of the PHS Act. Through the PREP Act, Congress delegated to me the authority to strike the appropriate Federal-state balance with respect to particular Covered Countermeasures through PREP Act declarations.²⁵

XII. Effective Time Period

42 U.S.C. 247d–6d(b)(2)(B)

Liability protections for any respiratory protective device approved by NIOSH under 42 CFR part 84, or any successor regulations, through the means of distribution identified in Section VII(a) of this Declaration, begin on March 27, 2020 and extend through October 1, 2024.

Liability protections for all other Covered Countermeasures identified in Section VI of this Declaration, through means of distribution identified in Section VII(a) of this Declaration, begin on February 4, 2020 and extend through October 1, 2024.

Liability protections for all Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, as identified in Section VII(b) of this Declaration, begin with a Declaration of Emergency as that term is defined in Section VII (except that, with respect to qualified persons who order or administer a routine childhood vaccination that ACIP recommends to persons ages three through 18 according to ACIP's standard immunization schedule, liability protections began on August 24, 2020), and last through (a) the final day the Declaration of Emergency is in effect, or (b) October 1, 2024, whichever occurs first.

Liability protections for all Covered Countermeasures identified in Section VII(c) of this Declaration begin on the date of this amended Declaration and last through (a) the final day the Declaration of Emergency is in effect, or (b) October 1, 2024, whichever occurs first.

XIII. Additional Time Period of Coverage

42 U.S.C. 247d–6d(b)(3)(B) and (C)

I have determined that an additional 12 months of liability protection is reasonable to allow for the manufacturer(s) to arrange for disposition of the Covered Countermeasure, including return of the Covered Countermeasures to the

manufacturer, and for Covered Persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasures.

Covered Countermeasures obtained for the SNS during the effective period of this Declaration are covered through the date of administration or use pursuant to a distribution or release from the SNS.

XIV. Countermeasures Injury Compensation Program

42 U.S.C 247d–6e

The PREP Act authorizes the Countermeasures Injury Compensation Program (CICP) to provide benefits to certain individuals or estates of individuals who sustain a covered serious physical injury as the direct result of the administration or use of the Covered Countermeasures, and benefits to certain survivors of individuals who die as a direct result of the administration or use of the Covered Countermeasures. The causal connection between the countermeasure and the serious physical injury must be supported by compelling, reliable, valid, medical and scientific evidence in order for the individual to be considered for compensation. The CICP is administered by the Health Resources and Services Administration, within the Department of Health and Human Services. Information about the CICP is available at the toll-free number 1–855–266–2427 or <http://www.hrsa.gov/cicp/>.

XV. Amendments

42 U.S.C. 247d–6d(b)(4)

Amendments to this Declaration will be published in the **Federal Register**, as warranted.

Authority: 42 U.S.C. 247d–6d.

Dated: December 3, 2020.

Alex M. Azar II,

Secretary of Health and Human Services.

[FR Doc. 2020–26977 Filed 12–8–20; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Declaration Under the Public Readiness and Emergency Preparedness Act for Countermeasures Against Marburgvirus and/or Marburg Disease

SUMMARY: The Secretary is issuing this Declaration pursuant to section 319F–3 of the Public Health Service Act to provide limited immunity for activities

related to countermeasures against marburgvirus and/or Marburg disease.

DATES: The Declaration is effective as of November 25, 2020.

FOR FURTHER INFORMATION CONTACT:

Robert P. Kadlec, MD, MTM&H, MS, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue SW, Washington, DC 20201; Telephone: 202–205–2882.

SUPPLEMENTARY INFORMATION: The Public Readiness and Emergency Preparedness Act (PREP Act) authorizes the Secretary of Health and Human Services (the Secretary) to issue a Declaration to provide liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving “willful misconduct” as defined in the PREP Act. This Declaration is subject to amendment as circumstances warrant.

The PREP Act was enacted on December 30, 2005, as Public Law 109–148, Division C, Section 2. It amended the Public Health Service (PHS) Act, adding Section 319F–3, which addresses liability immunity, and Section 319F–4, which creates a compensation program. These sections are codified at 42 U.S.C. 247d–6d and 42 U.S.C. 247d–6e, respectively.

The Pandemic and All-Hazards Preparedness Reauthorization Act (PAHPRA), Public Law 113–5, was enacted on March 13, 2013. Among other things, PAHPRA added sections 564A and 564B to the Federal Food, Drug, and Cosmetic (FD&C) Act to provide new authorities for the emergency use of approved products in emergencies and products held for emergency use. PAHPRA accordingly amended the definitions of “Covered Countermeasures” and “qualified pandemic and epidemic products” in Section 319F–3 of the Public Health Service Act (PREP Act provisions), so that products made available under these new FD&C Act authorities could be covered under PREP Act Declarations. PAHPRA also extended the definition of qualified pandemic and epidemic products that may be covered under a PREP Act Declaration to include products or technologies intended to enhance the use or effect of a drug, biological product, or device used against the pandemic or epidemic or against adverse events from these

²⁵ 42 U.S.C. 247d–6d(b)(7) provides that “[n]o court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this subsection.”

products. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116–136, enacted on March 27, 2020, amended section 319F–3(i)(1)(D) of the PHS Act, to create a new category of covered countermeasures to the PREP Act, namely, respiratory protective devices approved by the National Institute for Occupational Safety and Health (NIOSH) under 42 CFR part 84, or any successor regulations, that the Secretary determines to be a priority for use during a public health emergency declared under section 319 of the PHS Act.

Marburg disease is a severe and often fatal illness in humans caused by marburgviruses, a group of filoviruses of the same family as ebolaviruses. Marburg disease is a highly virulent disease that causes hemorrhagic fever, with a case fatality rate of approximately 88 percent. Humans can become infected with marburgviruses, but it is largely unknown how marburgvirus transmits from its animal host to humans. For previous cases, unprotected contact with infected bat feces or aerosols was deemed the most likely route of infection. After the initial crossover of the virus from host animal to humans, transmission can occur through person-to-person contact. This may happen in several ways: Direct contact to droplets of body fluids from infected persons, or contact with equipment and other objects contaminated with infectious blood or tissues. The virus can spread between humans in close environments and through direct contact. A common route of infection is through nosocomial transmission.

Marburgvirus was first recognized in 1967, when outbreaks of hemorrhagic fever occurred simultaneously in laboratories in Marburg and Frankfurt, Germany and in Belgrade, Yugoslavia (now Serbia). Thirty-one people became ill, initially laboratory workers followed by several medical personnel and family members who had cared for them; seven deaths were reported. The first people infected had been exposed to imported African green monkeys or their tissues while conducting research.

From 1975–2014, there have been 10 reported outbreaks of Marburg disease, and all but one of these outbreaks had an apparent or suspected origin in Africa. These outbreaks have resulted in a total of 435 reported human cases of Marburg disease and 366 deaths among those reported cases; a case fatality rate of approximately of 84%. The recurrent but unpredictable and variable nature of Marburg disease outbreaks and the transmission profile makes

marburgviruses a threat to the public health security of the American people, requiring vigilance and a continuing need for development of medical countermeasures. Similar to determinations and experiences with Ebola virus outbreaks, marburgvirus has been determined to have the potential to be a threat to US public health security.

Description of This Declaration by Section

Section I. Determination of Public Health Emergency or Credible Risk of Future Public Health Emergency

Before issuing a Declaration under the PREP Act, the Secretary is required to determine that a disease or other health condition or threat to health constitutes a public health emergency or that there is a credible risk that the disease, condition, or threat may constitute such an emergency.

This determination is separate and apart from the Declaration issued by the Secretary under Section 319 of the PHS Act that a disease or disorder presents a public health emergency or that a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, or other Declarations or determinations made under other authorities of the Secretary. Accordingly, in Section I of the Declaration, the Secretary determines that marburgviruses and Marburg disease are a credible risk such that Marburg disease or marburgviruses may in the future constitute a public health emergency.

Section II. Factors Considered by the Secretary

In deciding whether and under what circumstances to issue a Declaration with respect to a Covered Countermeasure, the Secretary must consider the desirability of encouraging the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of the countermeasure. In Section II of the Declaration, the Secretary states that he has considered these factors.

Section III. Activities Covered by This Declaration Under the PREP Act's Liability Immunity

The Secretary must delineate the activities for which the PREP Act's liability immunity is in effect. These activities may include, under conditions as the Secretary may specify, the manufacture, testing, development,

distribution, administration, or use of one or more Covered Countermeasures (Recommended Activities). In Section III of the Declaration, the Secretary sets out the activities for which the immunity is in effect.

Section IV. Limited Immunity

The Secretary must also state that liability protections available under the PREP Act are in effect with respect to the Recommended Activities. These liability protections provide that, “[s]ubject to other provisions of [the PREP Act], a covered person shall be immune from suit and liability under federal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure if a Declaration has been issued with respect to such countermeasure.” In Section IV of the Declaration, the Secretary states that liability protections are in effect with respect to the Recommended Activities.

Section V. Covered Persons

The PREP Act's liability immunity applies to “Covered Persons” with respect to administration or use of a Covered Countermeasure. The term “Covered Persons” has a specific meaning and is defined in the PREP Act to include manufacturers, distributors, program planners, and qualified persons, and their officials, agents, and employees, and the United States. The PREP Act further defines the terms “manufacturer,” “distributor,” “program planner,” and “qualified person” as described below.

A manufacturer includes a contractor or subcontractor of a manufacturer; a supplier or licensor of any product, intellectual property, service, research tool or component or other article used in the design, development, clinical testing, investigation or manufacturing of a Covered Countermeasure; and any or all the parents, subsidiaries, affiliates, successors, and assigns of a manufacturer.

A distributor means a person or entity engaged in the distribution of drugs, biologics, or devices, including but not limited to: Manufacturers; re-packers; common carriers; contract carriers; air carriers; own-label distributors; private-label distributors; jobbers; brokers; warehouses and wholesale drug warehouses; independent wholesale drug traders; and retail pharmacies.

A program planner means a state or local government, including an Indian tribe; a person employed by the state or local government; or other person who supervises or administers a program

with respect to the administration, dispensing, distribution, provision, or use of a Covered Countermeasure, including a person who establishes requirements, provides policy guidance, or supplies technical or scientific advice or assistance or provides a facility to administer or use a Covered Countermeasure in accordance with the Secretary's Declaration. Under this definition, a private sector employer or community group or other "person" can be a program planner when it carries out the described activities.

A qualified person means a licensed health professional or other individual authorized to prescribe, administer, or dispense Covered Countermeasures under the law of the state in which the Covered Countermeasure was prescribed, administered, or dispensed; or a person within a category of persons identified as qualified in the Secretary's Declaration. Under this definition, the Secretary can describe in the Declaration other qualified persons, such as volunteers, who are Covered Persons. Section V describes other qualified persons covered by this Declaration. The PREP Act also defines the word "person" as used in the Act: A person includes an individual, partnership, corporation, association, entity, or public or private corporation, including a federal, state, or local government agency or department.

Section V of the Declaration describes Covered Persons, including Qualified Persons. The Declaration includes all persons and entities defined as Covered Persons under the PREP Act.

Section VI. Covered Countermeasures

As noted above, Section III of the Declaration describes the activities (referred to as "Recommended Activities") for which liability immunity is in effect. Section VI of the Declaration identifies the Covered Countermeasures for which the Secretary has recommended such activities. The PREP Act states that a "Covered Countermeasure" must be a "qualified pandemic or epidemic product," or a "security countermeasure," as described immediately below; a drug, biological product or device authorized for emergency use in accordance with Sections 564, 564A, or 564B of the FD&C Act; or respiratory protective devices approved by the National Institute for Occupational Safety and Health (NIOSH) under 42 CFR part 84, or any successor regulations, that the Secretary determines to be a priority for use during a public health emergency declared under section 319 of the PHS Act.

A qualified pandemic or epidemic product means a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act that is (i) Manufactured, used, designed, developed, modified, licensed or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or limit the harm such a pandemic or epidemic might otherwise cause; (ii) manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by such a drug, biological product, or device; (iii) or a product or technology intended to enhance the use or effect of such a drug, biological product, or device.

A security countermeasure is a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act that (i)(a) The Secretary determines to be a priority to diagnose, mitigate, prevent, or treat harm from any biological, chemical, radiological, or nuclear agent identified as a material threat by the Secretary of Homeland Security, or (b) to diagnose, mitigate, prevent, or treat harm from a condition that may result in adverse health consequences or death and may be caused by administering a drug, biological product, or device against such an agent; and (ii) is determined by the Secretary of Health and Human Services to be a necessary countermeasure to protect public health.

To be a Covered Countermeasure, qualified pandemic or epidemic products or security countermeasures also must be approved or cleared under the FD&C Act; approved by the National Institute for Occupational Safety and Health (NIOSH) under 42 CFR part 84, or any successor regulations, that the Secretary determines to be a priority for use during a public health emergency declared under section 319 of the PHS Act; licensed under the PHS Act; or authorized for emergency use under Sections 564, 564A, or 564B of the FD&C Act.

A qualified pandemic or epidemic product also may be a Covered Countermeasure when it is subject to an exemption (that is, it is permitted to be used under an Investigational Drug Application or an Investigational Device Exemption) under the FD&C Act and is the object of research for possible use for diagnosis, mitigation, prevention, treatment, or cure, or to limit harm of a pandemic or epidemic or serious or life-threatening condition caused by such a drug or device.

A security countermeasure also may be a Covered Countermeasure if it may

reasonably be determined to qualify for approval or licensing within 10 years after the Department's determination that procurement of the countermeasure is appropriate.

Section VI lists countermeasures against marburgvirus and/or Marburg disease that are Covered Countermeasures under this declaration.

Section VI also refers to the statutory definitions of Covered Countermeasures to make clear that these statutory definitions limit the scope of Covered Countermeasures. Specifically, the Declaration notes that Covered Countermeasures must be "qualified pandemic or epidemic products," or "security countermeasures," or drugs, biological products, respiratory protective devices, or devices authorized for investigational or emergency use, as those terms are defined in the PREP Act, the FD&C Act, and the Public Health Service Act.

Section VII. Limitations on Distribution

The Secretary may specify that liability immunity is in effect only to Covered Countermeasures obtained through a particular means of distribution. The Declaration states that liability immunity is afforded to Covered Persons for Recommended Activities related to (a) Present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, or memoranda of understanding or other federal agreements; or (b) Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasures following a Declaration of an emergency.

Section VII defines the terms "Authority Having Jurisdiction" and "Declaration of an emergency." We have specified in the definition that Authorities having jurisdiction include federal, state, local, and tribal authorities and institutions or organizations acting on behalf of those governmental entities.

For governmental program planners only, liability immunity is afforded only to the extent they obtain Covered Countermeasures through voluntary means, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from state, local, or private stockpiles. This last limitation on distribution is intended to deter program planners that are government

entities from seizing privately held stockpiles of Covered Countermeasures. It does not apply to any other Covered Persons, including other program planners who are not government entities.

Section VIII. Category of Disease, Health Condition, or Threat

The Secretary must identify in the Declaration, for each Covered Countermeasure, the categories of diseases, health conditions, or threats to health for which the Secretary recommends the administration or use of the countermeasure. In Section VIII of the Declaration, the Secretary states that the disease threat for which he recommends administration or use of the Covered Countermeasures is Marburg disease caused by marburgviruses or virus mutating therefrom.

Section IX. Administration of Covered Countermeasures

The PREP Act does not explicitly define the term “administration” but does assign the Secretary the responsibility to provide relevant conditions in the Declaration. In Section IX of the Declaration, the Secretary defines “Administration of a Covered Countermeasure,” as follows:

Administration of a Covered Countermeasure means physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution, and dispensing of the countermeasures to recipients; management and operation of countermeasure programs; or management and operation of locations for purpose of distributing and dispensing countermeasures.

The definition of “administration” extends only to physical provision of a countermeasure to a recipient, such as vaccination or handing drugs to patients, and to activities related to management and operation of programs and locations for providing countermeasures to recipients, such as decisions and actions involving security and queuing, but only insofar as those activities directly relate to the countermeasure activities. Claims for which Covered Persons are provided immunity under the Act are losses caused by, arising out of, relating to, or resulting from the administration or use by an individual of a Covered Countermeasure consistent with the terms of a Declaration issued under the Act. Under the definition, these liability claims are precluded if they allege an injury caused by a countermeasure, or if the claims are due to manufacture, delivery, distribution, dispensing, or management and operation of

countermeasure programs at distribution and dispensing sites.

Thus, it is the Secretary’s interpretation that, when a Declaration is in effect, the Act precludes, for example, liability claims alleging negligence by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct. Likewise, the Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure’s administration or use. In each case, whether immunity is applicable will depend on the particular facts and circumstances.

Section X. Population

The Secretary must identify, for each Covered Countermeasure specified in a Declaration, the population or populations of individuals for which liability immunity is in effect with respect to administration or use of the countermeasure. Section X of the Declaration identifies which individuals should use the countermeasure or to whom the countermeasure should be administered—in short, those who should be vaccinated or take a drug or other countermeasure. Section X provides that the population includes “any individual who uses or who is administered a Covered Countermeasure in accordance with the Declaration.”

It should be noted that under the PREP Act, liability protection extends beyond the Population specified in the Declaration. Specifically, liability immunity is afforded (1) To manufacturers and distributors without regard to whether the countermeasure is used by or administered to this population, and (2) to program planners and qualified persons when the countermeasure is either used by or administered to this population or the program planner or qualified person reasonably could have believed the recipient was in this population. Section X of the Declaration includes these statutory conditions in the Declaration for clarity.

Section XI. Geographic Area

The Secretary must identify, for each Covered Countermeasure specified in the Declaration, the geographic area or areas for which liability immunity is in effect, including, as appropriate, whether the Declaration applies only to individuals physically present in the area or, in addition, applies to individuals who have a described connection to the area. Section XI of the Declaration provides that liability immunity is afforded for the administration or use of a Covered Countermeasure without geographic limitation. This could include claims related to administration or use in countries outside the U.S. It is possible that claims may arise in regard to administration or use of the Covered Countermeasures outside the U.S. that may be resolved under U.S. law.

In addition, the PREP Act specifies that liability immunity is afforded (1) to manufacturers and distributors without regard to whether the countermeasure is used by or administered to individuals in the geographic areas, and (2) to program planners and qualified persons when the countermeasure is either used or administered in the geographic areas or the program planner or qualified person reasonably could have believed the countermeasure was used or administered in the areas. Section XI of the Declaration includes these statutory conditions in the Declaration for clarity.

Section XII. Effective Time Period

The Secretary must identify, for each Covered Countermeasure, the period or periods during which liability immunity is in effect, designated by dates, milestones, or other description of events, including factors specified in the PREP Act. Section XII of the Declaration extends the effective period for different means of distribution of Covered Countermeasures through August 1, 2025.

Section XIII. Additional Time Period of Coverage

The Secretary must specify a date after the ending date of the effective time period of the Declaration that is reasonable for manufacturers to arrange for disposition of the Covered Countermeasure, including accepting returns of Covered Countermeasures, and for other Covered Persons to take appropriate actions to limit administration or use of the Covered Countermeasure. In addition, the PREP Act specifies that, for Covered Countermeasures that are subject to a Declaration at the time they are obtained for the Strategic National Stockpile

(SNS) under 42 U.S.C. 247d–6b(a), the effective period of the Declaration extends through the time the countermeasure is used or administered. Liability immunity under the provisions of the PREP Act and the conditions of the Declaration continue during these additional time periods. Thus, liability immunity is afforded during the “Effective Time Period,” described under Section XII of the Declaration, plus the “Additional Time Period” described under Section XIII of the Declaration.

Section XIII of the Declaration provides for 12 months as the Additional Time Period of coverage after expiration of the Declaration. Section XIII also explains the extended coverage that applies to any product obtained for the SNS during the effective period of the Declaration.

Section XIV. Countermeasures Injury Compensation Program

Section 319F–4 of the PHS Act, 42 U.S.C. 247d–6e, authorizes the Countermeasures Injury Compensation Program (CICP) to provide benefits to eligible individuals who sustain a serious physical injury or die as a direct result of the administration or use of a Covered Countermeasure. Compensation under the CICP for an injury directly caused by a Covered Countermeasure is based on the requirements set forth in this Declaration, the administrative rules for the Program, and the statute. To show direct causation between a Covered Countermeasure and a serious physical injury, the statute requires “compelling, reliable, valid, medical and scientific evidence.” The administrative rules for the Program further explain the necessary requirements for eligibility under the CICP. Please note that, by statute, requirements for compensation under the CICP may not align with the requirements for liability immunity provided under the PREP Act. Section XIV of the Declaration, “Countermeasures Injury Compensation Program,” explains the types of injury and standard of evidence needed to be considered for compensation under the CICP.

Further, the administrative rules for the CICP specify that if countermeasures are administered or used outside the United States, only otherwise eligible individuals at United States embassies, military installations abroad (such as military bases, ships, and camps) or at North Atlantic Treaty Organization (NATO) installations (subject to the NATO Status of Forces Agreement) where American servicemen and servicewomen are stationed may be

considered for CICP benefits. Other individuals outside the United States may not be eligible for CICP benefits.

Section XV. Amendments

Section XV of the Declaration confirms that the Secretary may amend any portion of this Declaration through publication in the **Federal Register**.

Declaration

Declaration for Public Readiness and Emergency Preparedness Act Coverage for Countermeasures Against Marburgvirus and/or Marburg Disease

I. Determination of Public Health Emergency

42 U.S.C. 247d–6d(b)(1)

I have determined that Marburg disease and marburgviruses are a credible risk such that Marburg disease or marburgviruses may in the future constitute a public health emergency. This Declaration must be construed in accordance with the Advisory Opinions of the Office of the General Counsel (Advisory Opinions). I incorporate those Advisory Opinions as part of this Declaration.¹ This Declaration is a “requirement” under the PREP Act.

II. Factors Considered

42 U.S.C. 247d–6d(b)(6)

I have considered the desirability of encouraging the design, development, clinical testing, or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of the Covered Countermeasures.

¹ See, e.g., Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration under the Act, Apr. 17, 2020, as Modified on May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-advisory-opinion-hhs-ogc.pdf> (last visited Nov. 24, 2020); Advisory Opinion 20–02 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, May 19, 2020, available at <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/advisory-opinion-20-02-hhs-ogc-prep-act.pdf> (last visited Nov. 24, 2020); Advisory Opinion 20–03 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/ao3.1.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Nov. 24, 2020); Advisory Opinion 20–04 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration under the Act, Oct. 22, 2020, as Modified on Oct. 23, 2020, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/ao%204.2_Updated_FINAL_SIGNED_10.23.20.pdf (last visited Nov. 24, 2020). This is not to suggest that other PREP Act declarations should be construed in a manner contrary to the interpretation provided in the Advisory Opinions.

III. Recommended Activities

42 U.S.C. 247d–6d(b)(1)

I recommend, under the conditions stated in this Declaration, the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures.

IV. Liability Immunity

42 U.S.C. 247d–6d(a), 247d–6d(b)(1)

Liability immunity as prescribed in the PREP Act and conditions stated in this Declaration is in effect for the Recommended Activities described in Section III.

V. Covered Persons

42 U.S.C. 247d–6d(i)(2), (3), (4), (6), (8)(A) and (B)

Covered Persons who are afforded liability immunity under this Declaration are “manufacturers,” “distributors,” “program planners,” “qualified persons,” and their officials, agents, and employees, as those terms are defined in the PREP Act, and the United States. In addition, I have determined that the following additional persons are qualified persons: (a) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction, as described in Section VII below, to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a Declaration of an emergency; (b) any person authorized to prescribe, administer, or dispense the Covered Countermeasures or who is otherwise authorized to perform an activity under an Emergency Use Authorization in accordance with Section 564 of the FD&C Act; and (c) any person authorized to prescribe, administer, or dispense Covered Countermeasures in accordance with Section 564A of the FD&C Act.

VI. Covered Countermeasures

42 U.S.C. 247d–6b(c)(1)(B), 42 U.S.C. 247d–6d(i)(1) and (7)

Covered Countermeasures are any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate Marburg disease, or the transmission of marburgviruses or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product, or countermeasures for adverse effects of these countermeasures, and

countermeasures that otherwise limit the harm caused by the health threat.

Covered Countermeasures must be “qualified pandemic or epidemic products,” or “security countermeasures,” or drugs, biological products, respiratory protective devices or devices authorized for investigational or emergency use, as those terms are defined in the PREP Act, the FD&C Act, and the Public Health Service Act.

VII. Limitations on Distribution

42 U.S.C. 247d–6d(a)(5) and (b)(2)(E)

I have determined that liability immunity is afforded to Covered Persons only for Recommended Activities involving Covered Countermeasures that are related to:

(a) Present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other federal agreements; or

(b) Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a Declaration of an emergency.

As used in this Declaration, the terms Authority Having Jurisdiction and Declaration of Emergency have the following meanings:

i. The Authority Having Jurisdiction means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (*e.g.*, city, county, tribal, state, or federal boundary lines) or functional (*e.g.*, law enforcement, public health) range or sphere of authority.

ii. A Declaration of Emergency means any Declaration by any authorized local, regional, state, or federal official of an emergency specific to events that indicate an immediate need to administer and use the Covered Countermeasures, with the exception of a federal Declaration in support of an Emergency Use Authorization under Section 564 of the FD&C Act unless such Declaration specifies otherwise;

I have also determined that, for governmental program planners only, liability immunity is afforded only to the extent such program planners obtain Covered Countermeasures through voluntary means, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from state, local, or private stockpiles.

VIII. Category of Disease, Health Condition, or Threat

42 U.S.C. 247d–6d(b)(2)(A)

The category of disease, health condition, or threat for which I recommend the administration or use of the Covered Countermeasures is Marburg disease caused by marburgviruses or virus mutating therefrom.

IX. Administration of Covered Countermeasures

42 U.S.C. 247d–6d(a)(2)(B)

Administration of the Covered Countermeasure means physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution and dispensing of the countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for purpose of distributing and dispensing countermeasures.

X. Population

42 U.S.C. 247d–6d(a)(4), 247d–6d(b)(2)(C)

The populations of individuals include any individual who uses or is administered the Covered Countermeasures in accordance with this Declaration.

Liability immunity is afforded to manufacturers and distributors without regard to whether the countermeasure is used by or administered to this population; liability immunity is afforded to program planners and qualified persons when the countermeasure is used by or administered to this population, or the program planner or qualified person reasonably could have believed the recipient was in this population.

XI. Geographic Area

42 U.S.C. 247d–6d(a)(4), 247d–6d(b)(2)(D)

Liability immunity is afforded for the administration or use of a Covered Countermeasure without geographic limitation.

Liability immunity is afforded to manufacturers and distributors without regard to whether the countermeasure is used by or administered in any designated geographic area; liability immunity is afforded to program planners and qualified persons when the countermeasure is used by or administered in any designated geographic area, or the program planner or qualified person reasonably could

have believed the recipient was in that geographic area.

XII. Effective Time Period

42 U.S.C. 247d–6d(b)(2)(B)

Liability immunity for Covered Countermeasures through means of distribution, as identified in Section VII(a) of this Declaration, other than in accordance with the public health and medical response of the Authority Having Jurisdiction and extends through August 1, 2025.

Liability immunity for Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction begins with a Declaration and lasts through (1) the final day the emergency Declaration is in effect, or (2) August 1, 2025, whichever occurs first.

XIII. Additional Time Period of Coverage

42 U.S.C. 247d–6d(b)(3)(B) and (C)

I have determined that an additional 12 months of liability protection is reasonable to allow for the manufacturer(s) to arrange for disposition of the Covered Countermeasure, including return of the Covered Countermeasures to the manufacturer, and for Covered Persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasures.

Covered Countermeasures obtained for the SNS during the effective period of this Declaration are covered through the date of administration or use pursuant to a distribution or release from the SNS.

XIV. Countermeasures Injury Compensation Program

42 U.S.C. 247d–6e

The PREP Act authorizes the Countermeasures Injury Compensation Program (CICP) to provide benefits to certain individuals or estates of individuals who sustain a covered serious physical injury as the direct result of the administration or use of the Covered Countermeasures, and benefits to certain survivors of individuals who die as a direct result of the administration or use of the Covered Countermeasures. The causal connection between the countermeasure and the serious physical injury must be supported by compelling, reliable, valid, medical and scientific evidence in order for the individual to be considered for compensation. The CICP is administered by the Health Resources and Services Administration, within the

Department of Health and Human Services. Information about the CICI is available at the toll-free number 1-855-266-2427 or <http://www.hrsa.gov/cicp/>.

XV. Amendments

42 U.S.C. 247d-6d(b)(4)

Amendments to this Declaration will be published in the **Federal Register**, as warranted.

Authority: 42 U.S.C. 247d-6d

Dated: December 2, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020-26972 Filed 12-8-20; 8:45 am]

BILLING CODE 4150-37-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Advisory Committee to the Director, National Institutes of Health, December 10, 12:00 p.m. to December 11, 05:00 p.m. National Institutes of Health, Building 1, Wilson Hall, 1 Center Drive, Bethesda, MD, 20892 (Virtual Meeting) which was published in the **Federal Register** on 11/30/2020, 85 FR 76590.

The meeting notice is amended to change the meeting start time on December 10, 2020 from 12:00 p.m. to 12:30 p.m. The meeting is open to the public.

Dated: December 4, 2020.

Natasha M. Copeland,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2020-27055 Filed 12-8-20; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Three Vehicle Tracking Devices, a Satellite Device, an NFC Reader, and an NFC Keyring FOB

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border

Protection (CBP) has issued a final determination concerning the country of origin of three vehicle tracking devices, a satellite device, a near field communication (NFC) reader, and an NFC keyring fob. Based upon the facts presented, CBP has concluded that the country of origin of the three vehicle tracking devices, the satellite device, and the NFC reader is Canada for purposes of U.S. Government procurement. The country of origin of the NFC keyring fob will be determined by the country of origin of the contactless integrated circuit (IC), which is usually Taiwan, but if unavailable, then either Thailand or Singapore will be the source country and the country of origin for purposes of U.S. Government procurement.

DATES: The final determination was issued on November 25, 2020. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within January 8, 2021.

FOR FURTHER INFORMATION CONTACT: Beth Junior, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0347.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on November 25, 2020, pursuant to subpart B of part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of three vehicle tracking devices, one satellite device, one NFC reader, and one NFC keyring fob imported by Geotab USA, Inc. (Geotab), which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, Headquarters Ruling Letter H309128, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511-18). In the final determination, CBP concluded that the country of origin of the three vehicle tracking devices, the satellite device, and the NFC reader is Canada for purposes of U.S. Government procurement. Regarding the NFC keyring fob, CBP concluded that the country of origin will be the country where the contactless integrated circuit is manufactured. In most cases, this will be Taiwan, but if the contactless integrated circuit cannot be sourced there, then it will be sourced from either Thailand or Singapore, and the corresponding sourcing country would then be the country of origin for

purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: November 25, 2020.

Alice A. Kipel,

Executive Director, Regulations and Rulings, Office of Trade.

HQ H309128

November 25, 2020

OT:RR:CTF:VS H309128 EGJ

CATEGORY: Origin

Mr. James Lay

Geotab USA, Inc.

770 E Pilot Rd., Suite A

Las Vegas, NV 89119

Re: U.S. Government Procurement; Country of Origin of Three Vehicle Tracking Devices, Satellite Device, NFC Reader, and NFC Keyring Fob; Substantial Transformation

Dear Mr. Lay

This is in response to your ruling request, dated February 6, 2020, requesting a final determination on behalf of Geotab USA, Inc. ("Geotab") pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection ("CBP") Regulations (19 CFR part 177).

This final determination concerns the country of origin of three vehicle tracking devices, one satellite device, one near field communication ("NFC") reader, and one NFC identification keyring fob. As a U.S. importer, Geotab is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination.

Facts

Geotab is a technology company which designs and imports vehicle tracking systems, and has submitted six different products for our review. The products' descriptions, pictures, and manufacturing processes are set forth below.

Product Descriptions

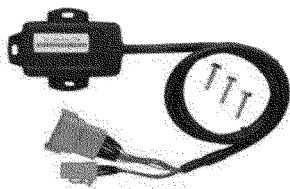
The first three products are telematics devices, which are designed to transmit vehicle tracking information over long distances. Specifically, the three products are:

- The GO9 device and its component harnesses;
- The GO9–NOGPSF, which is a GO9 device with the GPS permanently disabled, and its component harness; and
- The GR8 (ATT–GRLTEA1), which is a rugged version of the GO8 device that can be used for harsh conditions and installed on the exterior of a vehicle, for example on a truck trailer or on heavy equipment, and its component harness.

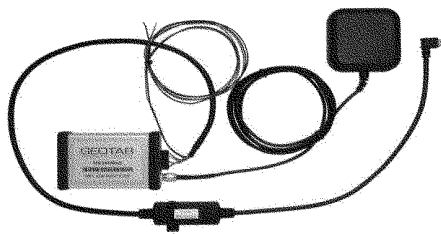
You state that the three vehicle tracking devices are very similar in design. When each end product is packaged, it includes the tracking device with one or more harnesses (communications and data cables), and other minor components, such as zip ties, mounting brackets, decals or stickers, and screws. A harness may be an external component that is plugged into the device or it may be a component built into the item. You have provided the following picture of the GO9 device, which does not have a built-in harness:



You have also provided the following picture of the GR8 device, which does have a built-in harness:



In addition, you have asked for a determination of the country of origin of a satellite device, which is an auxiliary item that plugs into a GO9 or GO8 device and that allows the GO9 or GO8 device to communicate over the satellite network when cellular connectivity is lost. The satellite add-on is a single device with two external components. Pictured below, it consists of the satellite device (the silver box on the lower left side), an IOX integrated receiver/decoder (IRD) (the rectangular unit at the bottom of the image), and an external antenna (the black square unit on the top right of the image), which are delivered connected together with a zip tie:



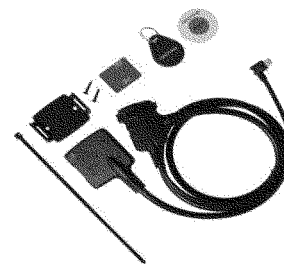
Finally, you have also requested a determination regarding an NFC reader and an NFC keyring fob, described as follows:

- An IOX NFC reader (IOX–NFC–READER), which allows dispatchers or managers to easily view where each driver is at any point in time and to monitor each driver as s/he operates a vehicle; and
- An NFC identification keyring fob (GEO–NFC FOB BLUE20), used in conjunction with the NFC reader to identify the individual driver operating a vehicle.

NFC technology allows two devices placed within a few centimeters of each other to exchange data. In order for this to work, both devices must be equipped with an NFC chip and an antenna.¹ According to your website, the NFC reader plugs into the Geotab vehicle tracking device. Each authorized vehicle driver has an assigned NFC keyring fob with a specific serial number assigned to that driver. The driver swipes the NFC keyring fob across the NFC reader before beginning the trip so that the vehicle tracking device can register who is driving the vehicle. See “NFC Driver ID Technology: How to Use and Install,” (April 5, 2018) available at <https://www.geotab.com/blog/driver-id/>.

You state that the NFC reader is a single unit featuring a black rectangular casing and a long connecting wire. It is pictured below with the NFC keyring fob (the blue item with an attached key ring, second from the right) and other minor components, such as the mounting bracket and screws, double sided tape for installation (the red item), the NFC sticker (the item on the far right), and a zip tie. You note that the NFC keyring fob and the sticker are sold separately.

¹ See “Everything you need to know about NFC and mobile payments,” CNET (September 9, 2014) available at <https://www.cnet.com/how-to/how-nfc-works-and-mobile-payments/>.



Three Vehicle Tracking Devices

You state that the GO9, the GO9–NOGPSF, and the GR8 vehicle tracking devices all have a similar manufacturing process. Each device consists of both Canadian and non-Canadian components, and two main components of each product are a printed circuit board assembly (“PCBA”) and proprietary software. The PCBAs for each of these products are manufactured in Canada. Additionally, all of the PCBAs for these three devices are loaded with software developed in Canada. You have provided us with the details of the manufacturing process for the GO9 device as a representative example.

For the GO9 and other two devices, most of the components are imported into Canada from China. At a facility in Canada, the PCBAs are assembled from two major components: A main card and a daughter card. To produce these two boards, blank printed circuit boards are run through surface mount technology (“SMT”) machines and are populated with different components. The GPS device is surface mounted to the main board and an antenna is attached to the daughter board. Next, the two boards are combined together into a single PCBA.

The inert PCBAs are shipped from the manufacturing facility to Geotab’s facility which is also in Ontario, Canada. At Geotab’s facility, the following six processes are performed: (1) Programming and testing, (2) closing, (3) scanning, (4) packaging, (5) labeling, and (6) debugging. During the first programming and testing phase, Geotab loads the final firmware and configurations onto the PCBA’s subassembly. This firmware was also developed in Canada. Then a SIM card is placed into the subassembly and the unit is tested. Various labels are affixed to parts of the unit, including the casing. The subassembly is inserted into the casing, then the unit is tested, inspected, and finally the casing is closed. Then the light pipe, labels, and decals are added. The device is placed in a box with its product literature and zip tie.

You note that the harness is a communication and data cable that is either hard-wired into the device or plugs into the device. The harness allows interaction between the device and the vehicle; it also provides connectivity to facilitate the transmission and collection of data. In many instances, an external harness is not necessary because the device can be plugged directly into the vehicle's On-Board Diagnostics ("OBD") port. You state the harnesses are subsidiary items, and that all of harnesses for these devices are currently sourced from China. You state that the devices are packaged together with their harnesses when they are shipped to the final customer in the United States.

IOX Satellite Add-On

Turning to the satellite device, it is made up of three major components which connect to each other via an electrical cord: The satellite box, an IOX integrated receiver/decoder ("IRD"), and an external antenna. The satellite box contains a PCBA, an internal antenna, and a modem. All of the discrete components of the satellite box are imported into Canada. The blank board is populated with the discrete components, including the modem, using SMT equipment at a facility in Canada. Then, the PCBA is shipped to Geotab's facility in Canada. At Geotab, the antenna is attached to the PCBA, which is then tested and packaged in its outer casing. This finished satellite box is the component that provides an alternative data connection based on a satellite signal when the GO device loses its cell tower based signal.

The IRD is the component which communicates and facilitates the data flow between the satellite box and the vehicle tracking device. The IRD is built in China, where it is loaded with proprietary software developed by Geotab in Canada. It is shipped to Canada to be packaged together with the satellite box. The final component is the external antenna, which is completely manufactured in China and shipped to Canada to be packaged together for shipment with the other two components.

NFC Reader

With regard to the NFC Reader, it contains two PCBAs, a main board, and an antenna board. Just like the components for the vehicle tracking devices, most of the components of these PCBAs are imported from China. At a Canadian facility, the blank imported boards are all populated with their components using SMT equipment. The two PCBAs and the two

boards are combined together into a single assembly. The new PCBA subassembly is loaded with Geotab firmware developed in Canada. In addition, the NFC reader's harness from China is wired into the PCBA at this facility.

Next, the PCBA subassembly is shipped to Geotab's Ontario facility, where it is inserted between two plastic pieces which will form the outer casing. The unit is tested, labelled, and packaged with a mounting bracket and a zip tie for delivery to customers.

NFC Fobs

With regard to the NFC fobs, they are manufactured in Taiwan. Each fob is made up of the following parts, sourced in Taiwan: (1) Plastic casing, (2) an "Ultralight C—contactless ticket integrated circuit ("IC") chip," (3) coil/antenna, (4) metal ring, and (5) label paint. However, you note that occasionally the manufacturer in Taiwan is unable to source the contactless IC in Taiwan. In those instances, the manufacturer will source the IC from either Thailand or Singapore. The fob's assembly always takes place in Taiwan.

After the finished fobs are imported into Canada, Geotab programs a serial number into each fob so that it can be uniquely identified. Then, Geotab marks the fobs and packages them into packs of 20 each for export.

Issue

What is the country of origin of the three vehicle tracking devices, the satellite device, the NFC reader, and the NFC keyring fob for purposes of U.S. Government procurement?

Law and Analysis

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*).

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into

a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character or use, different from that possessed by the article prior to processing. *See Texas Instruments Inc. v. United States*, 69 C.C.P.A. 151 (1982). In order to determine whether a substantial transformation has occurred, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. CBP has stated that a new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. This determination is based on the totality of the evidence. *See National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993).

Three Vehicle Tracking Devices and the NFC Reader

In *Data General v. United States*, 4 CIT 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. The court noted that the programs were developed by a U.S. project engineer with many years of experience in "designing and building hardware." In addition, the court noted that while replicating the program pattern from a "master" PROM may be a quick one-step process, the development of the pattern and the production of the "master" PROM required much time and expertise. The court noted that it was undisputed that programming altered the character of a PROM.

Accordingly, in some cases we have found that programming a device in the same country where the software was developed can constitute a substantial transformation. In HQ 558868, dated February 23, 1995, we determined that blank cards embedded with microchips were substantially transformed when they were imported into the United

States and programmed into Secure ID cards using software developed in the United States. We took the view that the programming changed the blank card from a card with many potential applications into a card that could only be used to enable the user to log into a secured computer. *See also* HQ 735027, dated September 7, 1993 (programming imported blank media (EEPROM) with U.S. software in the United States substantially transformed it into media which prevented the piracy of software).

We note that all four of these devices contain software developed and downloaded onto them in Canada. In addition to the software, these four devices all contain PCBAs built in Canada. The blank boards and the various capacitors, resistors, and other elements are permanently combined together using SMT machines at a facility in Canada. We note that the PCBAs are made up of a variety of parts from different countries, including non-TAA countries such as China.

For the four relevant devices, we note that they are imported into Canada as bare boards, PCBA parts, external housing, and wire harnesses. When the PCBAs are built in Canada, programmed with Canadian software in Canada, and changed into a finished vehicle tracking device or NFC reader in Canada, we find that they have a different name, character, and use than the imported articles. Therefore, we find that the discrete parts of these four devices are substantially transformed in Canada. As such, the country of origin for the purposes of government procurement of the three vehicle tracking devices and the NFC reader is Canada.

Satellite Device

Unlike the vehicle tracking devices and reader, the satellite device is made up of three different components: The satellite box, the IRD, and the external antenna. The satellite box contains a PCBA populated in Canada, which incorporates a modem and an internal antenna. The satellite box is the part of the system which connects to the satellite system in the event the vehicle tracking device loses its connection to cellular tower signals. The IRD communicates with the vehicle tracking device, and the external antenna provides additional connectivity. Both the IRD and the external antenna are completely manufactured in China; however, the IRD is loaded with proprietary software developed in Canada.

As stated previously in our analysis of the tracking devices and NFC reader, we have found that in certain situations, manufacturing a PCBA constitutes a

substantial transformation. With regard to the satellite box, we find that populating a bare board with a modem, an internal antenna, and enclosing it in the finished housing constitutes a substantial transformation. The individual components lose their identities as modems, antennae, capacitors, and resistors—and have a new name, character, and use as a satellite device box.

With regard to the remaining two components, we find that their country of origin is China. Although Canadian software is downloaded onto the IRD in China, we note that they are entirely manufactured in China. In HQ H241177, dated December 3, 2013, we examined Ethernet switches assembled to completion in Malaysia and then shipped to Singapore, where U.S.-origin software was downloaded onto the switches. In that ruling, we noted that:

We find that the software downloading performed in Singapore does not amount to programming. Programming involves writing, testing and implementing code necessary to make a computer function in a certain way. *See Data General supra*. *See also* “computer program”, Encyclopedia Britannica (2013), (9/19/2013) <http://www.britannica.com/>, which explains, in part, that “a program is prepared by first formulating a task and then expressing it in an appropriate computer language, presumably one suited to the application.”

While the programming occurs in the U.S., the downloading occurs in Singapore. Given these facts, we find that the country where the last substantial transformation occurs is Malaysia, that is, where the major assembly processes are performed. The country of origin for purposes of U.S. Government procurement is Malaysia.

Like the Ethernet switches referenced above, downloading Canadian software onto the IRD in China is not sufficient to substantially transform the device. However, we note that both the IRD and the external antenna are packaged together with the satellite box to form a finished satellite device system. All three components of the satellite device system operate as a single system when exported to the United States; therefore, we must determine the singular country of origin for the entire system.

In determining the country of origin for the satellite device system, the Court of International Trade’s (“CIT”) analysis in *Uniroyal, Inc. v. United States* (“*Uniroyal*”) is instructive, wherein the CIT examined whether a finished shoe upper was substantially transformed when it was combined with the shoe’s outer sole. 3 CIT 220, 542 F. Supp. 1026

(1982), *aff’d* 702 F.2d 1022 (Fed. Cir. 1983). The CIT noted that “the upper—which in its condition as imported is already a substantially complete shoe—is readily recognizable as a distinct item apart from the outsole to which it is attached.” *Id.* at 224. In addition, the CIT cited to *Grafton Spools, Ltd. v. United States*, 45 Cust. Ct. 16 (1960), another substantial transformation case in which the U.S. Customs Court noted that purchasers of typewriter ribbons were buying the ribbon, and not the spool upon which the ribbon was wound. The CIT noted that “in *Grafton Spools* the ribbon and not the spool was the essence of the finished article, while here the upper is the essence of the completed shoe.” *Id.* at 226–227. In *Uniroyal*, the CIT ultimately concluded that adding the outer soles did not result in a substantial transformation of the uppers as the uppers were the very essence of the finished shoe.

In the satellite device system, we find that it is the satellite box which is the “very essence” of the finished system, while the other two devices perform subsidiary roles. The satellite box communicates with the satellite network when the vehicle tracking device loses its connection with cellular towers. The IRD facilitates the flow of information between the tracking device and the satellite box, while the external antenna boosts connectivity. For all of these reasons, we find that the country of origin of the complete system will be the country of origin of the satellite box. For government procurement purposes, the country of origin of the satellite device system will be Canada, where the PCBAs were populated with various components.

NFC Keyring Fob

With regard to the NFC fobs, each fob is made up of the following parts sourced in Taiwan: (1) Plastic casing, (2) an “Ultralight C—contactless ticket IC chip,” (3) coil/antenna, (4) metal ring, and (5) label paint. However, you note that occasionally the manufacturer in Taiwan is unable to source the contactless IC in Taiwan. In those instances, the manufacturer will source the IC from either Thailand or Singapore. The fob’s assembly always takes place in Taiwan.

In Headquarters Ruling Letter (“HQ”) H303864, dated December 26, 2019, an electric motor from China was shipped to Mexico for assembly with the impeller, the seal, and the plastic housing to form the finished pump assembly. In that case, we noted that the assembly was rather simple—it involved press fitting the parts into each other. Moreover, the electric motor was the

most expensive and substantive part of the finished pump assembly. We found that it imparted the “very essence” of the pump assembly, as it turned the impeller and moved the fluid through the pump.

The question presented is whether the contactless IC is substantially transformed when it is assembled together with the other components. We note that in NFC technology, an NFC chip and an antenna are combined to transmit information across short distances. In this case, the driver’s serial ID number is transmitted to the NFC reader for tracking purposes. Therefore, the NFC chip is central to the function of the finished NFC fob.

Similar to the shoe upper in *Uniroyal*, the ribbon in *Grafton Spools*, and the electric motor in HQ H303864, we find that the NFC chip constitutes the “very essence” of the finished NFC fob. After the chip is assembled into the finished fob, its use remains unchanged. Therefore, we find that the country of origin of the NFC fob will be the country where the NFC chip is produced. In most cases, the country of origin will be Taiwan, but when the Ultralight C—contactless ticket IC is unavailable from Taiwan, then the country of origin of the NFC fob will be where the chip is sourced, which in this case is either Thailand or Singapore.

Holding

The country of origin of the three telematics devices, the satellite devices, and the NFC reader for purposes of U.S. Government procurement is Canada.

The country of origin of the NFC keyring fob for purposes of U.S. Government procurement is the country of origin of the contactless IC, which is usually Taiwan. However, if the contactless IC is sourced from Thailand or Singapore, then the country of origin for procurement would be Thailand or Singapore as the case may be.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,
Alice A. Kipel,

Executive Director Regulations & Rulings,
Office of Trade.

[FR Doc. 2020–27022 Filed 12–8–20; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2676–20; DHS Docket No. USCIS–2019–0020]

RIN 1615–ZB83

Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces actions to ensure its continued compliance with the preliminary injunction orders of the U.S. District Court for the Northern District of California in *Ramos, et al. v. Nielsen, et al.*, No. 18–cv–01554 (N.D. Cal. Oct. 3, 2018) (“*Ramos*”) and the U.S. District Court for the Eastern District of New York in *Saget, et al., v. Trump, et al.*, No. 18–cv–1599 (E.D.N.Y. Apr. 11, 2019) (“*Saget*”), and with the order of the U.S. District Court for the Northern District of California to stay proceedings in *Bhattarai v. Nielsen*, No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (“*Bhattarai*”). A panel of the U.S. Court of Appeals for the Ninth Circuit vacated the injunction in *Ramos* on September 14, 2020. However, because the appellate court has not issued its directive to the district court to make that ruling effective, the injunction remains in place at this time. See *Ramos, et al., v. Wolf, et al.*, No. 18–16981 (9th Cir., September 14, 2020). Beneficiaries under the Temporary Protected Status (TPS) designations for El Salvador, Nicaragua, Sudan, Honduras, and Nepal will retain their TPS while the preliminary injunction in *Ramos* and the *Bhattarai* order remain in effect, provided that an alien’s TPS is not withdrawn because of individual ineligibility. Beneficiaries under the TPS designation for Haiti will retain their TPS while either of the preliminary injunctions in *Ramos* or *Saget* remain in effect, provided that an alien’s TPS is not withdrawn because of individual ineligibility. This notice further provides information on the

automatic extension of the validity of TPS-related Employment Authorization Documents (EADs); Notices of Action (Forms I–797); and Arrival/Departure Records (Forms I–94), (collectively “TPS-related documentation”); for those beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal.

DATES: DHS is automatically extending the validity of TPS-related documentation for beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal for nine months through October 4, 2021, from the current expiration date of January 4, 2021.

FOR FURTHER INFORMATION CONTACT:

- You may contact Maureen Dunn, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, by mail at 5900 Capital Gateway Dr, Camp Springs, MD 20529–2140; or by phone at 800–375–5283.

- For further information on TPS, please visit the USCIS TPS web page at www.uscis.gov/tps.

- If you have additional questions about TPS, please visit uscis.gov/tools. Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our U.S. Citizenship and Immigration Services (USCIS) Contact Center at 800–375–5283 (TTY 800–767–1833).

- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at www.uscis.gov, or visit the USCIS Contact Center at uscis.gov/contactcenter.

- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
EAD—Employment Authorization Document
EOIR—Executive Office for Immigration Review
FNC—Final Nonconfirmation
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
Government—U.S. Government
INA—Immigration and Nationality Act

IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section

SAVE—USCIS Systematic Alien Verification for Entitlements Program

Secretary—Secretary of Homeland Security
TNC—Tentative Nonconfirmation

TPS—Temporary Protected Status

TTY—Text Telephone

USCIS—U.S. Citizenship and Immigration Services

Background on TPS

- TPS is a temporary immigration status granted to eligible nationals of a country designated for TPS under the Immigration and Nationality Act (INA) or to eligible persons without nationality who last habitually resided in the designated country.

- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS.

- TPS beneficiaries may travel abroad temporarily with the prior consent of DHS.

- The granting of TPS does not result in or lead to lawful permanent resident status.

- To qualify for TPS, beneficiaries must meet the eligibility standards at INA section 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).

- When the Secretary of Homeland Security (the Secretary) terminates a country's TPS designation, beneficiaries return to one of the following:

- The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or been terminated); or

- Any other lawfully obtained immigration status or category they received while registered for TPS, as long as it is still valid on the date TPS terminates.

Purpose of this Action

This notice ensures DHS's continued compliance with various court orders issued by the federal district courts in the *Ramos*, *Bhattarai*, and *Saget* lawsuits that require DHS to maintain the TPS designations for El Salvador, Haiti, Sudan, Nicaragua, Honduras, and Nepal, as well as the TPS and TPS-related documentation for eligible affected beneficiaries.¹ The U.S. Court

of Appeals for the Ninth Circuit vacated the district court's preliminary injunction in *Ramos* on September 14, 2020, holding that the decision to designate, extend, or terminate TPS is not subject to judicial review. However, the appellate order is not currently effective because the Ninth Circuit has not issued any directive to carry out the order to the federal district court.² Therefore, the *Ramos* preliminary injunction remains in effect. In addition, the order of the district court in *Bhattarai* staying proceedings and approving the parties' stipulated agreement to continue TPS and TPS-related documentation for eligible beneficiaries from Nepal and Honduras remains in effect. The *Saget* district court's order prohibiting the termination of TPS for Haiti also remains in effect while the decision is on appeal to the U.S. Court of Appeals for the Second Circuit. Affected TPS beneficiaries from the six countries will retain their status, provided they continue to meet all the individual requirements for TPS eligibility described in INA section 244(c) and 8 CFR 244. As necessary, DHS will publish future information in the **Federal Register** to ensure its compliance with any relevant court orders that may be issued after the date of this notice.

DHS has initially published notices to ensure its compliance with the *Ramos* preliminary injunction on October 31, 2018 and March 1, 2019, and the *Bhattarai* order to stay proceedings on May 10, 2019. *See* 83 FR 54764; 84 FR 7103; and 84 FR 20647. The Department last published a notice to ensure its continued compliance with the combined orders in *Ramos*, *Bhattarai*, and *Saget* on November 4, 2019. That notice automatically extended certain TPS and TPS-related documentation through January 4, 2021 for all eligible TPS beneficiaries covered by the courts' orders. *See* 84 FR 59403. Through this **Federal Register** notice, DHS announces actions to ensure its continued compliance with the district court orders in these three lawsuits while those orders remain in effect.

The TPS designations for El Salvador, Nicaragua, and Sudan will remain in effect, as required by the *Ramos* district court order, so long as the preliminary injunction remains in effect. The TPS

designation for Haiti will remain in effect, as required by the preliminary injunction orders in both *Ramos* and *Saget*, so long as either of those preliminary injunctions remain in effect. The TPS designations for Honduras and Nepal will remain in effect so long as the *Bhattarai* order staying proceedings and approving the parties' stipulated agreements continues in effect. Affected TPS beneficiaries under the TPS designations for El Salvador, Nicaragua, Sudan, Haiti, Honduras, and Nepal will retain their TPS and their TPS-related documentation will continue to be valid in accordance with the specific orders that affect the TPS designations regarding their individual countries, provided that the affected beneficiaries continue to meet all the individual requirements for TPS. *See* INA section 244(c)(3). *See also* 8 CFR 244.14. DHS will not terminate TPS for any of the affected countries pending final disposition of the *Ramos* appeal, or for Haiti pending both *Ramos* and *Saget* appeals, including through any additional appellate channels in which relief may be sought, or by other orders of the court.

DHS is further announcing it is automatically extending, through October 4, 2021, the validity of certain TPS-related documentation, as specified in this notice, for beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal provided that the affected beneficiaries remain individually eligible for TPS.

Automatic Extension of EADs Issued Under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal

Through this **Federal Register** notice, DHS automatically extends the validity of EADs listed in Table 1 below issued to beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal. Such aliens may show their EAD to employers to demonstrate they have employment authorization and may wish to also show employers this **Federal Register** notice to explain that their TPS-Related Documentation has been automatically extended through October 4, 2021. This Notice explains how TPS beneficiaries, their employers, and benefit-granting agencies may determine which EADs are automatically extended and how this affects the Form I–9, Employment Eligibility Verification, E-Verify, and USCIS Systematic Alien Verification for Entitlements (SAVE) processes. Additionally, a beneficiary under the

¹ *See Ramos, et al. v. Nielsen, et al.*, No. 18–cv–01554 (N.D. Cal. Oct. 3, 2018) (district court granted preliminary injunction against terminations of TPS for El Salvador, Haiti, Sudan, and Nicaragua) (“*Ramos*”); *Saget, et al., v. Trump, et al.*, No. 18–cv–1599 (E.D.N.Y. Apr. 11, 2019) (district court granted preliminary injunction against termination of TPS for Haiti) (“*Saget*”); and *Bhattarai, et al. v.*

Nielsen, et al., No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (district court stayed proceedings until *Ramos* appeal decided and approved parties' stipulation for continued TPS and issuance of TPS-related documentation to eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the appeal) (“*Bhattarai*”).

² *See Ramos, et al., v. Wolf, et al.*, No. 18–16981 (9th Cir., September 14, 2020).

TPS designation for any of these countries who has applied for a new EAD but who has not yet received his or her new EAD is covered by this automatic extension, provided that the EAD he or she possesses contains one of the expiration dates listed in Table 1 below.

TABLE 1—AFFECTED EADS

If an EAD has a category code of A–12 or C–19 and an expiration date of:	Then the validity of the EAD is extended through:
07/22/2017	10/04/2021
11/02/2017	10/04/2021
01/05/2018	10/04/2021
01/22/2018	10/04/2021
03/09/2018	10/04/2021
06/24/2018	10/04/2021
07/05/2018	10/04/2021
11/02/2018	10/04/2021
01/05/2019	10/04/2021

TABLE 1—AFFECTED EADS—
Continued

If an EAD has a category code of A–12 or C–19 and an expiration date of:	Then the validity of the EAD is extended through:
04/02/2019	10/04/2021
06/24/2019	10/04/2021
07/22/2019	10/04/2021
09/09/2019	10/04/2021
01/02/2020	10/04/2021
01/05/2020	10/04/2021
03/24/2020	10/04/2021
01/04/2021	10/04/2021

Automatic Extension of Forms I–94 and Forms I–797

Also through this **Federal Register** notice, DHS automatically extends the validity periods of the Forms I–94 and Forms I–797 listed in Table 2 below previously issued to beneficiaries under

the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal. These extensions apply only if the TPS beneficiary properly filed for re-registration during either the most recent DHS-announced registration period for their country, or any applicable previous DHS-announced re-registration periods for the alien's country,³ or has a re-registration application that remains pending. This notice does not extend the validity periods of Forms I–94 or Forms I–797 for any TPS beneficiary who failed to file for TPS re-registration during one of the applicable previous DHS-announced re-registration periods, or for whom a re-registration request has been finally denied. In addition, the extensions do not apply for any beneficiary from whom TPS has been withdrawn.

TABLE 2—AFFECTED FORMS I–94 AND I–797⁴

Country	Beginning date of validity:	End date of validity:	Validity of forms I–94 and I–797 extended through:
El Salvador	Sept. 10, 2016	Mar. 9, 2018	10/04/2021
	Mar. 10, 2018	Sept. 9, 2019	10/04/2021
Haiti	Jan. 23, 2016	July 22, 2017	10/04/2021
	July 23, 2017	Jan. 22, 2018	10/04/2021
	Jan. 23, 2018	July 22, 2019	10/04/2021
Honduras	July 6, 2016	Jan. 5, 2018	10/04/2021
	Jan. 6, 2018	July 5, 2018	10/04/2021
	July 6, 2018	Jan. 5, 2020	10/04/2021
Nepal	Dec. 25, 2016	June 24, 2018	10/04/2021
	June 25, 2018	June 24, 2019	10/04/2021
Nicaragua	July 6, 2016	Jan. 5, 2018	10/04/2021
	Jan. 6, 2018	Jan. 5, 2019	10/04/2021
Sudan	May 3, 2016	Nov. 2, 2017	10/04/2021
	Nov. 3, 2017	Nov. 2, 2018	10/04/2021

Application Procedures

Current beneficiaries under the TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan do not need to pay a fee or file any application, including Application for Employment Authorization (Form I–765), to maintain their TPS benefits through October 4, 2021, provided that they have properly re-registered for TPS during either the most recent DHS-announced registration period for their country, or any applicable previous re-registration period described in Footnote 3.

TPS beneficiaries who have failed to re-register properly for TPS during any of these re-registration periods may still

file an Application for Temporary Protected Status (Form I–821), but must demonstrate “good cause” for failing to re-register on time, as required by law. See INA section 244(c)(3)(C) (TPS beneficiary’s failure to register without good cause in form and manner specified by DHS is ground for TPS withdrawal); 8 CFR 244.17(b) and Form I–821 instructions.

Any currently eligible beneficiary who does not presently have a pending EAD application under the TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, or Sudan may file Form I–765 with appropriate fee.

Possible Future Actions

In order to comply with statutory requirements for TPS while the district courts’ orders or any superseding court order concerning the beneficiaries under the TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan are pending, DHS anticipates requiring these beneficiaries to re-register and will announce the re-registration procedures in a future **Federal Register** notice. DHS has the authority to conduct TPS re-registration in accordance with section 244(c)(3)(C) of the INA and 8 CFR 244.17. Through the re-registration process, which is generally conducted every 12 to 18 months while a country is designated

³ El Salvador: July 8–Sept. 6, 2016, or Jan. 18–Mar. 19, 2018; Haiti: Aug. 25–Oct. 26, 2015, May 24–July 24, 2017, or Jan. 18–Mar. 19, 2018; Honduras: May 16–July 16, 2016; Dec. 15, 2017–Feb. 13, 2018 or June 5–Aug. 6, 2018; Nepal: Oct. 26–Dec. 27, 2016 or May 22–July 23, 2018;

Nicaragua: May 16–July 15, 2016 or Dec. 15, 2017–Feb. 13, 2018; Sudan: Jan. 25–March 25, 2016 or Oct. 11, 2017–Dec. 11, 2017.

⁴ Your Forms I–94 and I–797 may show a different beginning date of validity than those listed

here if you were a late initial filer (LIF) at the time because the forms would have the date of approval of your LIF application for TPS. As long as they bear an end date of validity listed in this chart, then they are automatically extended by this Notice.

for TPS, USCIS determines whether each TPS beneficiary is continuing to maintain individual eligibility for TPS, including but not limited to, the requirements related to disqualifying criminal or security issues. See *id.*; INA, section 244(c)(2); 8 CFR 244.2, 244.3, and 244.4 (describing individual TPS eligibility requirements, including mandatory criminal and security bars).

The Government has appealed both the *Ramos* and *Saget* preliminary injunctions. A 3-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled for the Government and vacated the *Ramos* preliminary injunction on September 14, 2020. However, the preliminary injunction remains in effect because the appellate court has not issued its directive (*i.e.*, the mandate) to the district court to implement the panel's decision. Should the Government ultimately prevail in its challenge to the *Ramos* preliminary injunction, the Secretary's determination to terminate TPS for Nicaragua, Sudan, Honduras, and Nepal will take effect no earlier than 120 days from the issuance of any appellate mandate to the district court. The Secretary's determination to terminate TPS for El Salvador will take effect no earlier than 365 days from the issuance of any appellate mandate to the *Ramos* district court. DHS provides this additional time for El Salvador TPS beneficiaries in part because there are almost 100,000 more such beneficiaries than in the combined TPS beneficiary populations of all the other five countries covered by this notice.⁵ The additional period of 245 days beyond 120 days permits an orderly transition for beneficiaries of TPS from El Salvador as they return to their homeland. If the Government prevails in its appeals, DHS will also continue to monitor the circumstances of the affected beneficiaries under the other five TPS country designations covered by this notice. See INA, 244(d)(3).

TPS for beneficiaries under Haiti's designation may continue pursuant to the *Saget* preliminary injunction. However, should the Government prevail in its challenges to both the *Ramos* preliminary injunction and the *Saget* preliminary injunction, the Secretary's determination to terminate TPS for Haiti will take effect no earlier than 120 days from the issuance of the later of the two appellate mandates to the District Court. To the extent that a **Federal Register** notice has

automatically extended TPS-related documentation beyond 120 days from the issuance of any appellate mandate to the District Court, DHS reserves the right to issue a subsequent **Federal Register** notice announcing an expiration date for the documentation that corresponds to the last day of the 120-day period. Should the Government move to vacate the *Bhattarai* order to stay proceedings in light of an appellate decision affirming the preliminary injunction in *Ramos* that suggests a basis on which to distinguish the determinations to terminate the TPS designations for Honduras and Nepal from the TPS terminations at issue in *Ramos*, TPS will remain in effect for Honduras and Nepal for at least 180 days following an order of the District Court vacating the stay in proceedings.

Additional Notes

Nothing in this notice affects DHS's ongoing authority to determine on a case-by-case basis whether a TPS beneficiary continues to meet the eligibility requirements for TPS described in section 244(c) of the INA and the implementing regulations in part 244 of Title 8 of the Code of Federal Regulations.

Notice of Compliance With the "Order Enjoining the Implementation and Enforcement of Determinations To Terminate the TPS Designations for El Salvador, Haiti, Nicaragua, and Sudan" in *Ramos*, the "Order Enjoining the Implementation of Enforcement of Determination To Terminate the TPS Designation of Haiti" in *Saget*, and the "Order To Stay Proceedings and Agreement To Stay the Determinations To Terminate the TPS Designations for Honduras and Nepal" in *Bhattarai*

The previously announced determinations to terminate the existing designations of TPS for El Salvador, Nicaragua, and Sudan⁶ will not be implemented or enforced unless and until the district court's order in *Ramos* is reversed and that reversal becomes final. The previously announced determination to terminate the existing designation of TPS for Haiti will not be implemented or enforced unless and until the district court's orders in *Ramos* and *Saget* are reversed and those reversals become final.⁷ As required by

the order to stay proceedings in *Bhattarai*, DHS will not implement or enforce the previously announced determinations to terminate the existing TPS designations for Honduras and Nepal⁸ unless and until the district court's order in *Ramos* enjoining implementation and enforcement of the determinations to terminate the TPS designations for El Salvador, Haiti, Nicaragua, and Sudan is reversed and that reversal becomes final for some or all of the affected countries, or by other order of the court. Any termination of TPS-related documentation for beneficiaries under the TPS designations for Haiti, Nicaragua, Sudan, Honduras, and Nepal will go into effect no earlier than 120 days, and no earlier than 365 days for beneficiaries under the TPS designation for El Salvador, following the issuance of any mandate to the district court, as described in the "Possible Future Action" section of this **Federal Register** notice.⁹

In further compliance with the still-valid district court orders, DHS is publishing this notice automatically extending the validity of the TPS-related documentation specified in the Supplementary Information section of this notice through October 4, 2021, for eligible beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal. DHS will continue to issue notices that will automatically extend TPS-related documentation for all affected beneficiaries under the TPS designations for El Salvador, Honduras, Nicaragua, Nepal, and Sudan, so long as the *Ramos* preliminary injunction and *Bhattarai* order to stay proceedings remain in place; for Haiti so long as either the *Ramos* or *Saget* preliminary injunctions remain in place; or by other order of the court. However, should compliance with the *Ramos*, *Bhattarai*, and/or *Saget* court orders remain necessary, DHS may announce periodic re-registration procedures for eligible TPS beneficiaries in accordance with the INA and DHS regulations. DHS

⁸ See Termination of the Designation of Honduras for Temporary Protected Status, 83 FR 26074 (June 5, 2018); Termination of the Designation of Nepal for Temporary Protected Status, 83 FR 23705 (May 22, 2018).

⁹ An additional provision in the *Bhattarai* Order to Stay Proceedings states that if the preliminary injunction in *Ramos* is upheld, but the Government moves to vacate the *Bhattarai* Order based on reasons for distinguishing the terminations of TPS for Honduras and Nepal from those under the injunction in *Ramos*, TPS will remain in effect for Honduras and Nepal for at least 180 days following an order of the District Court vacating its stay of proceedings order.

⁵ As of December 31, 2019, the number of TPS beneficiaries covered under the affected designations were: El Salvador 247,412; Haiti 55,218; Nicaragua 4,409; Sudan 771; Honduras 79,290; Nepal 14,549.

⁶ See Termination of the Designation of El Salvador for Temporary Protected Status, 83 FR 2654 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 FR 59636 (Dec. 15, 2017); Termination of the Designation of Sudan for Temporary Protected Status, 82 FR 47228 (Oct. 11, 2017).

⁷ See Termination of the Designation of Haiti for Temporary Protected Status, 83 FR 2648 (Jan. 18, 2018).

further continues its commitment to a transition period, as described above.

All TPS beneficiaries must continue to maintain their TPS eligibility by meeting the requirements for TPS in INA section 244(c) and 8 CFR part 244. DHS will continue to adjudicate any pending TPS re-registration and pending late initial applications for affected beneficiaries under the TPS designations for El Salvador, Haiti, Honduras, Nicaragua, Nepal, and Sudan, and continue to make appropriate individual TPS withdrawal decisions in accordance with existing procedures if an alien no longer maintains TPS eligibility. DHS will take appropriate steps to continue its compliance with the orders, and with all statutory requirements.

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 Ian Brekke, who is the Deputy General Counsel for DHS, for purposes of publication in the **Federal Register**.

Ian Brekke,

Deputy General Counsel, U.S. Department of Homeland Security.

Approved Forms To Demonstrate Continuation of Lawful Status and TPS-Related Employment Authorization

- This **Federal Register** notice dated December 9, 2020
 - Through operation of this notice, certain TPS-related documentation, including EADs, of affected beneficiaries under the TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan are automatically extended through October 4, 2021.
 - A beneficiary granted TPS under the designation for El Salvador, Haiti, Honduras, Nepal, Nicaragua, or Sudan may show his or her EAD that has been automatically extended to his or her employer to demonstrate identity and continued TPS-related employment eligibility to meet Employment

Eligibility Verification (Form I-9) requirements. A beneficiary granted TPS under a designation for one of these countries may also wish to show an employer this **Federal Register** notice, which explains that his or her EAD has been automatically extended.

- Alternatively, such a TPS beneficiary may choose to show other acceptable documents that are evidence of identity and employment eligibility as described in the instructions to Form I-9.

- Finally, such a TPS beneficiary may show a copy of this **Federal Register** notice, along with his or her EAD that has been automatically extended, or Form I-94, or Form I-797, as evidence of his or her lawful status, to law enforcement, Federal, state, and local government agencies, and private entities.

- Employment Authorization Document (EAD)

Am I eligible to receive an automatic extension of my current EAD using this Federal Register notice?

Yes. Provided that you currently have a TPS-related EAD with the specified expiration dates below, this notice automatically extends your EAD as stated in Table 3 below.

TABLE 3—AFFECTED EADS

If your EAD has category code of A-12 or C-19 and an expiration date of:	Then this Federal Register notice extends your EAD through:
07/22/2017	10/04/2021
11/02/2017	10/04/2021
01/05/2018	10/04/2021
01/22/2018	10/04/2021
03/09/2018	10/04/2021
06/24/2018	10/04/2021
07/05/2018	10/04/2021
11/02/2018	10/04/2021
01/05/2019	10/04/2021
04/02/2019	10/04/2021
06/24/2019	10/04/2021
07/22/2019	10/04/2021
09/09/2019	10/04/2021
01/02/2020	10/04/2021
01/05/2020	10/04/2021
03/24/2020	10/04/2021
01/04/2021	10/04/2021

TABLE 4—AFFECTED EADS AND FORM I-9

You may show your EAD to complete Form I-9 if your EAD has category code of A-12 or C-19 and bears an expiration date of:	Enter this date in Section 1 of Form I-9:	Your employer must reverify your employment authorization by:
07/22/2017	10/04/2021	10/05/2021
11/02/2017	10/04/2021	10/05/2021
01/05/2018	10/04/2021	10/05/2021
01/22/2018	10/04/2021	10/05/2021
03/09/2018	10/04/2021	10/05/2021
06/24/2018	10/04/2021	10/05/2021
07/05/2018	10/04/2021	10/05/2021
11/02/2018	10/04/2021	10/05/2021
01/05/2019	10/04/2021	10/05/2021
04/02/2019	10/04/2021	10/05/2021

When hired, what documentation may I show to my employer as evidence of employment authorization and identity when completing Form I-9?

You can find the Lists of Acceptable Documents on the third page of Form I-9 as well as the Acceptable Documents web page at www.uscis.gov/i-9-central/acceptable-documents. Employers must complete Form I-9 to verify the identity and employment authorization of all new employees. Within 3 days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I-9 requirements.

You may present any document from List A (which provides evidence of both your identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of your employment authorization), or you may present an acceptable receipt as described in the Form I-9 instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I-9 on the I-9 Central web page at www.uscis.gov/I-9Central.

An EAD is an acceptable document under List A. See the section “How do my employer and I complete Form I-9 using my automatically extended employment authorization for a new job?” of this **Federal Register** notice for further information. If you present your EAD with one of the expiration dates specified below, you may also provide your employer with a copy of this **Federal Register** notice, which explains that your EAD has been automatically extended for a temporary period of time, through October 4, 2021, as follows:

TABLE 4—AFFECTED EADS AND FORM I-9—Continued

You may show your EAD to complete Form I-9 if your EAD has category code of A-12 or C-19 and bears an expiration date of:	Enter this date in Section 1 of Form I-9:	Your employer must reverify your employment authorization by:
06/24/2019	10/04/2021	10/05/2021
07/22/2019	10/04/2021	10/05/2021
09/09/2019	10/04/2021	10/05/2021
01/02/2020	10/04/2021	10/05/2021
01/05/2020	10/04/2021	10/05/2021
03/24/2020	10/04/2021	10/05/2021
01/04/2021	10/04/2021	10/05/2021

What documentation may I present to my employer for Form I-9 if I am already employed but my current TPS-related EAD is set to expire?

Even though your EAD has been automatically extended, your employer may need to re-inspect your automatically extended EAD to check the Card Expires date and Category code if your employer did not keep a copy of your EAD when you initially presented it. In this situation, your employer should update the EAD expiration date in Section 2 of Form I-9. See the section, “What corrections should my current employer make to Form I-9 if my employment authorization has been automatically extended?” of this **Federal Register** notice for further information. You may show this **Federal Register** notice to your employer to explain what to do for Form I-9 and to show that your EAD has been automatically extended through October 4, 2021 as indicated in the above chart.

The last day of the automatic extension for your EAD is October 4, 2021. Before you start work on October 5, 2021, your employer is required by law to reverify your employment authorization in Section 3 of Form I-9. At that time, you must present any document from List A or any document from List C on Form I-9, Lists of Acceptable Documents, or an acceptable List A or List C receipt described in the Form I-9 instructions to reverify employment authorization.

If your original Form I-9 was a previous version, your employer must complete Section 3 of the current version of Form I-9, and attach it to your previously completed Form I-9. Your employer can check the I-9 Central web page at www.uscis.gov/I-9Central for the most current version of Form I-9. Your employer may not specify which List A or List C document you must present and cannot reject an acceptable receipt.

Can I obtain a new EAD?

Yes, if you remain eligible for TPS and apply for a new EAD, you can

obtain a new EAD. However, you do not need to apply for a new EAD in order to benefit from this automatic extension. If you are a beneficiary under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, or Nepal and want to obtain a new EAD valid through October 4, 2021, then you must file Form I-765 and pay the associated fee. If you do not want a new EAD, you do not have to file Form I-765 or pay the Form I-765 fee. If you do not want to request a new EAD now, you may file Form I-765 at a later date and pay the fee, provided that you still have TPS or a pending TPS application. You may file the application for a new EAD either before or after your current EAD has expired.

If you are unable to pay the application fee and/or biometric services fee, you may complete a Request for Fee Waiver (Form I-912). For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at www.uscis.gov/tps.

If you have a Form I-821 and/or Form I-765 application that is still pending for beneficiaries under the TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, or Sudan, then you should not file either application again. If your pending Form I-821 is approved, you will be issued Forms I-797 and I-94 through October 4, 2021. Similarly, if you have a pending TPS-related Form I-765 that is approved, your new EAD will be valid through October 4, 2021. Your TPS itself continues as long as the preliminary injunction impacting your country's TPS designation remains in effect and in accordance with any relevant future **Federal Register** notices that DHS may issue respecting your country's TPS designation, or until your TPS is finally withdrawn for individual ineligibility under INA, section 244(c), or the applicable TPS designation is terminated as discussed in the “Possible Future Action” section of this **Federal Register** notice.

Can my employer require that I provide any other documentation to prove my status, such as proof of my citizenship from El Salvador, Haiti, Honduras, Nepal, Nicaragua, or Sudan?

No. When completing Form I-9, including reverifying employment authorization, employers must accept any documentation that appears on the Form I-9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. In addition, employers may not request documentation that does not appear on the Lists of Acceptable Documents. Therefore, employers may not request proof of citizenship or proof of re-registration for TPS when completing Form I-9 for new hires or reverifying the employment authorization of current employees. If presented with an EAD that has been automatically extended, employers should accept such a document as a valid List A document, so long as the EAD reasonably appears to be genuine and relates to the employee. Refer to the “Note to Employees” section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

How do my employer and I complete Form I-9 using my automatically extended employment authorization for a new job?

See the chart in the question above “When hired, what documentation may I show to my employer as evidence of employment authorization and identity when completing Form I-9?” to determine if your EAD has been automatically extended.

For Section 1, you should:

a. Check “An alien authorized to work until” and enter October 4, 2021, as the

expiration date indicated in the chart; and

b. Enter your USCIS number or A-Number where indicated (your EAD or other document from DHS will have your USCIS number or A-Number printed on it; the USCIS number is the same as your A-Number without the A prefix).

For Section 2, your employer should also use the chart in the question above “When hired, what documentation may I show to my employer as evidence of employment authorization and identity when completing Form I-9?” to determine if your EAD has been automatically extended. If it has been automatically extended, the employer should:

- a. Write in the document title;
- b. Enter the issuing authority;
- c. Enter either the employee’s A-Number or USCIS number from Section 1 into Section 2’s Document Number field on Form I-9; and
- d. Write October 4, 2021, as the expiration date indicated in the chart.

Before the start of work on October 5, 2021, employers must reverify the employee’s employment authorization in Section 3 of Form I-9.

What updates should my current employer make to Form I-9 if my employment authorization has been automatically extended?

If you presented a TPS-related EAD that was valid when you first started your job and your EAD has now been automatically extended, your employer may need to re-inspect your current EAD if they do not have a copy of the EAD on file. See the chart in the question above “When hired, what documentation may I show to my employer as evidence of employment authorization and identity when completing Form I-9?” to determine if your EAD has been automatically extended. If your employer determines that your EAD has been automatically extended, your employer should update Section 2 of your previously completed Form I-9 as follows:

- a. Write EAD EXT and October 4, 2021, as the last day of the automatic extension in the Additional Information field; and
- b. Initial and date the correction.

Note: This is not considered a reverification. Employers do not need to complete Section 3 until either this notice’s automatic extension of EADs has ended or the employee presents a new document to show continued employment authorization, whichever is sooner. By October 5, 2021, when the employee’s automatically extended EAD has expired, employers are required by

law to reverify the employee’s employment authorization in Section 3. If your original Form I-9 was a previous version, your employer must complete Section 3 of the current version of Form I-9 and attach it to your previously completed Form I-9. Your employer can check the I-9 Central web page at www.uscis.gov/I-9Central for the most current version of Form I-9.

If I am an employer enrolled in E-Verify, how do I verify a new employee whose EAD has been automatically extended?

Employers may create a case in E-Verify for a new employee by providing the employee’s A-Number or USCIS number from Form I-9 in the Document Number field in E-Verify.

If I am an employer enrolled in E-Verify, what do I do when I receive a “Work Authorization Documents Expiration” alert for an automatically extended EAD?

E-Verify has automated the verification process for TPS-related EADs that are automatically extended. If you have employees who provided a TPS-related EAD when they first started working for you, you will receive a “Work Authorization Documents Expiring” case alert when the auto-extension period for this EAD is about to expire. Before this employee starts work on October 5, 2021 as appropriate, you must reverify his or her employment authorization in Section 3 of Form I-9. Employers should not use E-Verify for reverification.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888-464-4218 (TTY 877-875-6028) or email USCIS at I9Central@dhs.gov. USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I-9 and E-Verify), employers may call the U.S. Department of Justice’s Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800-255-8155 (TTY 800-237-2515). IER offers language interpretation in

numerous languages. Employers may also email IER at IER@usdoj.gov.

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888-897-7781 (TTY 877-875-6028) or email USCIS at I-9Central@dhs.gov. USCIS accepts calls in English, Spanish, and many other languages. Employees or applicants may also call the IER Worker Hotline at 800-255-7688 (TTY 800-237-2515) for information regarding employment discrimination based upon citizenship, immigration status, or national origin, including discrimination related to Form I-9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I-9 instructions. Employers may not require extra or additional documentation beyond what is required for Form I-9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of “Tentative Nonconfirmation” (TNC) must promptly inform employees of the TNC and give such employees an opportunity to contest the TNC. A TNC case result means that the information entered into E-Verify from an employee’s Form I-9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold pay, lower pay, or take any adverse action against an employee because of the TNC while the case is still pending with E-Verify. A “Final Nonconfirmation” (FNC) case result is received when E-Verify cannot verify an employee’s employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888-897-7781 (TTY 877-875-6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER’s Worker Hotline at 800-255-7688 (TTY 800-237-2515). Additional information about proper nondiscriminatory Form I-9 and E-Verify procedures is available on the IER website at www.justice.gov/ier and on the USCIS and E-Verify websites at

www.uscis.gov/i-9-central and www.e-verify.gov.

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

While Federal Government agencies must follow the guidelines laid out by the Federal Government, state and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, state, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, and/or that may be used by DHS to determine whether you have TPS or other immigration status. Examples of such documents are:

- Your current EAD;
- Your automatically extended EAD with a copy of this **Federal Register** notice, providing an automatic extension of your currently expired or expiring EAD;
- A copy of your Form I-94 or Form I-797 that has been automatically extended by this notice and a copy of this notice;
- Any other relevant DHS-issued document that indicates your immigration status or authorization to be in the United States, or that may be used by DHS to determine whether you have such status or authorization to remain in the United States.

Check with the government agency regarding which document(s) the agency will accept. Some benefit-granting agencies use the USCIS Systematic Alien Verification for Entitlements Program (SAVE) program to confirm the current immigration status of applicants for public benefits. While SAVE can verify when an alien has TPS, each agency's procedures govern whether they will accept a particular document, such as an EAD or an I-94. If an agency accepts the type of TPS-related document you are presenting, such as an EAD or I-94, the agency should accept your automatically extended TPS-related document. You should:

- a. Present the agency with a copy of this **Federal Register** notice showing the extension of TPS-related documentation, in addition to your most recent TPS-related document with your A-Number, USCIS number or I-94 number;

- b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

- c. Ask the agency to initiate a SAVE query with your information and follow through with additional verification steps, if necessary, to get a final SAVE response showing the validity of your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but, occasionally, verification can be delayed. You can check the status of your SAVE verification by using CaseCheck at save.uscis.gov/casecheck/. CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (A-Number, USCIS number or Form I-94 number) or Verification Case Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted upon or will act upon a SAVE verification case and you do not believe the SAVE response is correct, find detailed information on how to make corrections or update your immigration record, make an appointment, or submit a written request to correct records under the Freedom of Information Act on the SAVE website at www.uscis.gov/save.

[FR Doc. 2020-27154 Filed 12-7-20; 1:30 pm]

BILLING CODE 9111-97-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[DOI-2020-0009; FF10T03000 190
FXGO16601025020]

Privacy Act of 1974; System of Records

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Rescinding of a system of records notice.

SUMMARY: The Department of the Interior (DOI) is issuing a public notice of its intent to rescind two U.S. Fish and Wildlife Service (FWS) Privacy Act systems of records, INTERIOR/FWS-19, Endangered Species Licensee System, and INTERIOR/FWS-34, National

Conservation Training Center Training Server System, from its existing inventory. These systems of records notices have been superseded by a Department-wide system of records notice or a FWS system of records notice. This rescinding will eliminate unnecessary duplicate notices and promote the overall streamlining and management of DOI Privacy Act systems of records.

DATES: These changes take effect on December 9, 2020.

ADDRESSES: You may send comments identified by docket number [DOI-2020-0009] by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for sending comments.
- **Email:** DOI_Privacy@ios.doi.gov. Include docket number [DOI-2020-0009] in the subject line of the message.
- **U.S. Mail or Hand-Delivery:** Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

Instructions: All submissions received must include the agency name and docket number [DOI-2020-0009]. 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>.

You should be aware your entire comment including your personal identifying information, such as your address, phone number, email address, or any other personal identifying information in your comment, may be made publicly available at any time. While you may request to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

FOR FURTHER INFORMATION CONTACT:

Jennifer Schmidt, Associate Privacy Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: IRTM, Falls Church, VA 22041-3803, FWS_Privacy@fws.gov or (703) 358-2291.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Privacy Act of 1974, as amended, the DOI is rescinding the following two FWS system of records notices from its system of records inventory. During a routine review, FWS determined these systems of records notices were superseded by a published Department-wide or FWS system of records notice. Therefore, DOI is rescinding these FWS systems of records notices to avoid duplication of

existing systems of records notices in accordance with the Office of Management and Budget Circular A-108, *Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act*.

- INTERIOR/FWS-19, Endangered Species Licensee System. This system of records notice was superseded by INTERIOR/FWS-21, Permit Systems, 68 FR 52610 (September 4, 2003); modification published 73 FR 31877 (June 4, 2008). Records in the system were migrated to and are maintained under the INTERIOR/FWS-21, Permit Systems, system of records notice.

- INTERIOR/FWS-34, National Conservation Training Center Training Server System. This system of records notice was superseded by a Department-wide system of records notice, INTERIOR/DOI-16, Learning Management System, 83 FR 50682 (October 9, 2018), which covers bureau and office training program records.

Rescinding these system of records notices will have no adverse impacts on individuals as the records previously maintained under INTERIOR/FWS-19 and INTERIOR/FWS-34 are covered under the published INTERIOR/FWS-21 and INTERIOR/DOI-16 systems of records notices. This rescindment will also promote the overall streamlining and management of DOI Privacy Act systems of records.

SYSTEM NAME AND NUMBER:

1. INTERIOR/FWS-19, Endangered Species Licensee System.
2. INTERIOR/FWS-34, National Conservation Training Center Training Server System.

HISTORY:

1. INTERIOR/FWS-19, Endangered Species Licensee System, 64 FR 29055 (May 28, 1999); modification published 73 FR 31877 (June 4, 2008).
2. INTERIOR/FWS-34, National Conservation Training Center Training Server System, 67 FR 17711 (April 11, 2002); modification published 73 FR 31877 (June 4, 2008).

Teri Barnett,

Departmental Privacy Officer, Department of the Interior.

[FR Doc. 2020-27156 Filed 12-8-20; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NRNL-DTS#-31229; PPWOCRADIO, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before November 28, 2020, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by December 24, 2020.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line "Public Comment on <property or proposed district name, (County) State>." If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before November 28, 2020. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

CALIFORNIA

Riverside County

Donaldson Futuro, 52895 Big Rock Rd., Idyllwild vicinity, SG100005994

San Francisco County

Mission Cultural Center (Latinos in 20th Century California MPS), 2868 Mission St., San Francisco, MP100005987

LOUISIANA

Tangipahoa Parish

Husser School-Husser Community Center, 56280 LA 445, Husser, SG100005986

MINNESOTA

Lake County

Kawishiwi Lodge, 3187 Fernberg Rd., Fall Lake Township, SG100005995

NORTH CAROLINA

Burke County

Southern Railway Freight Station, 630 South Green St., Morganton, SG100005993

Franklin County

Pearce-Stallings-Massey House, 4430 Old US 64, Pilot vicinity, SG100005997

Wilkes County

Harmon School, Sheets Gap Rd., .6 mi. west of jct. with Buckwheat Branch Rd., Laurel Springs vicinity, SG100005992

OHIO

Highland County

Greenfield Commercial Historic District, Roughly bounded by Jefferson, Washington, and Mirabeau Sts., Greenfield, SG100005996

PENNSYLVANIA

Allegheny County

Hunter Saw & Machine Company, 5648-5688 Butler St., Pittsburgh, SG100005985

Bedford County

Fort Dewart, Address Restricted, Juniata Township vicinity, SG100005989

Somerset County

Fort Dewart, Address Restricted, Allegheny Township vicinity, SG100005989

SOUTH CAROLINA

Horry County

Noel Court and Apartments (Myrtle Beach MPS), 312 6th Ave. North, Myrtle Beach, MP100005988

TEXAS

Bell County

High View, 731 Wolf St., Killeen, SG100005990

Nomination submitted by Federal Preservation Officer:

The State Historic Preservation Officer reviewed the following nomination and responded to the Federal Preservation Officer within 45 days of receipt of the nomination and supports listing the property in the National Register of Historic Places.

ARKANSAS

Newton County

Flowers Cabin, Buffalo NR, Bench Trail, approx. .2 mi. east of the Hemmed In Hollow Trail, south of the Compton Trailhead, Compton vicinity, SG100005991
(Authority: Section 60.13 of 36 CFR part 60)

Dated: December 2, 2020.

Sherry A. Frear,

Chief, National Register of Historic Places/
National Historic Landmarks Program.

[FR Doc. 2020-27040 Filed 12-8-20; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-660-661 and
731-TA-1543-1545 (Preliminary)]

Utility Scale Wind Towers From India, Malaysia, and Spain

Determinations

On the basis of the record¹ 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 utility scale wind towers from India, Malaysia, and Spain, provided for in subheadings 7308.20.00 and 8502.31.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (“LTFV”) and to be subsidized by the governments of India and Malaysia.²

Commencement of Final Phase Investigations

Pursuant to § 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 30, 2020, the Wind Tower Trade Coalition (Arcosa Wind Towers Inc. (Dallas, Texas) and Broadwind Towers, Inc. (Manitowoc, Wisconsin)) 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 subsidized imports of utility scale wind towers from India and Malaysia and LTFV imports of utility scale wind towers from India, Malaysia, and Spain. Accordingly, effective September 30, 2020, the Commission instituted countervailing duty investigation Nos. 701-TA-660-661 and antidumping duty investigation Nos. 731-TA-1543-1545 (Preliminary).

Notice of the institution of the Commission’s investigations and of a public conference through video conferencing 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 6, 2020 (85 FR 63137). 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 21, 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 December 4, 2020. The views of the Commission are contained in USITC Publication 5146 (December 2020), entitled *Utility Scale Wind Towers from India, Malaysia, and Spain: Investigation Nos. 701-TA-660-661 and 731-TA-1543-1545 (Preliminary)*.

By order of the Commission.

Issued: December 4, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020-27043 Filed 12-8-20; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1118]

Certain Movable Barrier Operator Systems and Components Thereof; Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and Cease and Desist Orders; Termination of the Investigation

AGENCY: U.S. International Trade
Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (the “Commission”) has determined to: (1) Find that respondents Nortek Security & Control, LLC of Carlsbad, California; Nortek, Inc. of Providence, Rhode Island; and GTO Access Systems, LLC of Tallahassee, Florida (collectively, “Nortek”) have violated Section 337 by way of infringing claims 1 and 21 of U.S. Patent No. 7,755,223 (“the ‘223 patent”); and (2) issue a limited exclusion order and cease and desist orders against each Nortek respondent, and set a bond in the amount of 100 percent of the entered value of the covered products during the period of Presidential review. The investigation is hereby terminated.

FOR FURTHER INFORMATION CONTACT: Carl P. Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket system (“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, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 11, 2018, based on a complaint, as supplemented, filed by The Chamberlain Group, Inc. (“CGI”) of Oak Brook, Illinois. 83 FR 27020-21 (June 11, 2018). The complaint alleges a violation of section 337 the Tariff Act, as amended, 19 U.S.C. 1337 (“Section 337”) in the importation, sale for importation, or sale in the United States after importation of certain movable barrier operator (“MBO”) systems that

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 73019 (November 16, 2020) and 85 FR 73023 (November 16, 2020).

purportedly infringe one or more of the asserted claims of the '223 patent and U.S. Patent Nos. 8,587,404 ("the '404 patent") and 6,741,052 ("the '052 patent"). *Id.* The Commission's notice of investigation named Nortek as respondents. *Id.* The Office of Unfair Import Investigations was not named as a party to this investigation. *See id.*

The Commission subsequently terminated the investigation with respect to certain patent claims withdrawn by CGI. *See* Order No. 16 (Feb. 5, 2019), *unreviewed by* Comm'n Notice (March 6, 2019); Order No. 27 (June 7, 2019), *unreviewed by* Comm'n Notice (June 27, 2019); Order No. 31 (July 30, 2019), *unreviewed by* Comm'n Notice (Aug. 19, 2019); Order No. 32 (Sept. 27, 2019), *unreviewed by* Comm'n Notice (Oct. 17, 2019).

On June 5, 2019, the presiding administrative law judge ("ALJ") issued a *Markman* order (Order No. 25) construing the claim terms in dispute.

On December 12, 2018, CGI filed a motion for summary determination that it satisfied the economic prong of the domestic industry requirement. Nortek opposed the motion. On June 6, 2019, the ALJ issued a notice advising the parties that the motion would be granted and a formal written order would be issued later. Order No. 26 (June 6, 2019).

The ALJ held an evidentiary hearing on the issues in dispute on June 10–14, 2019.

On November 25, 2019, the ALJ issued Order No. 38, finding no issue of material fact that CGI's investments in labor and capital relating to its domestic industry products were "significant" and that CGI has satisfied the economic prong of the domestic industry requirement pursuant to Section 337(a)(3)(B) (19 U.S.C. 1337(a)(3)(B)). Order No. 38 (Nov. 25, 2019). Order No. 38 also finds that genuine issues of material fact precluded entry of summary determination with respect to CGI's investments in plant and equipment, under Section 337(a)(3)(A) (19 U.S.C. 1337(a)(3)(A)). *Id.*

On the same date, the ALJ issued the final Initial Determination on Violation of Section 337 ("Final ID") and Recommended Determination on Remedy and Bond ("RD"), finding no violation of Section 337 because the asserted claims of the '223 and '404 patents, if valid, are not infringed and the asserted claim of the '052 patent is invalid, even if infringed. The RD sets forth the ALJ's recommendations on remedy and bond.

On February 19, 2020, the Commission issued a notice of its determination to review Order No. 38

and to partially review the Final ID with respect to certain issues relating to each of the three asserted patents. 85 FR 10723–26 (Feb. 25, 2020). The Commission directed the parties to brief questions on violation and requested briefing from the parties, the public, and any interested government entities on remedy, the public interest, and bonding. *Id.* at 10725. The parties submitted initial responses and replies in response to the notice. The Commission did not receive any comments from third parties in response to its notice.

On April 22, 2020, the Commission issued a determination finding no violation with respect to the '404 and '052 patents. Comm'n Notice at 3 (April 22, 2020). The Commission also vacated Order No. 38 and remanded the economic prong issue to the presiding ALJ for further proceedings while the Commission continued to review issues relating to the '223 patent. *Id.*; Order Vacating and Remanding Order No. 38 (April 22, 2020) ("Remand Order").

On May 15, 2020, the ALJ issued Order No. 39, seeking additional information from the parties in light of the Commission's Remand Order. Order No. 39 (May 15, 2020). On July 10, 2020, the ALJ issued the subject Remand Initial Determination ("Remand ID"), finding that CGI has made significant investments, both quantitatively and qualitatively, in plant and equipment and labor and capital, pursuant to Section 337(a)(3)(A) and (B) (19 U.S.C. 1337(a)(3)(A), (B)), respectively. Remand ID (July 10, 2020). The Remand ID concludes that CGI has satisfied the economic prong of the domestic industry requirement in relation to the '223 patent, pursuant to Sections 337(a)(3)(A) and (B). *Id.*

On July 20, 2020, Nortek filed a petition for review of the Remand ID. CGI filed its opposition to Nortek's petition for review on July 27, 2020. On September 9, 2020, the Commission determined to review the Remand ID and directed the parties to brief a number of questions with respect to the economic prong of the domestic industry requirement. 85 FR 57249–51 (Sept. 15, 2020). The Commission also allowed the parties to update their prior submissions on remedy, the public interest, and bonding, if necessary, and invited interested government entities and other interested parties to file written submissions on those issues as well. *Id.* at 57251.

The parties filed their initial responses to the Commission's questions on September 23, 2020. The parties filed their respective replies on September 30, 2020. The Commission

did not receive any comments from third parties in response to its notice.

Having reviewed the Remand ID, the parties' submissions, and the evidence of record, the Commission has determined to find that Nortek violated Section 337 with respect to the '223 patent. In particular, the Commission finds that Nortek infringed claims 1 and 21 of the '223 patent; CGI practiced at least claim 1 of the patent; and CGI satisfied the economic prong of the domestic industry requirement with respect to the '223 patent under both Sections 337(a)(3)(A) and (B). The Commission has determined to issue a limited exclusion order and cease and desist orders against each Nortek respondent and to impose a bond in the amount of 100 percent of the entered value of the covered products during the period of Presidential review. The Commission has further determined that the statutory public interest factors do not preclude issuance of a remedy. The investigation is hereby terminated.

The Commission voted to approve these determinations on December 3, 2020.

The authority for the Commission's determinations 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: December 3, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–27010 Filed 12–8–20; 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—Electrified Vehicle and Energy Storage Evaluation

Notice is hereby given that, on December 1, 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, ANSYS, Inc., Canonsburg, PA, 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).

The last notification was filed with the Department on October 20, 2020. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on November 19, 2020 (85 FR 73750).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–26975 Filed 12–8–20; 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—Medical Technology Enterprise Consortium

Notice is hereby given that, on November 18, 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”), Medical Technology Enterprise Consortium (“MTEC”) 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, Abram Scientific, Inc., Menlo Park, CA; Accenture Federal Services, Arlington, VA; Ace Laboratories Inc., Yarrow Point, WA; Aceso Plasma, Virginia Beach, VA; ACF Technologies, Inc., Asheville, NC; Action Medical Technologies LLC, Conshohocken, PA; Acuity Systems, LLC, Herndon, VA; Aerpio Pharmaceuticals, Cincinnati, OH; AirStrip Technologies, San Antonio, TX; Airway Medical Innovations Pty Ltd, Brisbane Queensland, AUS; Aktivax, Inc., Broomfield, CO; Allvivo

Vascular, Inc., Lake Forest, CA; Altimune, Inc., Gaithersburg, MD; Amydis, Inc., San Diego, CA; Aptahem AB, Malmö, SWE; Aptive Resources, LLC, Alexandria, VA; ARD Global LLC, McLean, VA; Articulate Labs, Dallas, TX; Ashvattha Therapeutics, Inc., Redwood City, CA; Astrocyte Pharmaceuticals Inc., Cambridge, MA; Asymmetric Technologies, LLC, Columbus, OH; Athena GTX, Johnston, IA; Atomo, Inc, West Lake Hills, TX; Augusta University Resarch Institute, Inc., Augusta, GA; Augustine Consulting, Inc. (ACI), Monterrey, CA; Auxocell Laboratories, Inc, Cambridge, MA; Avera Health, Sioux Falls, SD; Bambu Vault, LLC, Lowell, MA; Berry Consultants, LLC, Austin, TX; Beyond Barriers Therapeutics, Inc., Glencoe, IL; Bioflight, LLC, Akron, OH; BioGenerator, Saint Louis, MO; Biotags LLC, Key Biscayne, FL; Blue Cirrus Consulting LLC, Greenville, SC; Board of Trustees of the University of Illinois, Champaign, IL; Brainbox Solutions Inc., Richmond, VA; CAPRICOR THERAPEUTICS, INC., Beverly, CA; Carahsoft Technology Corporation, Reston, VA; Centivax, Inc., South San Francisco; Ceras Health Inc., New York, NY; Channel Clinical Solutions, LLC, Raleigh, NC; Chenega Reliable Services, LLC, San Antonio, TX; Cherish Health, Inc., Cambridge, MA; Clarkson University, Potsdam, NY; Coalition for National Trauma Research, San Antonio, TX; Computer Technology Associates, Inc., Ridgecrest, CA; Conflict Kinetics Corporation, Sterling, VA; Core Mobile Networks Inc.; DBA Core Mobile Inc., Campbell, CA; Crimson Government LLC, Carlisle, OH; Curza Global, LLC, Salt Lake City, UT; Data Intelligence Technologies, Inc., Arlington, VA; DEFTEC Corporation, Huntsville, AL; Digital For Mental Health (MYNDBLUE), Paris, FRA; Diomics Corporation, Murrieta, CA; DocBox Inc., Waltham, MA; EchoNous Inc., Redmond, WA; ECI Defense Group, Lyles, TN; Empatica, Inc., Boston, MA; Endomex Inc., Montclair, NJ; Etiometry Inc., Boston, MA; Eumentis Therapeutics Inc, Newton, MA; Exciton Technologies Inc., Edmonton, Alberta, CAN; Expesicor Inc., Missoula, MT; FesariusTherapeutics Inc., Brooklyn, NY; FHI Clinical Inc., Durham, NC, Fitbit, Inc., San Francisco, CA; Flashback Technologies, Inc., Louisville, CO; FloTBI Inc., Cleveland, OH; FUJIFILM Pharmaceuticals USA, Inc., Valhalla, NY; GelMEDIX Inc., Newton, MA; GeneCapture, Inc., Huntsville, AL; General Biologics Inc., Cambridge, MA; Get Help Now LLC, Fort Myers, FL; GreyScan Inc., Melbourne, FL; Heat

Biologics, Morrisville, NC; Hememics Biotechnologies Inc, Gaithersburg, MD; Hough Ear Institute, Oklahoma City, OK; Humanetics Corporation, Edina, MN; Hybrid Plastics Inc., Hattiesburg, MS; Iacta Pharmaceuticals Inc, Irvine, CA; Ichor Sciences, LLC, Nashville, TN; ImmunoVation, LLC, Pasadena, CA; INCELL Corporation LLC, San Antonio, TX; Infectious Disease Research Institute, Seattle, WA; Inflammatory Response Research Inc., Santa Barbara, CA; Informa Business Intelligence Inc., New York, NY; Inhalon Biopharma, Inc., Durham, NC; Innovenn, Inc., Madison, WI; Innsightful, Inc., Sunnyvale, CA; Integrated Computer Solutions, Inc., Waltham, MA; InTouch Technologies, D/B/A Inc. InTouch Health, Goleta, CA; J.R. Reingold & Associates, Inc, Alexandria, VA; JTEK Data Solutions, LLC, Bethesda, MD; KMASS SOLUTIONS, El Paso, TX; Knowmadics, Inc., Herndon, VA; Level Ex, Inc., Chicago, IL; LifeQ, Inc, Alphaertta, GA; LMI Consulting, LLC, Tysons, VA; LOGGEREX INC., Deland, FL; Lumen Bioscience, Inc., Seattle, WA; Luna Innovations Incorporated, Roanoke, VA; MadApparel Ind. DBA Athos, Redwood City, CA; ManTech Advanced Systems International, Inc., Herndon, VA; Mantel Technologies Inc., Fort Collins, CO; Masimo Corporation, Irvine, CA; Materials Modification Inc., Fairfax, VA; Medcura, Inc., Riverdale, MD; Media Riders Inc., Pearland, TX; Medical Center of the Americas Foundation, El Paso, TX; Medicortex Finland Oy, Turku, FIN; Medtrade Products Limited, Crew, Cheshire, GBR; MEMBIO INC., Kitchener, CAN; Mespere LifeSciences Inc., Waterloo, Ontario, CAN; MicroHealth, LLC, Vienna, VA; Microsoft, Redmon, VA; Millennium Enterprise Corporation, Fairfax, VA; Mineurva LLC, Albuquerque, NM; Moberg Analytics Inc., Ambler, PA; Moleculin Biotech, Inc., Houston, TX; Nanowear Inc., New York, NY; Neuronasal Inc, Wexford, PA; Neuronoff, Inc., Valencia, CA; New Horizons Diagnostics Corporation, Baltimore, MD; New Jersey Institute of Technology, Newark, NJ; NoMo Diagnostics, Chicago, IL; Non-Invasive Medical Systems LLC, Stamford, CT; North Carolina State University, Raleigh, NC; Northwestern University, Evanston, IL; Nostromo, LLC, Kennebunk, ME; Nuada Orthopedics, Inc., Sherborn, MA; Nyrada Inc., Gordon, AUS; Obatala Sciences, Inc., New Orleans, LA; Oculogica, Inc., New York, NY; Odin Technologies, Chicago, IL; OLGS Inc., Imperial, PA; Oregon Health & Science University, Portland, OR; Otolith Labs, Washington, DC;

Panakeia LLC, Newport News, VA; Parnell Pharmaceuticals Inc., San Rafael, CA; Patchd, Inc., San Francisco, CA; Perspecta Enterprise Solutions LLC, Herndon, VA; Pinteon Therapeutics, Newton Center, MA; Posit Science Corporation, San Francisco, CA; PPD Development LP, Wilmington, NC; Predictions Systems Inc., Spring Lake, NJ; Promaxo, Oakland, CA; QUASAR Federal Systems, Inc., San Diego, CA; REACT Neuro, Cambridge, MA; Remote Health LLC, Springfield, OH; Renovo Concepts, Inc., San Antonio, TX; Rensselaer Polytechnic Institute, Troy, NY; Research Bridge Partners, Inc., Austin, TX; Resolys Bio, Inc., Delanson, NY; RIVA Solutions, Inc., McLean, VA; RTI International, Research Triangle Park, SAIC, Reston, VA; Sandstone Diagnostics, Inc., Pleasanton, CA; SaNOTize Research & Development Corp., Vancouver, CAN; Sense Diagnostics Inc., Cincinnati, OH; Sentien Biotechnologies, Lexington, MA; ServiceNow, Inc., Vienna, VA; Seventh Dimension, LLC, Mocksville, NC; Shipcom Federal Solutions, LLC, Belcamp, MD; Sibel Inc., Evanston, IL; Sierra Nevada Corporation (SNC), Sparks, NV; SightLife, Seattle, WA; Sim Vivo LLC, Essex, NY; SimX, Inc., Mountain View, CA; Snoretex Pty Ltd, Kew, Victoria, AUS; Softox Solutions AS, Oslo, NOR; STEL Technologies, LLC, Ann Arbor, MI; Stuart Therapeutics Inc, Stuart, FL; Symbinas Pharmaceuticals Inc., Jacksonville, FL; Systems Engineering Solutions Corporation, Greenbelt, MD; TechWerks LLC, Arlington Heights, IL; TeleCommunication Systems, Inc., Annapolis, MD; TensorX, Inc, Vienna, VA; Texas A&M University, College Station, TX; The Cleveland Clinic Foundation, Cleveland, OH; The Curators of the University of Missouri, on behalf of Missouri University of Science and Technology, Rolla, MO; The Research and Recognition Project Inc, Corning, NY; The Spaulding Rehabilitation Corporation, Charlestown, MA; The Spectrum Group, LLC, Alexandria, VA; The University of Alabama at Birmingham, Birmingham, AL; The University of Tennessee Health Science Center, Memphis, TN; The University of Texas at Dallas, Richardson, TX; Thornhill Research Inc., North York, Ontario, CAN; Thornton Tomasetti, Inc., New York, NY; Tiber Creek Partners, Tiber Creek Partners, VA; Tissue Regeneration Sciences, Inc, Park City, UT; TITUS Sports Academy LLC, Tallahassee, FL; Tomorrow Lab LLC, New York, NY; Topadur Pharma AG, Schlieren, CHE; Trifecta Solutions, Reston, VA; Triton

Systems Inc, Chelmsford, MA; Trustees of the University of Pennsylvania, Philadelphia, PA; UNandUP, LLC, Saint Louis, MO; Unissant, Inc., Herndon, VA; Universal Consulting Services, Inc., Fairfax, VA; University of Arizona Applied Research Corporation, Tucson, AZ; University of Georgia Research Foundation, Inc., Athens, GA; University of Kansas Medical Center Research Institute, Inc., Kansas City, KS; University of North Carolina at Chapel Hill, Chapel Hill, NC; University of Ottawa, Ottawa, CAN; University of South Carolina, Columbia, SC; University of South Florida, Tampa, FL; University of Southern California, Los Angeles, CA; Vinformatix LLC, Baton Rouge, LA; VIRGINIA HIGH PERFORMANCE LLC, Virginia Beach, VA; VirtuSense Technologies, Inc., Peoria, IL; Vista LifeSciences, Inc., Parker, CO; VXBIOSCIENCES, INC., Oakland, CA; Zane Networks, LLC, Washington, DC; ZOLL Medical Corporation, Chelmsford, MA; have been added as parties to this venture.

Also, 21 MedTech, LLC, Burlington, NC; 410 Medical, Inc., Elgin, NC; 911 Medical Devices, LLC, Houston, TX; 98point6 Inc., Seattle, WA; Adventist Health System—Sunbelt, Inc. dba Florida Hospital, Orlando, FL; Akron Biotechnology, LLC, Boca Raton, FL; American Type Culture Collection (ATCC Federal Solutions), Manassas, VA; Arrevus, Inc., Raleigh, NC; Auckland UniServices Limited, Auckland, NZL; Awarables Inc., Baltimore, MD; Axonova Medical, LLC, Philadelphia, PA; Becton Dickinson & Company, Franklin Lake, NJ; Biobeat Technologies Ltd., Petach, Yikva, ISR; BioSpyder Technologies, Inc., Carlsbad, CA; Blood Systems, Inc. dba Blood Systems Research Institute, Scottsdale, AZ; bR3 UNIQ, Inc. dba QUADYSTER, Bettendorf, IA; Bramante Bioscience, Elmira Heights, NY; Brain Power, LLC, Cambridge, MA; Caci, Inc.—Federal, Chantilly, VA; Calimex USA Corporation, San Francisco, CA; Carmell Therapeutics Corporation, Pittsburgh, PA; Case Western Reserve University, Cleveland, OH; CFD Research Corporation, Huntsville, AL; Combat Medical Systems, Harrisburg, NC; Cortical Metrics, LLC, Semora, NC; Crius Technology Group, Austin, TX; Detact Diagnostics BV, Hoge der, Gronigen Netherlands; Droper Med America, LLC, Elgin, SC; Engility Corporation, Chantilly, VA; Existential Technologies, Inc., Chula Vista, CA; Family Health International DBA FHI 360, Durham, NC; FloTBI, Cleveland, OH; FullSecurity Corporation, Irving, TX; Full Spectrum Omega, Inc.,

Huntington Beach, CA; Georgia Tech Research Corporation, Atlanta, GA; HeadsafeP Pty Ltd, Bronte, NSW, AUS; Healios, Inc., Flemington, NJ; Hemoclear B.V., Zwolle, Overijssel, Netherlands; Howmedica Osteonics Corp. dba Stryker Orthopaedics, Mahwah, NJ; Human Biomed, Inc., Siuth Burlington, VT; HYPR Life Sciences, Inc., Pilot Mountain, NC; ImmunoVation, LLC, Pasadena, CA; Integrum Scientific, LLC, Greensboro, NC; Irving Burton Associates, Inc. (IBA), Falls Church, VA; JumpStartCSR, Seattle, WA; Knowledge Driven LLC, Alexandria, VA; Kindred Biosciences, Inc., Burlingame, CA; Lieber Institute, Inc., Baltimore, MD; LongView International Technology Solutions, Inc., Herndon, VA; Magle Chemoswed AB, Lund, SWE; Massachusetts Eye and Ear Infirmary, Boston, MA; Melinta Therapeutics, Inc., New Haven, CT; MilanaPharm, LLC, Tallassee, AL; Molecular Biologicals, Pasadena, TX; MO-SCI Corporation, Rollo, MO; New Horizons Diagnostics Corporation, Baltimore, MD; New York University School of Medicine, New York, NY; Next Generation Stretcher Ltd, Raman gan, ISR; NON-INVASIVE MEDICAL SYSTEMS, LLC, Stamford, CT; NUES LLC, Silver Spring, MD; Onera Health Inc., Palo Alto, CA; PEER Technologies PLLC, Fairfax, VA; Phagelux (Canada) Inc., Montreal, CAN; Physcient, Inc., Durham, NC; Pluristem LTD, Haifa, ISR; PolarityTE MD, Inc., Salt Lake City, UT; Pop Test Oncology LLC aka Palisades Therapeutics, Cliffside Park, NJ; Power of Patients, LLC, Charleston, SC; Praeses, LLC, Shreveport, LA; Prep Tech, LLC, Westlake, LA; Pulmotect, Inc., Houston, TX; Q2Pharma, Haifa, ISR; Qrons, Inc., Miami, FL; Radical Concepts LLC, Brooklyn, NY; RegenFix, LLC, Toledo, OH; Remedor Biomed Ltd., Nazareth Illit, ISR; Rocco, LLC, Longmont, CO; San Diego Blood Bank, San Diego, CA; Scinus Cell Expansion B.V., Bilthoven, Utrecht; Seran Bioscience, Bend, OR; Sleep Care, Inc., Columbus, OH; SmartPoints Technology, Inc., Stow, MA; Southern Research Institute, Birmingham, AL; SurgiBox Inc., Brookline, MA; Syracuse University, Syracuse, NY; TBT Pharma, LLC, Baltimore, MD; TearSolutions, Inc., Charlottesville, VA; TerumoBCT, Inc., Lakewood, CO; TheraNova, LLC, San Francisco, CA; The University of Arizona, Defense and Security Research Institute (DSRI), Tucson, AZ; ThoraXS Israel 17 Ltd, Tzur Hadassa, ISR; Trailhead Biosystems Inc., Cleveland, OH; Truecath Inc., Camarillo, CA; Trustees of Boston University, Boston, MA; University of Florida Division of

Sponsored Programs, Gainesville, FL; University of South Carolina, Columbia, SC; University of Tartu, Tartu, EST; Upside Biotechnologies Ltd., Auckland, NZL; Virginia Polytechnic Institute and State University, Blacksburg, VA; Wello, Inc., Addison, TX; Williams-Jones Consulting, Greenville, SC; Worcester Polytechnic Institute, Worcester, MA; X-Therma Inc., Richmond, CA; Yale University, New Haven, CT 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 MTEC intends to file additional written notifications disclosing all changes in membership.

On May 9, 2014, MTEC 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 17, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 12, 2019 (84 FR 61071).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020-26978 Filed 12-8-20; 8:45 am]

BILLING CODE 4410-11-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2020-0003]

Advisory Committee on Construction Safety and Health (ACCSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for nominations for membership on ACCSH.

SUMMARY: The Secretary of Labor requests nominations for membership on ACCSH.

DATES: Submit (postmark, send, transmit) nominations for ACCSH membership by January 8, 2021.

ADDRESSES: You may submit nominations and supporting materials by one of the following methods:

Electronically: You may submit nominations, including attachments, electronically into Docket No. OSHA-2020-0003 at <http://www.regulations.gov>, which is the

Federal eRulemaking Portal. Follow the online instructions for submissions.

Facsimile: If your nomination and supporting materials, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

Regular mail, express mail, hand delivery, or messenger (courier) service: Submit materials to the OSHA Docket Office, Docket No. OSHA-2020-0003, Room N-3653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-2350. *Please note:* While OSHA's Docket Office is continuing to accept and process requests, due to the COVID-19 pandemic, the Docket Office is closed to the public.

Instructions: All nominations and supporting materials must include the agency name and docket number for this **Federal Register** document (Docket No. OSHA-2020-0003). Because of security-related procedures, submitting nominations by regular mail may result in a significant delay in their receipt.

OSHA will post submissions in response to this **Federal Register** document, including personal information provided, without change at <http://www.regulations.gov>. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security Numbers and birthdates.

Access to docket: The <http://www.regulations.gov> index lists all submissions provided in response to this **Federal Register** document; however, some information (e.g., copyrighted material) is not publicly available to read or download from that web page. All submissions, including materials not available online, are available for inspection through the OSHA Docket Office. For information about accessing materials in Docket No. OSHA-2020-0003, including materials not available online, contact the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications; telephone: (202) 693-1999; email: meilinger.francis2@dol.gov.

For general information about ACCSH and ACCSH membership: Mr. Damon Bonneau, OSHA, Directorate of Construction; telephone: (202) 693-2020; email: bonneau.damon@dol.gov.

Copies of this Federal Register document: Electronic copies of this **Federal Register** document are available at <http://www.regulations.gov>. This document, as well as news releases and other relevant information are also available on the OSHA web page at <http://www.osha.gov>.

SUPPLEMENTARY INFORMATION: The Secretary of Labor invites interested persons to submit nominations for membership on ACCSH.

A. Background

ACCSH advises the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) in the formulation of standards affecting the construction industry, and on policy matters arising in the administration of the safety and health provisions under the Contract Work Hours and Safety Standards Act (Construction Safety Act (CSA)) (40 U.S.C. 3701 *et seq.*) and the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) (see also 29 CFR 1911.10 and 1912.3). In addition, the OSH Act and CSA require the Assistant Secretary to consult with ACCSH before the agency proposes any occupational safety and health standard affecting construction activities (29 CFR 1911.10; 40 U.S.C. 3704).

ACCSH operates in accordance with the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App. 2), and the implementing regulations (41 CFR 102-3 *et seq.*); and Department of Labor Manual Series Chapter 1-900 (8/31/2020). ACCSH generally meets two to four times a year.

B. ACCSH Membership

ACCSH consists of 15 members whom the Secretary appoints. ACCSH members generally serve staggered two-year terms, unless they resign, cease to be qualified, become unable to serve, or the Secretary removes them (29 CFR 1912.3(e)). The Secretary may appoint ACCSH members to successive terms. No member of ACCSH, other than members who represent employers or employees, shall have an economic interest in any proposed rule that affects the construction industry (29 CFR 1912.6).

The categories of ACCSH membership, and the number of new members to be appointed to replace members whose terms will expire, are:

- Five members who are qualified by experience and affiliation to present the viewpoint of employers in the construction industry—five employer representatives will be appointed;
- Five members who are similarly qualified to present the viewpoint of employees in the construction industry—five employee representatives will be appointed;
- Two representatives of State safety and health agencies—two representatives from a State safety and health agency will be appointed;

- Two public members, qualified by knowledge and experience to make a useful contribution to the work of ACCSH, such as those who have professional or technical experience and competence with occupational safety and health in the construction industry—two public representatives will be appointed; and

- One representative designated by the Secretary of the Department of Health and Human Services and appointed by the Secretary—no new appointment will be made.

The Department of Labor is committed to equal opportunity in the workplace and seeks broad-based and diverse ACCSH membership. Any interested person or organization may nominate one or more individuals for membership on ACCSH. Interested persons also are invited and encouraged to submit statements in support of nominees.

C. Submission Requirements

Nominations must include the following information:

- Nominee's contact information and current employment or position;
- Nominee's résumé or curriculum vitae, including prior membership on ACCSH and other relevant organizations and associations;
- Category of membership (employer, employee, public, State safety and health agency) that the nominee is qualified to represent;
- A summary of the background, experience, and qualifications that addresses the nominee's suitability for each of the nominated membership categories;
- Articles or other documents the nominee has authored that indicate the nominee's knowledge, experience, and expertise in occupational safety and health, particularly as it pertains to the construction industry; and
- A statement that the nominee is aware of the nomination, is willing to regularly attend and participate in ACCSH meetings, and has no conflicts of interest that would preclude membership on ACCSH.

D. Member Selection

The Secretary will select ACCSH members on the basis of their experience, knowledge, and competence in the field of occupational safety and health, particularly as it pertains to the construction industry. Nominees will also be evaluated in accordance with Secretary's Order 10–2020 (85 FR 71104) to ensure they are sufficiently financially independent from the Department programs and activities for which they may be called upon to

provide advice. Information received through this nomination process, in addition to other relevant sources of information, will assist the Secretary in appointing members to ACCSH. In selecting ACCSH members, the Secretary will consider individuals nominated in response to this **Federal Register** document, as well as other qualified individuals.

Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by 29 U.S.C. 655(b)(1) and 656(b), 40 U.S.C. 3704(a)(2), 5 U.S.C. App. 2, Secretary of Labor's Order No. 8–2020 (85 FR 58393), and 29 CFR part 1912.

Signed at Washington, DC, on December 4, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2020–27050 Filed 12–8–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2017–0013]

Safe + Sound Campaign; Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits public comments concerning the proposal to the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Safe + Sound Campaign.

DATES: Comments must be submitted (postmarked, sent, or received) by February 8, 2021.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When

using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2017–0013, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. *Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2017–0013) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at <http://www.regulations.gov>. For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other materials in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the below phone number to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time

and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

In 2016, OSHA established the Safe + Sound Campaign, a voluntary effort to support the implementation of safety and health programs in businesses throughout the United States. Outside stakeholders, including safety and health professional organizations, trade and industry associations, academic institutions, and state and federal government agencies, collaborate with the agency on the Campaign. The Campaign includes periodic activities and events, ranging from regular email updates to quarterly national webinars to local meetings to an annual national stand down (*i.e.*, Safe + Sound Week), designed to increase overall employer and employee awareness and understanding of safety and health programs and promote employer adoption of these programs. OSHA believes widespread implementation of such programs will substantially improve overall workplace safety and health conditions.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency is requesting an adjustment increase of 91 in burden hours (from 754 hours to 845 hours) resulting from an increase in the number of respondents due to an increase of participants and the addition of the focus group interviews.

Type of Review: Extension of a currently approved collection.

Title: Safe + Sound Campaign.

OMB Control Number: 1218-0269.

Affected Public: Business or other for-profits.

Number of Respondents: 11,585.

Frequency of Responses: Annually.

Average Time per Response: Time varies per response.

Estimated Total Burden Hours: 845.

Estimated Cost (Operation and Maintenance): \$25,209.88.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. *Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID-19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service. All comments, attachments, and other materials must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA-2017-0013). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled "ADDRESSES"). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions comments about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (*e.g.*, copyrighted

material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1-2012 (77 FR 3912).

Signed at Washington, DC, on December 3, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2020-27052 Filed 12-8-20; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF LABOR

Office of the Workers' Compensation Programs

Agency Information Collection Activities; Comment Request; Certification of Medical Necessity

AGENCY: Division of Coal Mine Workers' Compensation, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, "Certification of Medical Necessity." This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by February 8, 2021.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free by contacting Anjanette Suggs by telephone at 202-

354-9660 or by email at suggs.anjanette@dol.gov.

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Office of Workers' Compensation Programs, Room S3323, 200 Constitution Avenue NW, Washington, DC 20210; by email: suggs.anjanette@dol.gov.

FOR FURTHER INFORMATION CONTACT:

Anjanette Suggs by telephone at 202-354-9660 or by email at suggs.anjanette@dol.gov.

SUPPLEMENTARY INFORMATION: The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

The Office of Workers' Compensation Programs administers the Federal Black Lung Workers' Compensation Program. The Black Lung Benefits Act (30 U.S.C. 901(a)(b) and its implementing regulations necessitate this information collection. The regulations at 20 CFR 725.701, establish miner eligibility for medical services and supplies for the length of time required by the miner's pneumoconiosis and related disability. 20 CFR 725.706 requires prior approval before ordering an apparatus where the purchase price exceeds \$300. 20 CFR 727.707 provides for the ongoing supervision of the miner's medical care, including the necessity, character and sufficiency of care to be furnished; gives the authority to request medical reports; and indicates the right to refuse payment of failing to submit any report required. Because of the above legislation and regulations, it was necessary to devise a form to collect the required information. The form is the CM-893, Certification of Medical Necessity is completed by the coal miner's doctor and is used by the Division of Coal Mine Workers' Compensation to determine if the miner meets impairment standards to qualify for durable medical equipment and home nursing. This information collection is currently approved, for use through April 30, 2021. The Black Lung Benefits Act (30 U.S.C. 901(a)(b) and implementing regulation, 20 CFR

725.406, authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Written comments will receive consideration, and summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention 1240-0024.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL-Office of Workers' Compensation Programs.

Type of Review: Extension.

Title of Collection: Certification of Medical Necessity.

Form: CM-893.

OMB Control Number: 1240-0024.

Affected Public: Individuals or households; Business or other for profit, and Not for profit institutions.

Estimated Number of Respondents: 1,300.

Frequency: On occasion.

Total Estimated Annual Responses: 1,300.

Estimated Average Time per Response: 20-40 minutes.

Estimated Total Annual Burden

Hours: 488 hours.

Total Estimated Annual Other Cost Burden: \$0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Anjanette Suggs,

Agency Clearance Officer.

[FR Doc. 2020-27012 Filed 12-8-20; 8:45 am]

BILLING CODE 4510-CK-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of a Modified System of Records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, the National Aeronautics and Space Administration is issuing public notice of its proposal to significantly alter a previously noticed system of records NASA Health Information Management System/NASA 10HIMS. This notice incorporates locations and NASA standard routine uses, as appropriate, that NASA has previously published separately from, and cited by reference in, this and other NASA systems of records notices. This notice further clarifies and crystalizes this system of records; updates records access, notification, and contesting procedures; enhances one and adds one new routine uses, as set forth below under the caption **SUPPLEMENTARY INFORMATION**.

DATES: Submit comments within 30 calendar days from the date of this publication. The changes will take effect at the end of that period, if no adverse comments are received.

ADDRESSES: Patti F. Stockman, Privacy Act Officer, Office of the Chief Information Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546-0001, (202) 358-4787, NASAPAOfficer@nasa.gov.

FOR FURTHER INFORMATION CONTACT: NASA Privacy Act Officer, Patti F. Stockman, (202) 358-4787, NASAPAOfficer@nasa.gov.

SUPPLEMENTARY INFORMATION:

This system notice includes both minor and substantial revisions to NASA's existing system of records notice. This notice clarifies that NASA's purpose for this system of records is to ensure a healthy workforce and working environment. It adds a field by which records may be retrieved, and records access, notification, and contesting procedures consistent with NASA Privacy Act regulations; adds new locations to reflect the location of NASA pandemic contact tracing records that identify individuals who have contracted infectious diseases and others they have potentially exposed in the NASA workplace; and incorporates, as appropriate, information formerly published separately in the **Federal Register** as Appendix A, Location Numbers and Mailing Addresses of NASA Installations at which Records are Located. It incorporates, in whole, NASA Standard Routine uses heretofore published by NASA as Appendix B and cited within individual system notices. This notice modifies categories of individuals covered and categories of records to be more precise. Finally, this notice expands routine use number 2 for contingency medical mission support; and revises NASA's Standard Routine Use 6 and adds a new standard routine use number 9, both to permit disclosure of information to another federal agency or entity to permit their response to a breach or address of harm caused by a breach.

Cheryl Parker,

Federal Register Liaison Officer.

SYSTEM NAME AND NUMBER:

Health Information Management System, NASA 10HIMS.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Records of Medical Clinics/Units and Environmental Health Offices are maintained at:

Mary W. Jackson NASA Headquarters, National Aeronautics and Space Administration (NASA), Washington, DC 20546-0001;

Ames Research Center (NASA), Moffett Field, CA 94035-1000;

Armstrong Flight Research Center (NASA), P.O. Box 273, Edwards, CA 93523-0273;

John H. Glenn Research Center at Lewis Field (NASA), 21000 Brookpark Road, Cleveland, OH 44135-3191;

Goddard Space Flight Center (NASA), Greenbelt, MD 20771-0001;

Lyndon B. Johnson Space Center (NASA), Houston, TX 77058-3696;

John F. Kennedy Space Center (NASA), Kennedy Space Center, FL 32899-0001;

Langley Research Center, (NASA), Hampton, VA 23681-2199;

George C. Marshall Space Flight Center (NASA), Marshall Space Flight Center, AL 35812-0001;

John C. Stennis Space Center (NASA), Stennis Space Center, MS 39529-6000; Michoud Assembly Facility (NASA), P.O. Box 29300, New Orleans, LA 70189; and

Wallops Flight Facility (NASA), Wallops Island, VA 23337.

Electronic records are also hosted at: CORITY Chicago Data Center, 341 Haynes Drive, in Wood Dale, Illinois 60191;

Salesforce Government Cloud in Ashburn, Virginia; and

Salesforce Disaster Recovery Center in Elk Grove Village, Illinois.

SYSTEM AND SUBSYSTEM MANAGER(S):

Chief Health and Medical Officer at NASA Headquarters (see System Location above for address).

Subsystem Managers:

Director Health and Medical Systems, Occupational Health at NASA Headquarters (see System Location above for address);

Chief, Space Medicine Division at NASA Johnson Space Center (see System Location above for address);

Occupational Health Contracting Officer Representatives at NASA Ames Research Center, (see System Location above for address);

NASA Armstrong Flight Research Center (see System Location above for address);

NASA Goddard Space Flight Center (see System Location above for address);

NASA Kennedy Space Center (see System Location above for address);

NASA Langley Research Center (see System Location above for address);

NASA Glenn Research Center (see System Location above for address);

NASA Marshall Space Flight Center (see System Location above for address);

NASA Jet Propulsion Laboratory (see System Location above for address);

NASA Stennis Space Center (see System Location above for address);

Michoud Assembly Facility (NASA) (see System Location above for address); and

Wallops Flight Facility (NASA) (see System Location above for address).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 7901—Health service programs;

51 U.S.C. 20113 (a)—Powers of the Administration in performance of functions to make and promulgate rules and regulations;

44 U.S.C. 3101—Records management by agency heads; general duties;

42 CFR part 2—Confidentiality of substance use disorder patient records.

PURPOSE(S) OF THE SYSTEM:

In order to ensure a healthy environment and workforce, information in this system of records is maintained on anyone receiving (1) exams for general wellness, (2) occupational clearances or determination of fitness for duty, (3) behavioral health assistance, (4) workplace surveillance for potential human exposure within NASA to communicable diseases and hazards such as noise and chemical exposure, repetitive motion, and (5) first aid or medical care for onsite illness or injuries through a NASA clinic outreach.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains information on (1) NASA employees and applicants; (2) employees from other agencies and military detailees working at NASA; (3) active or retired astronauts and active astronaut family members; (4) other space flight personnel on temporary or extended duty at NASA; (5) contractor personnel; (6) Space Flight Participants and those engaged in commercial use of NASA facilities, (7) civil service and contractor family members; and (8) visitors to NASA Centers who use clinics or ambulance services for emergency or first-aid treatment.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system contain demographic data and private health information:

(1) Wellness records including but not limited to exams provided for continuing healthcare, documentation of immunizations and other outreach records.

(2) Fitness for duty and/or exposure exams/surveillance including but not limited to ergonomics, hazardous materials, radiation, noise, communicable diseases and other applicable longitudinal surveillance.

(3) Qualification records including the use of offsite or onsite exams to determine suitability for duties.

(4) Behavioral health and employee assistance records.

(5) Records of first aid, contingency response, or emergency care, including ambulance transportation.

RECORD SOURCE CATEGORIES:

The information in this system of records is obtained from individuals themselves, physicians, and previous medical records of individuals.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Any disclosures of information will be compatible with the purpose for which the Agency collected the information. Under the following routine uses that are unique to this system of records, information in this system may be disclosed: (1) To external medical professionals and independent entities to support internal and external reviews for purposes of medical quality assurance; (2) to private or other government health care providers for consultation, referral, or mission medical contingency support; (3) to the Office of Personnel Management, Occupational Safety and Health Administration, and other Federal or State agencies as required in accordance with the Federal agency's special program responsibilities; (4) to insurers for referrals or reimbursement; (5) to employers of non-NASA personnel in support of the Mission Critical Space Systems Personnel Reliability Program; (6) to international partners for mission support and continuity of care for their employees pursuant to NASA Space Act agreements; (7) to non-NASA personnel performing research, studies, or other activities through arrangements or agreements with NASA; (8) to the public of pre-space flight information having mission impact concerning an individual crewmember, limited to the crewmember's name and the fact that a medical condition exists; (9) to the public, limited to the crewmember's name and the fact that a medical condition exists, if a flight crewmember is, for medical reasons, unable to perform a scheduled public event following a space flight mission/landing; (10) to the public to advise of medical conditions arising from accidents, consistent with NASA regulations; and (12) in accordance with standard routine uses as set forth here.

In addition, the following routine uses of information contained in SORs are standard for many NASA systems and are compatible with the purpose for which the Agency collected the information. They are NASA Standard Routine Uses.

Standard Routine Use No. 1—In the event this system of records indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the SOR may be referred to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or

prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

Standard Routine Use No. 2—A record from this SOR may be disclosed to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

Standard Routine Use No. 3—A record from this SOR may be disclosed to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

Standard Routine Use No. 4—A record from this system may be disclosed to the Department of Justice when (a) the Agency, or any component thereof; or (b) any employee of the Agency in his or her official capacity; or (c) any employee of the Agency in his or her individual capacity where the Department of Justice or the Agency has agreed to represent the employee; or (d) the United States, where the Agency determines that litigation is likely to affect the Agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or the Agency is deemed by the Agency to be relevant and necessary to the litigation.

Standard Routine Use No. 5—A record from this system may be disclosed in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when: (a) The Agency, or any component thereof; or (b) any employee of the Agency in his or her official capacity; or (c) any employee of the Agency in his or her individual capacity where the Agency has agreed to represent the employee; or (d) the United States, where the Agency determines that litigation is likely to affect the Agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Agency is deemed to be relevant and necessary to the litigation.

Standard Routine Use No. 6—A record from this SOR may be disclosed to appropriate agencies, entities, and persons when (1) NASA suspects or has confirmed that there has been a breach of the system of records; (2) NASA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NASA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NASA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

Standard Routine Use No. 7—A record from this system may be disclosed to contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government, when necessary to accomplish an Agency function related to this system of records.

Standard Routine Use No. 8—A record from this system may be disclosed to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

Standard Routine Use No. 9—A record from this system may be disclosed to another Federal agency or Federal entity, when NASA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored in multiple formats including paper, digital, micrographic, photographic, and as medical recordings such as electrocardiograph tapes, x-rays and strip charts.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved from the system by the individual's name, date of birth, or unique assigned Numbers.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained in Agency files and destroyed in accordance with NASA Records Retention Schedule 1, Item 126, and NASA Records Retention Schedule 8, Item 57.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records are maintained on secure NASA servers and protected in accordance with all Federal standards and those established in NASA regulations at 14 CFR 1212.605. Additionally, server and data management environments employ infrastructure encryption technologies both in data transmission and at rest on servers. Electronic messages sent within and outside of the Agency that convey sensitive data are encrypted and transmitted by staff via pre-approved electronic encryption systems as required by NASA policy. Approved security plans are in place for information systems containing the records in accordance with the Federal Information Security Management Act of 2014 (FISMA) and OMB Circular A-130, Management of Federal Information Resources. Only authorized personnel requiring information in the official discharge of their duties are authorized access to records through approved access or authentication methods. Access to electronic records is achieved only from workstations within the NASA Intranet, or remotely via a secure Virtual Private Network (VPN) connection requiring two-factor token authentication using NASA-issued computers or via employee PIV badge authentication from NASA-issued computers. The CORITY Chicago Data Center and Salesforce Government Cloud and Disaster Recovery Center maintain documentation and verification of commensurate safeguards in accordance with FISMA, NASA Procedural Requirements (NPR) 2810.1A, and NASA ITS-HBK-2810.02-05. Non-electronic records are secured in locked rooms or files.

RECORD ACCESS PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, information may be obtained by contacting in person or in writing the system or subsystem manager listed above at the location where the records are created and/or maintained. Requests must contain the identifying data concerning the requester, e.g., first, middle and last name; date of birth; description and time periods of the records desired. NASA Regulations also address contesting contents and

appealing initial determinations regarding records access.

CONTESTING RECORD PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, information may be obtained by contacting in person or in writing the system or subsystem manager listed above at the location where the records are created and/or maintained. Requests must contain the identifying data concerning the requester, e.g., first, middle and last name; date of birth; description and time periods of the records desired. NASA Regulations also address contesting contents and appealing initial determinations regarding records access.

NOTIFICATION PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, information may be obtained by contacting in person or in writing the system or subsystem manager listed above at the location where the records are created and/or maintained. Requests must contain the identifying data concerning the requester, e.g., first, middle and last name; date of birth; description and time periods of the records desired. NASA Regulations also address contesting contents and appealing initial determinations regarding records access.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

15-101, 80 FR 214, pp. 68568-68572.

[FR Doc. 2020-27051 Filed 12-8-20; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL SCIENCE FOUNDATION**Notice of Virtual Workshop on Pioneering the Future of Federally Supported Data Repositories**

AGENCY: Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO), National Science Foundation.

ACTION: Notice of Virtual Workshop.

SUMMARY: The workshop on “Pioneering the Future of Federally Supported Data Repositories” seeks to engage representatives of federally supported data repositories, thought-leaders in data science, and representative users to imagine future opportunities and challenges, build and strengthen the community of federally supported repositories, and identify areas for cross agency coordination.

DATES: January 13-15, 2021.

ADDRESSES: The workshop on “Pioneering the Future of Federally Supported Data Repositories” will be held virtually.

Instructions: Participation is by invitation only, but observers are welcome on a first-come, first-served basis, as there are a limited number of virtual seats available. Registration is required; registration link will be available a week before the workshop. For more information on the workshop, agenda, and registration, please see the workshop website: <https://www.nitrd.gov/nitrdgroups/index.php?title=Federally-Supported-Data-Repositories>.

FOR FURTHER INFORMATION CONTACT: Ji Lee at BDWorkshop-Repositories@nitrd.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time (ET), Monday through Friday.

SUPPLEMENTARY INFORMATION:

Overview: This notice is issued on behalf of the NITRD Big Data (BD) Interagency Working Group (IWG). Agencies of the NITRD BD IWG are holding a workshop focused on federally supported repositories. Experts from federally supported data repositories, thought-leaders in data science, and representative users will explore future visions for federally supported research data repositories, what the repositories can do to prepare for this future vision, and how to build and strengthen the community of federally supported repositories. The workshop will be held virtually on January 13-15, 2021 from 1 p.m. (ET) to 5 p.m. (ET).

Goal: The workshop will explore future visions for the federally supported repositories to identify opportunities and challenges, areas for cross agency coordination, and ways to build and strengthen the community of federally supported repositories.

Rationale: Data-driven research and Artificial Intelligence and Machine Learning (AI/ML) bring renewed focus on research data repositories. Adapting to the emerging and evolving needs and requirements of future data-intensive research is a challenge facing federally supported data repositories.

Submitted by the National Science Foundation in support of the Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO) on December 4, 2020.

(Authority: 42 U.S.C. 1861)

Suzanne H. Plimpton,
Reports Clearance Officer, National Science
Foundation.

[FR Doc. 2020-27047 Filed 12-8-20; 8:45 am]

BILLING CODE 7555-01-P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings; Regular Board of Directors Meeting

TIME AND DATE: 2:00 p.m., Thursday, December 17, 2020.

PLACE: Via Conference Call.

STATUS: Open (with the exception of Executive Session).

MATTERS TO BE CONSIDERED: The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552 (b)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive Session

Agenda:

- I. CALL TO ORDER
- II. Executive Session: Report from CEO
- III. Executive Session: Report of CFO
- IV. Action Item Approval of Minutes
- V. Action Item Acceptance of Revised Audit Committee Charter
- VI. Discussion Item NeighborWorks Compass Update
- VII. Management Program Background and Updates
- VIII. Adjournment

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524-9940; Lthompson@nw.org.

Lakeyia Thompson,
Special Assistant.

[FR Doc. 2020-27186 Filed 12-7-20; 4:15 pm]

BILLING CODE 7570-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70-1151; NRC-2020-0263]

Westinghouse Electric Company, LLC; Columbia Fuel Fabrication Facility; and US Ecology, Inc.; Idaho Resource Conservation and Recovery Act Subtitle C Hazardous Disposal Facility Located Near Grand View, Idaho

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an

environmental assessment (EA) and finding of no significant impact (FONSI) related to a request for alternate disposal, exemptions, and associated license amendment for the disposition of waste containing byproduct material and special nuclear material (SNM) from the Westinghouse Electric Company, LLC's (WEC) Columbia Fuel Fabrication Facility (CFFF) in Hopkins, South Carolina, under License Number SNM-1107. Additionally, the NRC is considering the related action of approving exemptions to US Ecology, Inc. (USEI) from the NRC licensing requirements to allow USEI to receive and dispose the material from CFFF without an NRC license. The USEI disposal facility, located near Grand View, Idaho, is a Subtitle C Resource Conservation and Recovery Act (RCRA) hazardous waste disposal facility permitted by the State of Idaho to receive low-level radioactive waste and is not licensed. Approval of the alternate disposal request from WEC and the exemptions requested by WEC and USEI would allow WEC to transfer the specific waste from CFFF for disposal at USEI.

DATES: The EA and FONSI referenced in this document are available on December 9, 2020.

ADDRESSES: Please refer to Docket ID NRC-2020-0263 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0263. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: Jennifer.Borges@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov.

- **Attention:** The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at PDR.Resource@nrc.gov or call

1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Tiktinsky, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-8740, email: David.Tiktinsky@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated May 8, 2020 (ADAMS Accession No. ML20129J935; Package No. ML20129J934), as supplemented on September 22, 2020 (ADAMS Accession No. ML20266G551), and October 13, 2020 (ADAMS Accession No. ML20287A545), WEC requested an exemption and associated license amendment to License SNM-1107, issued for the operation of CFFF located in Hopkins, South Carolina. The requests are for NRC authorization for an alternate disposal of specified NRC-licensed byproduct and SNM from the CFFF. As required by section 51.21 of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC conducted an EA. Based on the results of the EA that follows, the NRC has determined that pursuant to 10 CFR 51.31, preparation of an environmental impact statement for the exemption request is not required and pursuant to 10 CFR 51.32, issuance of a FONSI is appropriate.

A corresponding exemption request from USEI, dated May 11, 2020 (ADAMS Accession No. ML20280A601), would allow for possession and disposal of the byproduct and SNM materials at the USEI disposal site. USEI is a RCRA Subtitle C hazardous waste disposal facility located near Grand View, Idaho.

II. Environmental Assessment

Description of the Proposed Action

WEC and USEI requested NRC approval for a 10 CFR 20.2002 alternate disposal request, exemptions to 10 CFR part 70.3 and 10 CFR 30.3, and a conforming WEC license amendment to allow WEC to transfer specific waste from CFFF for disposal at the USEI disposal facility.

Waste being considered in this request includes approximately 2,550 cubic meters (m³; 90,000 cubic feet (ft³)) of radiologically contaminated soil, sludge, and debris associated with the East Lagoon, a treatment/settling pond that received effluents from multiple sources throughout the site. The East Lagoon is in the process of being closed in accordance with a consent agreement and regulations set by the South

Carolina Department of Health and Environmental Control (SCDHEC). In addition to the material from the East Lagoon, the request also includes approximately 1,430 m³ (50,400 ft³) of previously dredged CaF₂ sludge being stored on site. WEC proposes to mix these materials with Portland cement to stabilize the material for shipping. WEC proposes to transport this aggregated waste stream to USEI using a combination of trucks and railcars.

In addition to this soil and sludge, the request also includes the shipping and disposal of up to 526 obsolete UF₆ cylinders previously used for transportation. The cylinders are contaminated with SNM and U-238, and represent a disposal volume of approximately 651 m³ (23,000 ft³) prior to downsizing. The UF₆ Cylinders are solid form (steel), approximately 1.8 m (6 ft) in length and 0.76 m (2.5 ft) in diameter. The UF₆ Cylinders are empty and have been through the UF₆ Cylinder internal wash/rinse process following their last use. The UF₆ Cylinders will be downsized to eliminate void space prior to packaging for shipment offsite for disposal. The UF₆ Cylinders would be transported to the USEI site by trucks, separate from the aggregated waste shipments.

Both waste streams would be transported from CFFF in South Carolina to the USEI facility, Grand View, Idaho in the Owyhee Desert. The USEI facility is a RCRA Subtitle C hazardous waste disposal facility permitted by the State of Idaho. The USEI site has both natural and engineered features that limit the transport of radioactive material. The natural features include a low precipitation rate [*i.e.*, 18.4 cm/year (7.4 in./year)] and a long vertical distance to groundwater (*i.e.*, 61-meter (203-ft) thick on average unsaturated zone below the disposal zone). The engineered features include an engineered cover, liners, and leachate monitoring systems. Because the USEI facility is not licensed by the NRC, this proposed action requires the NRC to exempt USEI from the Atomic Energy Act of 1954, and NRC licensing requirements with respect to USEI's requested receipt and disposal of this material.

Need for the Proposed Action

The need for the proposed action is to authorize a safe and appropriate method of disposal for the subject waste material generated during day-to-day activities and currently being stored at the CFFF. Specifically, the East Lagoon is in the process of being closed in accordance with a consent agreement and regulations set by the SCDHEC.

Thus, material associated with the East Lagoon must be removed from the site in order to comply with regulatory requirements. The proposed alternate disposal would also conserve low-level radioactive waste disposal capacity at licensed low-level radioactive disposal sites while ensuring that the material being considered is disposed of safely in a regulated facility.

Environmental Impacts of the Proposed Action

The NRC staff reviewed the information provided by WEC to support their 10 CFR 20.2002 alternate disposal request and for the specific exemptions from 10 CFR 30.3 and 10 CFR 70.3 in order to dispose of the aggregated waste and UF₆ cylinders at USEI. Under the 10 CFR 20.2002 criteria, a licensee may seek NRC authorization to dispose of licensed material using procedures not otherwise authorized by NRC regulations. The licensee's supporting analysis must show that the radiological doses arising from the proposed 10 CFR 20.2002 disposal will be as low as reasonably achievable and within the 10 CFR part 20 dose limits.

WEC performed a radiological assessment in consultation with USEI. Based on this assessment, WEC concludes that potential doses to members of the public, including transportation workers and USEI workers involved in processing and disposing of the waste upon its arrival at USEI, are less than 1 mrem/y, well within the "few mrem" criteria that the NRC established (see NUREG-1757, Volume 1, Revision 2).

As documented in the Safety Evaluation Report (SER), the NRC staff reviewed scenarios and related input parameters considered by WEC and USEI and found that they are appropriate for the scenarios considered. The NRC staff also reviewed the projected doses from the post-closure and intruder scenarios at USEI and found them acceptable. NRC staff did note that the inadvertent intruder construction scenario had potential doses that were larger than the other inadvertent intruder scenarios evaluated, but the NRC does not consider this scenario to be feasible due to the configuration of the disposal cells and USEI's waste disposal practices. NRC staff also notes that the proposed disposals are also subject to regulation under RCRA.

Based upon its evaluation above and its assessment of the potential impacts of the proposed action, in addition to focusing on the potential radiological impacts discussed above, this EA next

considers potential environmental impacts from non-radiological materials. With regard to potential non-radiological impacts, the NRC staff concludes that approval of the proposed request to dispose of material with small amounts of radioactive material would not have significant environmental impacts, including effects on non-radiological effluents, air quality, or noise. In addition, approval of the proposed action will not significantly increase the probability or consequences of accidents as well as occupational and public radiation exposure because of the quantities and forms of material involved, as further evaluated in the NRC's SER.

Therefore, due to the very small amounts of radioactive material involved, the evaluation above, and the NRC staff's analysis in the SER, the NRC staff finds that the environmental impacts of the proposed action are not significant.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered the no-action alternative in which the NRC staff would deny the disposal request. Denial of the request would require WEC to find another disposal pathway for this material, and would ultimately only change the location of the disposal site. All other factors would remain the same or similar. Therefore, the no-action alternative was not further considered. NRC staff also notes that pursuing the no-action alternative would result in the licensee potentially violating the SCDHEC requirements to remove the material from the East Lagoon so that it can be remediated while it identifies another disposal option.

Agencies and Persons Consulted

In accordance with its stated policy, on November 23, 2020, the staff consulted with SCDHEC and the Idaho Department of Environmental Quality regarding the environmental impacts of the proposed action. The state officials concurred with the EA and FONSI.

III. Finding of No Significant Impact

The proposed action consists of NRC approval of (a) WEC's and USEI's alternate disposal requests under 10 CFR 20.2002, (b) WEC and USEI's exemption requests under 10 CFR 30.11(a) and 10 CFR 70.11(a), and (c) the issuance of a conforming license amendment to WEC. Based on this EA, the NRC finds that there are no significant environmental impacts from the proposed action. Therefore, the NRC has determined, pursuant to 10 CFR

51.31, that preparation of an environmental impact statement is not required for the proposed action and a FONSI is appropriate.

IV. Availability of Documents

The documents identified in the following table are available to

interested persons through one or more of the following methods, as indicated.

Document	ADAMS accession No.
Request for Alternate Disposal Approval and Exemption for Specific Columbia Fuel Fabrication Facility Waste (License No. SNM-1197, Docket No. 70-1151), dated May 8, 2020.	ML20129J934 (Package).
Request for Exemptions under 10 CFR 30.11 and 10 CFR 70.17 for Alternate Disposal of Wastes from Columbia Fuel Fabrication Facility Under 10 CFR 20.2002, dated May 11, 2020.	ML20280A601.
Response to Request for Additional Information—Alternate Disposal Approval and Exemptions for Specific Columbia Fuel Fabrication Facility Waste (License No. SNM-1107, Docket No. 70-1151), dated September 22, 2020.	ML20266G551.
Response to Request for Additional Information—Alternate Disposal Approval and Exemptions for Specific Columbia Fuel Fabrication Facility Waste (License No. SNM-1107, Docket No. 70-1151), dated October 13, 2020.	ML20287A545.
Safety Evaluation Report	ML20302A085.
NUREG-1757, Volume 1, Revision 2, "Consolidated Decommissioning Guidance"	ML063000243.

Dated: December 3, 2020.

For the Nuclear Regulatory Commission.

Damaris Marciano,

*Acting Chief, Fuel Facility Licensing Branch,
Division of Fuel Management, Office of
Nuclear Material Safety and Safeguards.*

[FR Doc. 2020-26973 Filed 12-8-20; 8:45 am]

BILLING CODE 7590-01-P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020-198; MC2021-39 and CP2021-40]

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:* December 11, 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:

Table of Contents

- 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. CP2020-198; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to International Priority Airmail, Commercial ePacket, Priority Mail Express International, Priority Mail International & First-Class Package International Service with Reseller Contract 5 Negotiated Service Agreement; *Filing Acceptance Date:* December 3, 2020; *Filing Authority:* 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 11, 2020.

2. *Docket No(s):* MC2021-39 and CP2021-40; *Filing Title:* USPS Request to Add Priority Mail Contract 682 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 3, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 11, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020-27023 Filed 12-8-20; 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. 34-90558; File No. SR-PHLX-2020-51]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Nasdaq PSX Rules 3213, 3301A, and 3301B

December 3, 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 20, 2020, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Nasdaq PSX Rules 3213, 3301A, and 3301B, as described further below.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Presently, the Exchange is making functional enhancements and

improvements to specific Order Types³ and Order Attributes⁴ that are currently only available via the RASH Order entry protocol.⁵ Specifically, the Exchange will be upgrading the logic and implementation of these Order Types and Order Attributes so that the features are more streamlined across the Exchange’s Systems and order entry protocols, and will enable the Exchange to process these Orders more quickly and efficiently. Additionally, this System upgrade will pave the way for the Exchange to enhance the OUCH Order entry protocol⁶ so that Participants may enter such Order Types and Order Attributes via OUCH, in addition to the RASH Order entry protocols.⁷ The Exchange plans to implement its enhancement of the OUCH protocol sequentially, by Order Type and Order Attribute.

To support and prepare for these upgrades and enhancements, the Exchange now proposes to amend its Rules governing Order Types and Order Attributes, at Rules 3301A and 3301B, respectively. In particular, the Exchange proposes to adjust the current functionality of the Market Maker Peg Order⁸ and Reserve Size Order

³ An “Order Type” is a standardized set of instructions associated with an Order that define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. *See* Rule 3301(e).

⁴ An “Order Attribute” is a further set of variable instructions that may be associated with an Order to further define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. *See id.*

⁵ The RASH (Routing and Special Handling) Order entry protocol is a proprietary protocol that allows members to enter Orders, cancel existing Orders and receive executions. RASH allows participants to use advanced functionality, including discretion, random reserve, pegging and routing. *See* http://nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/rash_sb.pdf.

⁶ The OUCH Order entry protocol is a proprietary protocol that allows subscribers to quickly enter orders into the System and receive executions. OUCH accepts limit Orders from members, and if there are matching Orders, they will execute. Non-matching Orders are added to the Limit Order Book, a database of available limit Orders, where they are matched in price-time priority. OUCH only provides a method for members to send Orders and receive status updates on those Orders. *See* <https://www.nasdaqtrader.com/Trader.aspx?id=OUCH>.

⁷ The Exchange designed the OUCH protocol to enable members to enter Orders quickly into the System. As such, the Exchange developed OUCH with simplicity in mind, and it therefore lacks more complex order handling capabilities. By contrast, the Exchange specifically designed RASH to support advanced functionality, including discretion, random reserve, pegging and routing. Once the System upgrades occur, then the Exchange intends to propose further changes to its Rules to permit participants to utilize OUCH, in addition to RASH, to enter order types that require advanced functionality.

⁸ *See* Rule 3301A(b)(5).

Attribute,⁹ as described below, so that they align with how the System, once upgraded, will handle these Orders going forward. The Exchange also proposes to make several associated clarifications and corrections to these Rules, and to Rule 3213, as it prepares to enhance its order handling processes.

The Exchange notes that the Exchange’s affiliate, the Nasdaq Stock Market, LLC, recently filed a proposal for immediate effectiveness to make changes that are similar to those proposed herein.¹⁰

Changes to Market Maker Peg Order

A Market Maker Peg Order is an Order Type that exists to help a Market Maker to meet its obligation to maintain continuous two-sided quotations (the “Two-Sided Obligation”), as set forth in Rule 3213(a)(2).¹¹ The Exchange proposes to make three changes related to the Market Maker Peg Order.

First, the Exchange proposes to amend Rule 3301A(b)(5) to correct the conditions under which a Market Maker Peg Order will be sent back to a Participant. Rule 3301A(b)(5) currently states that a Market Maker Peg Order will be sent back to the Participant if: (1) Upon entry of the Order, the limit price of the Order is not within the Designated Percentage,¹² or (2) after the Order has been posted to the Exchange Book, the Reference Price¹³ shifts to reach the Defined Limit,¹⁴ such that the

⁹ *See* Rule 3301B(h).

¹⁰ *See* Securities Exchange Act Release No. 34-90389 (November 10, 2020), 85 FR 73304 (November 17, 2020) (SR-NASDAQ-2020-71).

¹¹ *See* Rule 3213(a)(2).

¹² *See* Rule 3301A(b)(5). The “Designated Percentage” is (i) 8% for securities included in the S&P 500® Index, Russell 1000® Index, and a pilot list of Exchange Traded Products (“Tier 1 Securities”); (ii) 28% for all NMS stocks that are not Tier 1 Securities with a price equal to or greater than \$1 (“Tier 2 Securities”); (iii) 30% for all NMS stocks that are not Tier 1 Securities with a price less than \$1 (“Tier 3 Securities”), except that between 9:30 a.m. and 9:45 a.m. and between 3:35 p.m. and the close of trading, the Designated Percentage shall be 20% for Tier 1 Securities, 28% for Tier 2 Securities, and 30% for Tier 3 Securities. The Designated Percentage for rights and warrants shall be 30%. *See* Rule 3213(a)(2)(D). As discussed below, the Exchange proposes to amend this definition.

¹³ The “Reference Price” for a Market Maker Peg Order to buy (sell) is the then-current National Best Bid (National Best Offer) (including the Exchange), or if no such National Best Bid or National Best Offer, the most recent reported last-sale eligible trade from the responsible single plan processor for that day, or if none, the previous closing price of the security as adjusted to reflect any corporate actions (e.g., dividends or stock splits) in the security. *See* Rule 3301A(b)(5).

¹⁴ The term “Defined Limit” means 9.5% for Tier 1 Securities, 29.5% for Tier 2 Securities, and 31.5% for Tier 3 Securities, except that between 9:30 a.m. and 9:45 a.m. and between 3:35 p.m. and the close of trading, the Defined Limit shall be 21.5% for Tier

Continued

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Order is subject to re-pricing at the Designated Percentage away from the shifted Reference Price, but the limit price of the Order would then fall outside of the Defined Limit (which would now be measured by the difference between the re-priced Order and the shifted Reference Price).¹⁵

The Exchange proposes to correct the second of these two conditions because it inadvertently allows for a circumstance in which a Market Maker Peg Order will be automatically re-priced by the System to a limit price that is outside of the Designated Percentage but inside of the Defined Limit. Such an outcome is inconsistent with a Market Maker's obligations to price or reprice its bid (offer) quotations not more than the Designated Percentage away from the then National Best Bid (Offer), as set forth in Rule 3213(a)(2).¹⁶ In order for Rule 3301A(b)(5) to be consistent with Rule 3213(a)(2), Rule 3301A(b)(5) cannot permit the System to re-price a Market Maker Peg Order to a limit price that is outside of the Designated Percentage. In any circumstance in which the Order would be re-priced to a limit that is outside of the Designated Percentage, the Rule must require the System to return the Order to the Participant. The Exchange proposes to amend Rule 3301A(b)(5) accordingly.¹⁷

¹⁵ Securities, 29.5% for Tier 2 Securities, and 31.5% for Tier 3 Securities. See Rule 3213(a)(2)(E).

¹⁶ See Rule 3301A(b)(5).

¹⁷ Rule 3213(a)(2) states that for a Market Maker to satisfy its Two-Sided Obligation, the Market Maker must price bid (offer) interest not more than the Designated Percentage away from the then current National Best Bid (Offer) (or if there is no National Best Bid (Offer), not more than the Designated Percentage away from the last reported sale from the responsible single plan processor). Moreover, Rule 3213(a)(2) states that if the National Best Bid (Offer) or reported sale increases (decreases) to a level that would cause the bid (offer) interest of the Two-Sided Obligation to be more than the Defined Limit away from the National Best Bid (offer) or last reported sale, or if the bid (offer) is executed or cancelled, then the Market Maker must enter new bid (offer) interest at a price not more than the Designated Percentage away from the then current National Best Bid (Offer) or last reported sale.

¹⁸ The Exchange also proposes to amend this condition to state that repricing will occur when the difference between the displayed price of a Market Maker Peg Order and the Reference Price exceeds, rather than merely reaches, the Defined Limit. Currently, the Rule uses the term "reaches," but this is inconsistent with the example that follows it ("In the foregoing example, if the Defined Limit is 9.5% and the National Best Bid increases to \$10.17, such that the displayed price of the Market Maker Peg Order would be more than 9.5% away, the Order will be repriced to \$9.36, or 8% away from the National Best Bid.") (emphasis added). The Exchange proposes to reconcile this inconsistency in a manner that reflects the stated example as well as the manner in which the Exchange's System presently applies the Rule. It would also render the Rule consistent with Market Maker obligations under Rule 3213.

Second, the Exchange proposes to amend Rule 3301A(b)(5) to no longer allow entry of a Market Maker Peg Order entered with an offset. The Rule presently permits a Market Maker to enter a Market Maker Peg Order with a more aggressive offset than the Designated Percentage, but not a less aggressive offset. The Exchange has reviewed usage of offsets with Market Maker Peg Orders and found that no Market Maker assigned an offset to their Market Maker Peg Orders since January 2019. The Exchange does not believe that there is value in keeping offsets as an option for Market Maker Peg Orders. Eliminating this option will also facilitate the System upgrades and ease the import of RASH functionality to OUCH. Accordingly, the Exchange proposes to delete text from Rule 3301A(b)(5)(A) that discusses offsets and replace it with text stating that Market Maker Peg Orders entered with pegging offsets will not be accepted. The Exchange also makes conforming changes to Rule 3301A(b)(5)(B) where the text refers to offsets.

Third, the Exchange proposes to amend Rule 3301A(b)(5) to account for a scenario where, after entry of a Market Maker Peg Order whose initial displayed price was set with reference to the National Best Bid or Offer, the National Best Bid or Offer shifts such that the displayed price of the Order to buy (sell) is equal to or greater (less than) the National Best Bid (Offer). The Exchange proposes to state that the Exchange will not reprice the Market Maker Peg Order in this scenario until a new Reference Price is established that is more aggressive than the displayed price of the Order. By specifying that the Exchange will not reprice Market Maker Peg Orders in this scenario until a new, more aggressive Reference Price is established, the Exchange will ensure that it does not engage in a potential cycle of pegging against a Reference Price established by the Order itself.

Change to Rule 3213

Next, the Exchange proposes to clarify the definitions of "Designated Percentage" in Rule 3213(a)(2)(D) and "Defined Limit" in Rule 3213(a)(2)(E), which presently are as follows:

(D) For purposes of this Rule, the "Designated Percentage" shall be: (i) 8% for securities included in the S&P 500® Index, Russell 1000® Index, and a pilot list of Exchange Traded Products ("Tier 1 Securities"); (ii) 28% for all NMS stocks that are not Tier 1 Securities with a price equal to or greater than \$1 ("Tier 2 Securities"); (iii) 30% for all NMS stocks that are not Tier 1 Securities with a price less than \$1 ("Tier 3

Securities"), except that between 9:30 a.m. and 9:45 a.m. and between 3:35 p.m. and the close of trading, the Designated Percentage shall be 20% for Tier 1 Securities, 28% for Tier 2 Securities, and 30% for Tier 3 Securities. The Designated Percentage for rights and warrants shall be 30%.

(E) For purposes of this Rule, the "Defined Limit" shall be 9.5% for Tier 1 Securities, 29.5% for Tier 2 Securities, and 31.5% for Tier 3 Securities, except that between 9:30 a.m. and 9:45 a.m. and between 3:35 p.m. and the close of trading, the Defined Limit shall be 21.5% for Tier 1 Securities, 29.5% for Tier 2 Securities, and 31.5% for Tier 3 Securities.

The Exchange is concerned that these two provisions could be misinterpreted to suggest that prior to 9:30 a.m., the Exchange applies a narrower Designated Percentage and Defined Limit than it does between 9:30 and 9:45 a.m., under the same conditions. In fact, the Exchange applies the same wider Designated Percentage and Defined Limit prior to 9:30 a.m. as it does between 9:30 and 9:45 a.m. To avoid confusion (and without changing existing market maker obligations), the Exchange therefore proposes to clarify both of these provisions of Rule 3213(a)(2) to state that "prior to 9:45 a.m." and between 3:35 p.m. and the close of trading, the Designated Percentage and Defined Limit (including for Market Maker Peg Orders) shall be as stated. Furthermore, throughout Rule 3213(a)(2)(D), in defining the term "Designated Percentage," the Exchange proposes to replace references to Tier 1, 2, and 3 NMS Securities with the following: (i) The Designated Percentage shall be 8% for all Tier 1 NMS Stocks under the LULD Plan,¹⁸ 28% for all Tier 2 NMS Stocks under the LULD Plan with a price equal to or greater than \$1, and 30% for all Tier 2 NMS Stocks under the LULD Plan with a price less than \$1, except that prior to 9:45 a.m. and between 3:35 p.m. and the close of trading, the Designated Percentage shall be: (i) 20% for Tier 1 NMS Stocks under the LULD Plan; (ii) 28% for all Tier 2 NMS Stocks under the LULD Plan with a price equal to or greater than \$1; and (iii) 30% for all Tier 2 NMS Stocks under the LULD Plan with a price less than \$1. Similarly, in Rule 3213(a)(2)(E),

¹⁸ Tier 1 NMS Stocks under the LULD Plan comprise all NMS Stocks included in the S&P 500® Index, Russell 1000® Index, and a list of Exchange Traded Products identified as Schedule 1 to the Plan to Address Extraordinary Market Volatility Submitted to the Securities and Exchange Commission Pursuant to Rule 608 of Regulation NMS Under the Securities Exchange Act of 1934 (the "LULD Plan").

in defining the term “Defined Limit,” the Exchange proposes to replace references to securities subject to Rule 4120(a)(11)(A), (B), and (C) [sic] with the following: (i) 9.5% for all Tier 1 NMS Stocks under the LULD Plan; (ii) 29.5% for all Tier 2 NMS Stocks under the LULD Plan with a price equal to or greater than \$1; and (iii) 31.5% for all Tier 2 NMS Stocks under the LULD Plan with a price less than \$1, except that prior to 9:45 a.m. and between 3:35 p.m. and the close of trading, the Defined Limit shall be: (i) 21.5% all Tier 1 NMS Stocks under the LULD Plan; (ii) 29.5% for all Tier 2 NMS Stocks under the LULD Plan with a price equal to or greater than \$1; and (iii) 31.5% for all Tier 2 NMS Stocks under the LULD Plan with a price less than \$1. The Exchange proposes this change because the existing references are obsolete.

The Exchange also proposes to add to Rule 3213(a)(2)(E) the fact that the Defined Limit for rights and warrants shall be 31.5%. The Exchange mistakenly omitted the Defined Limit for such securities from prior filings.¹⁹

Changes to Reserve Size

As set forth in Rule 3301B(h), “Reserve Size” is an Order Attribute that permits a Participant to stipulate that an Order Type that is Displayed may have its displayed size replenished from additional non-displayed size.²⁰ The Exchange proposes three changes to the rule text describing the Reserve Size Order Attribute.

First, the Exchange proposes to amend a paragraph of Rule 3301B(h) which begins as follows: “Whenever a Participant enters an Order with Reserve Size, PSX will process the Order as two Orders: A Displayed Order (with the characteristics of its selected Order Type) and a Non-Displayed Order. Upon entry, the full size of each such Order will be processed for potential execution in accordance with the parameters applicable to the Order Type.” The Exchange proposes to amend this language because it does not describe precisely how the Exchange processes Orders with Reserve Size. The Exchange proposes to state instead that whenever a Participant enters an Order with Reserve Size, the full size of the Order will be presented for potential execution in compliance with Regulation NMS and that thereafter, unexecuted portions of the Order will be processed as two Orders: A Displayed Order (with the

characteristics of its selected Order Type) and a Non-Displayed Order. The Exchange also proposes to delete the following sentence: “Upon entry, the full size of each such Order will be processed for potential execution in accordance with the parameters applicable to the Order Type.” The proposed re-formulation reflects that it is possible that the Order with Reserve Size will be executed immediately in full and without needing to place unexecuted portions of the Order in reserve. Furthermore, it clarifies that the System will present the Order for immediate execution (provided that it does not trade through a protected quotation, in accordance with Regulation NMS) without complying with underlying characteristics of the Order Type that might otherwise require an adjustment to the price of the Order before the System attempts to execute it.²¹ The proposed language is consistent with the following example set forth in the existing rule text:

For example, a Participant might enter a Price to Display Order with 200 shares displayed and an additional 3,000 shares non-displayed. Upon entry, the Order would attempt to execute against available liquidity on the PSX Book, up to 3,200 shares. Thereafter, unexecuted portions of the Order would post to the PSX Book as a Displayed Price to Display Order and a Non-Displayed Order; provided, however, that if the remaining total size is less than the display size stipulated by the Participant, the Displayed Order will post without Reserve Size. Thus, if 3,050 shares executed upon entry, the Price to Display Order would post with a size of 150 shares and no Reserve Size.

The proposed language eliminates confusion that might otherwise arise from perceived inconsistencies between the above example and existing rule text. Again, the existing rule text states that whenever a participant enters an Order with Reserve Size, the System will process the Reserve Order as two orders upon entry and also, upon entry, the full size of an Order with Reserve will be presented for potential execution in accordance with the parameters applicable to the Order Type.

When there is, in fact, an unexecuted portion of the Order, then the Exchange will continue to process the unexecuted portion as two Orders: A Displayed Order and a Non-Displayed Order.

Second, the Exchange proposes to delete text from Rule 3301B(h) which states that “[a] Participant may stipulate that the Displayed Order should be

replenished to its original size.” The Exchange proposes to delete this text because it is redundant of text elsewhere in the Rule that describes how a Displayed Order with Reserve Size replenishes.²²

Third, the Exchange proposes to amend text from Rule 3301B(h) that allows the original and subsequent displayed sizes of the Displayed Order to be amounts randomly determined based upon factors they select (“Random Reserve”). The amendments also state that when Participants stipulate use of a Random Reserve, they would select a nominal (rather than a “theoretical”) displayed size, which is a more precise term. Furthermore, the amendment adds a reminder that the actual displayed size will be randomly determined by the System from a range of “normal trading units.” Lastly, the amendments include other changes that do not change the substantive meaning of the text, but simply improve its readability.

The Exchange intends to implement the foregoing changes during the First Quarter of 2021. The Exchange will issue an Equity Trader Alert at least 30 days in advance of implementing the changes.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²³ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁴ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that it is consistent with the Act to amend Rule 3301A(b)(5), which describes the Market Maker Peg Order Type, to correct one of the stated conditions under which a Market Maker Peg Order will be sent back to a Participant. As presently stated, this condition provides for Market Maker Peg Orders to be repriced automatically at limit prices that are within the Defined Limit, but outside of the Designated Percentage, which places

²² The Exchange proposes to clarify a portion of Rule 3301B(h) which states that if an execution against a Displayed Order causes its size to decrease below a normal unit of trading, another Displayed Order will be entered at the “level” stipulated by the Participant while the size of the Non-Displayed Order will be reduced by the same amount. In describing the entry of the new Displayed Order in this instance, the Exchange proposes to replace the word “level” with “limit price and size,” which is a more precise phrase.

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(5).

¹⁹ See Securities Exchange Act Release No. 34–69194 (March 20, 2013), 78 FR 18386 (March 26, 2013) (SR–Phlx–2013–24).

²⁰ An Order with Reserve Size may be referred to as a “Reserve Order.”

²¹ This clarification is needed due to the fact that pursuant to Rule 3301A(b)(2)(A), a Price to Display Order would automatically reprice upon entry if its entered limit price would lock or cross a protected quotation, = .

them in conflict with Rule 3213(a)(2), which requires Market Makers to price and re-price bid and offer interest at the Designated Percentage. It is just and in the interests of the investors and the public for the Exchange to correct Rule 3301A(b)(5) to ensure that Market Maker Peg Orders operate in a manner that helps rather than hinders Market Makers from complying with Rule 3213.

It is also consistent with the Act for the Exchange to amend Rule 3301A(b)(5) to clarify that repricing will occur when the difference between the displayed price of a Market Maker Peg Order and the Reference Price “exceeds,” rather than merely “reaches,” the Defined Limit, as the Rule states presently. The proposed change would ensure that the Rule text is internally consistent, as the example set forth in the text suggests that the Rule should be read to mean exceeds. It would also render the Rule consistent with Market Maker obligations under Rule 3213. The Exchange believes that it is in the interest of investors and the public to eliminate such inconsistencies.

Meanwhile, the Exchange believes that it is consistent with the Act to eliminate the option for Participants to enter offsets from the Market Maker Peg Orders. The proposal is consistent with the Act because Market Makers do not actively employ such offsets. As noted above, the Exchange has reviewed usage of offsets with Market Maker Peg Orders and found that no Market Maker has assigned an offset with their Market Maker Peg Orders since January 2019. Moreover, elimination of the option to enter offsets would simplify the Exchange’s efforts to improve processing.

The Exchange believes that it is consistent with the Act to clarify Rule 3301A(b)(5) so that it specifies how the System will react when, after entry of a Market Maker Peg Order whose initial displayed price was set with reference to the National Best Bid or Offer, the National Best Bid or Offer shifts such that the displayed price of the Order to buy (sell) is equal to or greater (less) than the National Best Bid (National Best Offer). Specifically, the Exchange believes that it is just and in the interests of investors to specify that the Exchange will not reprice Market Maker Peg Orders in this scenario until a new, more aggressive Reference Price is established, because doing so ensures that the Exchange will not engage in a potential cycle of pegging against a Reference Price established by the Order itself.

The Exchange’s proposal to amend the definitions of “Designated

Percentage” and “Defined Limit,” as set forth in Rule 3213(a)(2)(D) and (E), is consistent with the Act because the amendment is necessary to correct obsolete references and to avoid confusion about which particular percentage or limit will apply to orders prior to 9:30 a.m. The proposal clarifies the Rule by stating expressly that the same sets of bands that apply between 9:30–9:45 a.m. and between 3:35 p.m. and the close of trading also apply prior to 9:30 a.m. The proposal also specifies a Defined Limit for rights and warrants, which was mistakenly omitted from prior filings and which relates to the Designated Percentage for rights and warrants, which is set forth already at Rule 3213(a)(2)(D).

It is also consistent with the Act to amend Rule 3301B(h) to clarify that when a Participant enters an Order with Reserve Size, the full size of the Order will first be presented for potential execution in compliance with Regulation NMS, and only if there is an unexecuted portion of the Order will it be processed as a Displayed Order and a Non-Displayed Order. This clarification describes the behavior of the System more precisely than the existing Rule language. It also reflects the possibility that the Order with Reserve Size will be executed immediately in full and without needing to place unexecuted portions of the Order in reserve. Furthermore, it eliminates inconsistency between rule text which presently suggests that the System will process the Order with Reserve Size for potential immediate execution consistent with the characteristics of its underlying Order Type, and an example in the rule text in which the Exchange provides that the System will process the Order for potential immediate execution regardless of the parameters applicable to the Order Type. The proposed amendment will resolve this inconsistency by making clear that the System will present an order for potential immediate execution regardless of the characteristics of the underlying Order Type, with the caveat that the Order will not trade-through a protected quotation as required by Regulation NMS.

It is consistent with the Act to amend Rule 3301B(h) to state that when participants stipulate use of a Random Reserve, they would select a “nominal”—rather than a “theoretical”—displayed size. The proposed term “nominal” is more precise than the existing Rule text. Improving the precision of the Exchange’s Rules improves the ability of the public and investors to comprehend them and

account for and comply with them. For similar reasons, proposed non-substantive amendments to other text in Rule 3301B(h) are consistent with the Act because they would improve the readability of the Rule.

Finally, the Exchange believes that various proposed non-substantive clarifications and corrections to the text of the Rule will improve its readability, which is in the interests of market participants and investors, and would promote a more orderly market.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that its proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As a general principle, the proposed changes are reflective of the significant competition among exchanges and non-exchange venues for order flow. In this regard, proposed changes that facilitate enhancements to the Exchange’s System and order entry protocols as well as those that clarify and correct the Exchange’s Rules regarding its Order Types and Attributes, are pro-competitive because they bolster the efficiency, integrity, and overall attractiveness of the Exchange in an absolute sense and relative to its peers.

Moreover, none of the proposed changes will burden intra-market competition among various Exchange Participants. Proposed changes to the Market Maker Peg Order Type, at Rule 3301A(b)(5), and to Rule 3213, will apply equally to all Market Makers. Market Makers will experience no competitive impact from proposals to eliminate their ability to use offsets with Market Maker Peg Orders because Market Makers do not actually utilize offsets. Likewise, Market Makers will feel no competitive effects from proposed corrections and clarifications to the manner in which the Exchange prices and re-prices their Market Maker Peg Orders, except that the changes will benefit Market Makers by ensuring that the Exchange always processes those Orders in a manner that complies with their Market Maker pricing obligations under Rule 3213. Proposed clarifications to the Reserve Order Attribute Rule, at Rule 3301B(h), will have no substantive impact on participants.

Proposed changes to Rule 3213 are intended to correct inadvertent errors and should have no competitive impact on Market Makers. Proposed clarifications and amendments to the Reserve Order Attribute Rule, at Rule 3301B(h), are intended to improve the

precision and readability of the Rule text and will not have any competitive impact on participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁵ and Rule 19b-4(f)(6) thereunder.²⁶

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-Phlx-2020-51 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2020-51. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2020-51 and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-26991 Filed 12-8-20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90556; File No. SR-NYSEArca-2020-101]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Streamline the NYSE Arca Equities Fees and Charges

December 3, 2020

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act"),² and Rule 19b-4 thereunder,³ notice is hereby given that on November 23, 2020, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to streamline the NYSE Arca Equities Fees and Charges ("Fee Schedule") by deleting redundant rule text from Tier 1, Tier 2 and Tier 3 pricing tiers. The Exchange proposes to implement the fee changes effective November 23, 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.

²⁵ 15 U.S.C. 78s(b)(3)(A).

²⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to streamline the Fee Schedule by deleting redundant rule text from Tier 1, Tier 2 and Tier 3 pricing tiers. The Exchange proposes to implement the fee changes effective November 23, 2020.

Currently, each of Tier 1, Tier 2 and Tier 3 pricing tiers provides fees and credits that ETP Holders⁴ can qualify for if they meet the prescribed volume criteria.

Historically, in addition to the fees and credits applicable to each of Tier 1, Tier 2 and Tier 3 pricing tiers, each such tier also included the Basic Rates fees and credits. The Exchange believes this approach has caused more confusion than clarity and proposes to delete the redundant rule text that appears in Tier 1, Tier 2 and Tier 3. Each of the fees and credits proposed for deletion currently appear under the Basic Rates section of the Fee Schedule and would continue to apply to ETP Holders for their activity that falls outside of Tier 1, Tier 2 and Tier 3, as applicable. The Exchange is not proposing any change to the fees and credits applicable to ETP Holders other than to delete redundant text from Tier 1, Tier 2 and Tier 3.

Under Tier 1, ETP Holders that provide liquidity an average daily share volume per month of 0.70% or more of the US consolidated average daily volume ("US CADV")⁵ pay a fee of \$0.0030 per share for orders, including Primary Only ("PO") Orders, routed to any away market that remove liquidity in Tape A, Tape B and Tape C securities, and receive a credit of \$0.0031 per share for orders that provide liquidity in Tape A securities, \$0.0023 per share in Tape B securities,⁶ and \$0.0032 per share in Tape C

securities. Additionally, ETP Holders that qualify for Tier 1 also pay a fee of \$0.0010 per share for Market, Market-On-Close, Limit-On-Close, and Auction-Only Orders executed in a Closing Auction. All other fees and credits under Tier 1 are identical to the fees and credits provided under the Basic Rates section of the Fee Schedule. The Exchange is not proposing to adopt any new fees or credits or remove any current fees or credits under Tier 1 with this proposed rule change.

Accordingly, the Exchange proposes to delete the following fees and credits applicable to Tape A and Tape C securities under Tier 1 of the Fee Schedule, all of which currently appear under Basic Rates on the Fee Schedule:

- \$0.0030 per share (fee) for orders that take liquidity from the Book for Tape A Securities and Tape C Securities.
- For Mid-Point Liquidity ("MPL") orders providing liquidity to the Book:
 - \$0.0015 per share (credit) in Tape A Securities and \$0.0020 per share (credit) in Tape C Securities if provided liquidity in MPL Orders for Tape A, Tape B and Tape C Securities combined ("MPL Adding ADV") during the billing month is at least 3 million shares;
 - \$0.0015 per share (credit) in Tape A Securities and Tape C Securities if MPL Adding ADV during the billing month is at least 1.5 million shares and less than 3 million shares;
 - \$0.0010 per share (credit) in Tape A and Tape C Securities.
- \$0.0030 per share (fee) for MPL orders removing liquidity from the Book that are not designated as "Retail Orders" defined below.
- \$0.0010 per share (fee) for MPL orders removing liquidity from the Book and are designated as "retail" that meet the requirements of Rule 7.44–E(a)(3) but that are not executed in the Retail Liquidity Program ("Retail Orders").
- \$0.0015 per share (fee) for Market and Auction-Only Orders executed in an Early Open Auction, Core Open Auction or Trading Halt Auction, capped at \$20,000 per month per Equity Trading Permit ID.
- No fee or credit for Limit Non-Displayed Orders that provide liquidity to the Book.
- \$0.0030 per share (fee) for Limit Non-Displayed Orders that take liquidity from the Book.

Additionally, the Exchange proposes to delete the following fees and credits applicable to Tape A securities under Tier 1 of the Fee Schedule:

- \$0.0012 per share (credit) for PO Orders that provide liquidity to the NYSE.

- \$0.0010 per share (fee) for PO Orders routed to the NYSE that execute in the opening or closing auction.

Finally, under Tier 1, the Fee Schedule currently provides for a fee of \$0.0029 per share for orders in Tape B securities that take liquidity from the Book, and a fee of \$0.0029 per share for Limit Non-Displayed Orders that take liquidity from the Book. The Exchange proposes to merge these two fees into a single fee by adding the words "including Limit Non-Displayed Limit Orders" to the former fee and deleting the text of the latter from the Fee Schedule. In addition, similar to the statement that currently appears at the end of Tier 3 of the Fee Schedule, the Exchange proposes to add the words "For all other fees and credits, Basic Rates apply" at the end of Tier 1 to clarify that the rates that are proposed for deletion would continue to apply to ETP Holders that qualify for Tier 1 for all of their other trading activity. The Exchange also proposes to delete the following fees and credits applicable to Tape B securities under Tier 1 as each are duplicative and currently appear under Basic Rates:

- No per share (credit) for PO orders routed to NYSE American that provide liquidity to the NYSE American Book.
- MPL orders providing liquidity to the Book:
 - \$0.0020 per share (credit) if MPL Adding ADV during the billing month is at least 3 million shares;
 - \$0.0015 per share (credit) if MPL Adding ADV during the billing month is at least 1.5 million shares and less than 3 million shares;
 - \$0.0010 per share (credit) if MPL Adding ADV during the billing month is less than 1.5 million shares.
- \$0.0030 per share (fee) for MPL orders removing liquidity from the Book that are not designated as Retail Orders.
- \$0.0010 per share (fee) for MPL orders removing liquidity from the Book that are designated as Retail Orders.
- \$0.0015 per share (fee) for Market and Auction-Only Orders executed in an Early Open Auction, Core Open Auction or Trading Halt Auction, capped at \$20,000 per month per Equity Trading Permit ID.
- \$0.0005 per share (fee) for PO Orders routed to NYSE American that execute in the opening or closing auction.
- No fee or credit for Limit Non-Displayed Orders that provide liquidity to the Book.

Under Tier 2, ETP Holders can qualify for the applicable fees and credits in one of two ways. ETP Holders can either provide liquidity an average daily share volume per month of 0.30% or more,

⁴ All references to ETP Holders in connection with this proposed fee change include Market Makers.

⁵ US CADV means United States Consolidated Average Daily Volume for transactions reported to the Consolidated Tape, excluding odd lots through January 31, 2014 (except for purposes of Lead Market Maker pricing), and excludes volume on days when the market closes early and on the date of the annual reconstitution of the Russell Investments Indexes. Transactions that are not reported to the Consolidated Tape are not included in US CADV. See Fee Schedule, footnote 3.

⁶ Pursuant to the LMM Transaction Fees and Credits pricing program, ETP Holders affiliated with LMMs can receive an additional credit when such ETP Holders provide displayed liquidity to the Book based on the number of Less Active ETP Securities in which the LMM is registered as the LMM. See Securities Exchange Act Release No. 87978 (January 15, 2020), 85 FR 3727 (January 22, 2020) (SR-NYSEArca-2020-03).

but less than 0.70% of the US CADV. Alternatively, ETP Holders can (a) provide liquidity an average daily share volume per month of 0.25% or more, but less than 0.70% of the US CADV, (b) execute removing volume in Tape B Securities equal to at least 0.40% of US Tape B CADV, and (c) maintain affiliation with an OTP Holder or OTP Firm that provides an ADV of electronic posted Customer and Professional Customer executions in all issues on NYSE Arca Options (excluding mini options) of at least 0.25% of total Customer equity and ETF option ADV as reported by OCC.

ETP Holders that qualify for Tier 2 pay a fee of \$0.0030 per share for orders, including PO Orders, routed to any away market that remove liquidity in Tape A, Tape B and Tape C securities, and receive a credit of \$0.0029 per share for orders that provide liquidity in Tape A and Tape C securities,⁷ and \$0.0022 per share for orders that provide liquidity in Tape B securities.⁸ All other fees and credits under Tier 2 are identical to the fees and credits provided under the Basic Rates section of the Fee Schedule. The Exchange is not proposing to adopt any new fees or credits or remove any current fees or credits under Tier 2 with this proposed rule change.

Accordingly, the Exchange proposes to delete the following fees and credits applicable to Tape A and Tape C securities under Tier 2 of the Fee Schedule, all of which currently appear under Basic Rates on the Fee Schedule:

- \$0.0030 per share (fee) for orders that take liquidity from the Book.
- For Mid-Point Liquidity (“MPL”) orders providing liquidity to the Book:
 - \$0.0015 per share (credit) in Tape A Securities and \$0.0020 per share

⁷ Under Tier 2, ETP Holders can alternatively qualify for a credit of \$0.0031 per share for orders in Tape A and Tape C securities that provide displayed liquidity if such ETP Holder meets the requirements of Tier 2 and, (1) executes providing volume equal to at least 0.30% of US CADV, (2) executes removing volume equal to at least 0.285% of US CADV, and (3) executes Market-On-Close and Limit-On-Close Orders executed in a Closing Auction of at least 0.075% of US CADV.

⁸ Under Tier 2, ETP Holders can alternatively qualify for a credit of \$0.0024 per share for orders in Tape B securities that provide displayed liquidity if such ETP Holder meets the requirements of Tier 2 and, (1) executes providing volume equal to at least 0.30% of US CADV, (2) executes removing volume equal to at least 0.285% of US CADV, and (3) executes Market-On-Close and Limit-On-Close Orders executed in a Closing Auction of at least 0.075% of US CADV. Pursuant to the LMM Transaction Fees and Credits pricing program, ETP Holders affiliated with LMMs can receive an additional credit when such ETP Holders provide displayed liquidity to the Book in Tape B securities based on the number of Less Active ETP Securities in which the LMM is registered as the LMM.

(credit) in Tape C Securities if provided liquidity in MPL Orders for Tape A, Tape B and Tape C Securities combined (“MPL Adding ADV”) during the billing month is at least 3 million shares;

- \$0.0015 per share (credit) in Tape A Securities and Tape C Securities if MPL Adding ADV during the billing month is at least 1.5 million shares and less than 3 million shares;
- \$0.0010 per share (credit) in Tape A and Tape C Securities.
- \$0.0030 per share (fee) for MPL orders removing liquidity from the Book that are not designated as “Retail Orders” defined below.
- \$0.0010 per share (fee) for MPL orders removing liquidity from the Book that are designated Retail Orders.
- \$0.0015 per share (fee) for Market and Auction-Only Orders executed in an Early Open Auction, Core Open Auction or Trading Halt Auction, capped at \$20,000 per month per Equity Trading Permit ID.
- No fee or credit for Limit Non-Displayed Orders that provide liquidity to the Book.
- \$0.0030 per share (fee) for Limit Non-Displayed Orders that take liquidity from the Book.

Additionally, the Exchange proposes to delete the following fees and credits applicable to Tape A securities under Tier 2 of the Fee Schedule:

- \$0.0012 per share (credit) for PO Orders that provide liquidity to the NYSE.
- \$0.0010 per share (fee) for PO Orders routed to the NYSE that execute in the opening or closing auction.

Finally, under Tier 2, the Fee Schedule currently provides for a fee of \$0.0029 per share for orders in Tape B securities that take liquidity from the Book, and a fee of \$0.0029 per share for Limit Non-Displayed Orders that take liquidity from the Book. The Exchange proposes to merge these two fees into a single fee by adding the words “including Limit Non-Displayed Limit Orders” to the former fee and deleting the text of the latter from the Fee Schedule. In addition, similar to the statement that currently appears at the end of Tier 3 of the Fee Schedule, the Exchange proposes to add the words “For all other fees and credits, Basic Rates apply” at the end of Tier 2 to clarify that the rates that are proposed for deletion would continue to apply to ETP Holders that qualify for Tier 2 for all of their other trading activity. The Exchange also proposes to delete the following fees and credits applicable to Tape B securities under Tier 2 as each are duplicative and currently appear under Basic Rates:

- No per share (credit) for PO orders routed to NYSE American that provide liquidity to the NYSE American Book.

- MPL orders providing liquidity to the Book:

- \$0.0020 per share (credit) if MPL Adding ADV during the billing month is at least 3 million shares;
- \$0.0015 per share (credit) if MPL Adding ADV during the billing month is at least 1.5 million shares and less than 3 million shares;
- \$0.0010 per share (credit) if MPL Adding ADV during the billing month is less than 1.5 million shares.
- \$0.0030 per share (fee) for MPL orders removing liquidity from the Book that are not designated as Retail Orders.
- \$0.0010 per share (fee) for MPL orders removing liquidity from the Book that are designated as Retail Orders.
- \$0.0015 per share (fee) for Market and Auction-Only Orders executed in an Early Open Auction, Core Open Auction or Trading Halt Auction, capped at \$20,000 per month per Equity Trading Permit ID.
- \$0.0005 per share (fee) for PO Orders routed to NYSE American that execute in the opening or closing auction.

- No fee or credit for Limit Non-Displayed Orders that provide liquidity to the Book.

Under Tier 3, ETP Holders that provide liquidity an average daily share volume per month of 0.20% or more, but less than 0.30% of the US CADV pay a fee of \$0.0030 per share for orders, including PO Orders, routed to any away market that remove liquidity in Tape A, Tape B and Tape C securities, and receive a credit of \$0.0025 per share for orders that provide liquidity in Tape A and Tape C securities,⁹ or and \$0.0022 per share in Tape B securities.¹⁰ Additionally, ETP Holders that qualify for Tier 3 also pay a fee of \$0.0010 per share for Market, Market-On-Close, Limit-On-Close, and Auction-Only Orders executed in a Closing Auction. All other fees and credits under Tier 3 are identical to the fees and credits provided under the Basic Rates section of the Fee Schedule. The Exchange is

⁹ Under Tier 3, ETP Holder can also receive a credit of \$0.0027 per share for orders in Tape A and Tape C securities if the ETP Holder meets the requirements of Tier 3 and its ADV of executed orders that provide liquidity is at least 0.05% of US CADV more than the ETP Holder’s ADV of executed orders that provide liquidity as a percent of US CADV in May 2019.

¹⁰ Pursuant to the LMM Transaction Fees and Credits pricing program, ETP Holders affiliated with LMMs can receive an additional credit when such ETP Holders provide displayed liquidity to the Book based on the number of Less Active ETP Securities in which the LMM is registered as the LMM.

not proposing to adopt any new fees or credits or remove any current fees or credits under Tier 3 with this proposed rule change.

Accordingly, the Exchange proposes to delete the following fees and credits applicable to Tape A and Tape C securities under Tier 3 of the Fee Schedule, all of which currently appear under Basic Rates on the Fee Schedule:

- \$0.0030 per share (fee) for orders that take liquidity from the Book.
- No fee or credit for Limit Non-Displayed Orders that provide liquidity to the Book.
- \$0.0030 per share (fee) for Limit Non-Displayed Orders that take liquidity from the Book.

Additionally, the Exchange proposes to delete the following fee applicable to Tape A securities under Tier 3 of the Fee Schedule:

- \$0.0010 per share (fee) for PO Orders routed to the NYSE that execute in the opening or closing auction.

Finally, under Tier 3, the Fee Schedule currently provides for a fee of \$0.0029 per share for orders in Tape B securities that take liquidity from the Book, and a fee of \$0.0029 per share for Limit Non-Displayed Orders that take liquidity from the Book. The Exchange proposes to merge these two fees into a single fee by adding the words “including Limit Non-Displayed Limit Orders” to the former fee and deleting the text of the latter from the Fee Schedule. The Exchange also proposes to delete the following fees and credits applicable to Tape B securities under Tier 3 as it is duplicative and currently appears under Basic Rates:

- No fee or credit for Limit Non-Displayed Orders that provide liquidity to the Book.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹² in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed rule change to streamline the

Fee Schedule by deleting redundant rule text is reasonable because each of the fees and credits proposed for deletion currently appear under the Basic Rates section of the Fee Schedule which is the more appropriate place for such fees and credits. The Exchange believes providing the base rates under the Basic Rates section of the Fee Schedule would promote clarity to the Fee Schedule and reduce confusion to ETP Holders as to which fees and credits are applicable to their trading activity on the Exchange. The Exchange believes it is reasonable to delete the redundant fees and credits from Tier 1, Tier 2 and Tier 3 of the Fee Schedule and therefore, streamline the Fee Schedule to promote clarity and reduce confusion as to the applicability of fees and credits that ETP Holders would be subject to. The Exchange believes deleting redundant fees and credits would also simplify the Fee Schedule. The Exchange believes that deleting redundant fees and credits from Tier 1, Tier 2 and Tier of the Fee Schedule is equitable and not unfairly discriminatory because the resulting streamlined Fee Schedule would continue to apply to ETP Holders as it does currently because the Exchange is not adopting any new fees or credits or removing any current fees or credits from the Fee Schedule. All ETP Holders would continue to be subject to the same fees and credits that currently apply to them.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,¹³ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition. The Exchange's proposal to delete redundant fees and credits from Tier 1, Tier 2 and Tier 3 of the Fee Schedule will not place any undue burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because all ETP Holders would continue to be subject to the same fees and credits that currently apply to them. To the extent the proposed rule change places a burden on competition, any such burden would be outweighed by the fact that a streamlined Fee Schedule would promote clarity and reduce confusion

with respect to the fees and credits that ETP Holders would be subject to.

Intermarket Competition. The Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. Market share statistics provide ample evidence that price competition between exchanges is fierce, with liquidity and market share moving freely from one execution venue to another in reaction to pricing changes.

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)¹⁴ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁵ 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)¹⁶ 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:

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(2).

¹⁶ 15 U.S.C. 78s(b)(2)(B).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4) and (5).

¹³ 15 U.S.C. 78f(b)(8).

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-2020-101 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-2020-101. 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-2020-101, and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020-26990 Filed 12-8-20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90560; File No. SR-NYSEArca-2020-35]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Schedule of Fees and Rebates

December 3, 2020.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act"),² and Rule 19b-4 thereunder,³ notice is hereby given that on December 1, 2020, NYSE National, Inc. ("NYSE National" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees and Rebates ("Fee Schedule") to modify Adding Tier 2 and Removing Tier 1. The Exchange proposes to implement the rule change on December 1, 2020. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to modify Adding Tier 2 and Removing Tier 1.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing and liquidity-removing orders by offering further incentives for ETP Holders to send additional displayed and non-displayed liquidity to the Exchange. The proposed changes also respond to the current volatile market environment that has resulted in unprecedented average daily volumes, which is related to the ongoing spread of the novel coronavirus ("COVID-19").

The Exchange proposes to implement the rule change on December 1, 2020.

Current Market and Competitive Environment

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. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."⁴

While Regulation NMS has enhanced competition, it has also fostered a "fragmented" market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that "such competition can lead to the fragmentation of order flow in that stock."⁵ Indeed, equity trading is currently dispersed across 16 exchanges,⁶ 31 alternative trading

⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (S7-10-04) (Final Rule) ("Regulation NMS").

⁵ See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

⁶ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

¹⁷ 17 CFR 200.30-3(a)(12).

systems,⁷ and numerous broker-dealer internalizers and wholesalers. Based on publicly-available information, no single exchange has more than 16% of the market share of executed volume of equity trades (whether excluding or including auction volume).⁸ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange's share of executed volume of equity trades in Tapes A, B and C securities is less than 2%.⁹

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain products, in response to fee changes. While it is not possible to know a firm's reason for moving order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange trading venues to which a firm routes order flow. These fees vary month to month, and not all are publicly available. With respect to non-marketable order flow

that would provide liquidity on an exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange utilizes a "taker-maker" or inverted fee model to attract orders that provide liquidity at the most competitive prices. Under the taker-maker model, offering rebates for taking (or removing) liquidity increases the likelihood that market participants will send orders to the Exchange to trade with liquidity providers' orders. This increased taker order flow provides an incentive for market participants to send orders that provide liquidity. The Exchange generally charges fees for order flow that provides liquidity. These fees are reasonable due to the additional marketable interest (in part attracted by the Exchange's rebate to remove liquidity) with which those order flow providers can trade.

Proposed Rule Change

To respond to this competitive environment, the Exchange proposes the following changes to its Fee Schedule designed to provide order flow providers with incentives to route liquidity-providing order flow to the Exchange. As described above, ETP Holders with liquidity-providing order flow have a choice of where to send that order flow.

Proposed Change To Adding Tier 2

Under current Adding Tier 2, ETP Holders that add liquidity to the Exchange in securities with a per share price of \$1.00 or more and that have at least 0.15% or more of ADV of adding liquidity as a percentage of US CADV are charged a fee of \$0.0022 per share for adding displayed orders in Tape A, B, and C securities. The Exchange proposes to revise Adding Tier 2 by modifying the requirements to qualify for the tier, as follows (proposed additions underlined, deletions bracketed):

Tier requirement	Adding rate
Adding Tier 2: At least [0.15%] <u>0.13%</u> or more Adding ADV as a % of US CADV	Displayed liquidity: Tapes A, B and C: \$0.0022.

The Exchange does not propose any changes to the Adding Rate for Adding Tier 2, and the rate for Orders that add liquidity under the Adding Tier 2 would remain unchanged.

The Exchange believes that lowering the ADV requirement for Adding Tier 2 from 0.15% to 0.13% or more Adding ADV as a percentage of US CADV will allow greater numbers of ETP Holders to potentially qualify for the tier, and will incentivize more ETP Holders to route their liquidity-providing order flow to the Exchange in order to qualify for the tier. This in turn would support the quality of price discovery on the Exchange and provide additional price improvement opportunities for incoming orders. The Exchange believes that by correlating the amount of the fee to the level of orders sent by an ETP Holder that add liquidity, the Exchange's fee structure would

incentivize ETP Holders to submit more orders that add liquidity to the Exchange, thereby increasing the potential for price improvement to incoming marketable orders submitted to the Exchange.

As noted above, the Exchange operates in a competitive environment, particularly as relates to attracting non-marketable orders, which add liquidity to the Exchange. Currently, only a few ETP Holders have qualified for Adding Tier 2. The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. Without having a view of ETP Holders' activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any additional ETP Holders directing orders to the Exchange in order to qualify for the

revised Adding Tier 2 rate. However, the Exchange believes there are multiple additional ETP Holders that could qualify for the revised Adding Tier 2, if they so choose, based on their current trading profiles.

Proposed Changes To Removing Tier 1

Under current Removing Tier 1, the Exchange provides a rebate of \$0.0030 per share to ETP Holders that remove liquidity from the Exchange in securities with a per share price of \$1.00 or more and that have (i) a combined Adding ADV and Removing ADV of at least 0.20% as a % of US CADV, and (ii) 250,000 of Adding ADV.

The Exchange proposes to revise Removing Tier 1 by modifying the requirements to qualify for the tier, as follows (proposed additions underlined, deletions bracketed):

Tier requirement	Removing rate
Removing Tier 1: At least [0.20%] <u>0.18%</u> Adding ADV and Removing ADV combined as a % of US CADV and 250,000 Adding ADV	(\$0.0030)

⁷ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. Although 54 alternative trading systems were registered with the Commission as of

July 29, 2019, only 31 are currently trading. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

⁸ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

⁹ See *id.*

The Exchange does not propose any changes to the Removing Rate for Orders that removed liquidity that qualify for Removing Tier 1, and the rate for such orders under Removing Tier 1 would remain unchanged.

The Exchange believes that lowering the combined Adding ADV and Removing ADV requirement for Removing Tier 1 from 0.20% to 0.18% as a percentage of US CADV for ETP Holders that also have 250,000 Adding ADV will allow greater numbers of ETP Holders to qualify for the tier, and will incentivize more ETP Holders to route liquidity-removing order flow to the Exchange in order to qualify for the tier. This in turn would support the quality of price discovery on the Exchange and provide additional price improvement opportunities for incoming orders.

As described above, ETP Holders with liquidity-removing order flow have a choice of where to send that order flow. The Exchange believes that as a result of the proposed change to Removing Tier 1, more ETP Holders will choose to route their liquidity-removing order flow to the Exchange in order to qualify for the credits for removing liquidity associated with Removing Tier 1 given that the requirements to qualify have been reduced.

As noted, the Exchange operates in a competitive environment. Currently, only a few ETP Holders qualify for Removing Tier 1. The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. Without having a view of ETP Holders' activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any additional ETP Holders directing orders to the Exchange in order to qualify for the revised Removing Tier 1 rate. However, the Exchange believes there are multiple ETP Holders that could qualify for the revised Removing Tier 1, if they so choose, based on their current trading profiles.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any problems that ETP Holders would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ in

particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Change Is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any one of the registered exchanges or non-exchange trading venues that a firm routes order flow to, which vary month to month, and not all of which are publicly known. With respect to non-marketable order flow that would provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

Given the current competitive environment, the Exchange believes that the proposal represents a reasonable attempt to attract additional order flow to the Exchange. Specifically, the Exchange believes that the proposed revisions to Adding Tier 2 and Removing Tier 1 are reasonable because they would promote execution opportunities for ETP Holders routing order flow to the Exchange.

The Exchange believes that the proposal as a whole represents a reasonable effort to promote price improvement and enhanced order execution opportunities for ETP Holders. All ETP Holders would benefit from the greater amounts of liquidity on the Exchange, which would represent a wider range of execution opportunities.

The Proposal Is an Equitable Allocation of Fees

The Exchange believes the proposed rule change equitably allocates its fees among its market participants. The proposed change would continue to encourage ETP Holders to both submit additional liquidity to the Exchange and execute orders on the Exchange, thereby contributing to robust levels of liquidity, to the benefit of all market participants.

The Exchange believes that modifying Adding Tier 2 and Removing Tier 1 would encourage the submission and removal of additional liquidity from the Exchange, thus enhancing order execution opportunities for ETP Holders from the substantial amounts of liquidity present on the Exchange. All ETP Holders would benefit from the greater amounts of liquidity that would be present on the Exchange, which would provide greater execution opportunities.

The Exchange believes the proposed rule change would also improve market quality for all market participants seeking to remove liquidity on the Exchange and, as a consequence, attract more liquidity to the Exchange, thereby improving market-wide quality. The proposal neither targets nor will it have a disparate impact on any particular category of market participant.

Specifically, the Exchange believes that the proposal constitutes an equitable allocation of fees because all similarly situated ETP Holders and other market participants would be eligible for the same general and tiered rates and would be eligible for the same fees and credits. Moreover, the proposed change is equitable because the revised fees would apply equally to all similarly situated ETP Holders.

The Proposal Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

Moreover, the proposal neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that the proposal does not permit unfair discrimination because the proposal would be applied to all similarly situated ETP Holders and all ETP Holders would be subject to the same modified Adding Tier 2 and Removing Tier 1. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by the proposed allocation of fees and credits.

The Exchange further believes that the proposed changes would not permit unfair discrimination among ETP Holders because the tiered rates are available equally to all ETP Holders. As described above, in today's competitive marketplace, order flow providers have a choice of where to direct liquidity-providing order flow, and the Exchange believes there are additional ETP Holders that could qualify if they chose

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) & (5).

to direct their order flow to the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,¹² the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional liquidity and order flow to a public exchange, thereby enhancing order execution opportunities for ETP Holders. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering 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 to the Exchange. As described above, the Exchange believes that the proposed change would provide additional incentives for market participants to route liquidity-providing and liquidity-removing orders to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages ETP Holders to send orders, thereby contributing to robust levels of liquidity. The proposed revised fees would be available to all similarly-situated market participants, and thus, 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 choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange's market share of intraday trading in Tapes A, B and C securities is less than 2%. In such an environment, the Exchange must continually adjust its fees and rebates to

remain competitive with other exchanges and off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)¹⁴ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁵ 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)¹⁶ 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-NYSENAT-2020-35 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-NYSENAT-2020-35. 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-NYSENAT-2020-35, and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020-26993 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

¹² 15 U.S.C. 78f(b)(8).

¹³ Regulation NMS, 70 FR at 37498-99.

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(2).

¹⁶ 15 U.S.C. 78s(b)(2)(B).

¹⁷ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90554; File No. SR-ICEEU-2020-015]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Delivery Procedures

December 3, 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 25, 2020, ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule changes described in Items I, II, and III below, which Items have been primarily prepared by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(4)(ii)⁴ thereunder, such that the proposed rule change was immediately effective upon filing with the Commission. 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 principal purpose of the proposed amendments is for ICE Clear Europe to amend Part Q, Part R and Part B of its Delivery Procedures (the “Delivery Procedures”) in connection to make clarifications and updates with respect to certain delivery specifications.⁵

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe 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

(a) Purpose

ICE Clear Europe is proposing to amend Part Q, Part R and Part B of its Delivery Procedures.

The Part Q delivery specifications, which apply to the ICE Futures Europe White Sugar Futures Contracts, would be amended to provide that the contract relates to sugar of any origin of the crop or production current on the first day of the delivery period (instead of referencing the time of delivery). The clarification would facilitate identification of sugar eligible for delivery under the contract. Further, the related delivery timetable would be amended to provide that the document notice day (*i.e.*, the day on which delivery document notifications are made via Guardian (or a successor system)) would be 20 days after the date of issue of the bill of lading (whether the date of issue is the same as or later than the date of completion of loading of the vessel), rather than 20 days after the vessel has completed loading.

The Part R delivery specifications, for ICE Futures Europe Wheat Futures Contracts, would be amended to provide that wheat shall be delivered of an EU or UK origin, rather than an EC origin, to account for the UK leaving the EU.

The Part B delivery specifications, for ICE Futures Europe Gasoil Futures Contracts, would be amended to provide that if the Buyer chooses the coaster delivery method, the maximum size would be 15,000 DWT instead of 10,000 DWT.

(b) Statutory Basis

Section 17A(b)(3)(F) of the Act⁶ requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The proposed amendments are designed to clarify and update certain delivery specifications relating to sugar, wheat and gasoil futures contracts, consistent with the ICE Futures Europe Rules. These changes are intended to facilitate continued clearing and physical settlement of the contracts through enhancements to the delivery

requirements and delivery process. ICE Clear Europe is not otherwise proposing to change the contractual or delivery terms for these contracts, or its financial resources, risk management, systems and operational arrangements for these contracts (and ICE Clear Europe believes such terms and arrangements are sufficient to continue support continued clearing of these contracts). As a result, in ICE Clear Europe’s view, the amendments would be consistent with the prompt and accurate clearance and settlement of the ICE Futures Europe White Sugar Futures Contracts, ICE Futures Europe Wheat Futures Contracts and ICE Futures Europe Gasoil Futures Contracts, and the protection of investors and the public interest consistent with the requirements of Section 17A(b)(3)(F) of the Act.⁷ (In ICE Clear Europe’s view, the amendments would not affect the safeguarding of funds or securities in the custody or control of the clearing agency or for which it is responsible, within the meaning of Section 17A(b)(3)(F).⁸)

In addition, Rule 17Ad-22(e)(10)⁹ requires that each covered clearing agency establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor and manage the risks associated with such physical deliveries. As discussed above, the amendments would clarify and update the delivery specifications relating to sugar, wheat and gasoil futures contracts, consistent with the ICE Futures Europe Rules. The amendments would thus clarify and update the role and responsibilities of the Clearing House and Clearing Members in the physical delivery process. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad-22(e)(10).¹⁰

(B) Clearing Agency’s Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule changes would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The changes are being proposed in order to update the Delivery Procedures in connection with the UK leaving the EU and to provide general drafting clarifications and updates to delivery specifications. The

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)(ii).

⁵ Capitalized terms used but not defined herein have the meaning specified in the ICE Clear Europe Clearing Rules (the “Rules”).

⁶ 15 U.S.C. 78q-1(b)(3)(F).

⁷ 15 U.S.C. 78q-1(b)(3)(F).

⁸ 15 U.S.C. 78q-1(b)(3)(F).

⁹ 17 CFR 240.17Ad-22(e)(10).

¹⁰ 17 CFR 240.17Ad-22(e)(10).

amendments would not otherwise affect the terms of the contracts. ICE Clear Europe does not believe the amendments would adversely affect competition among Clearing Members, materially affect the cost of clearing, adversely affect access to clearing in the new contracts for Clearing Members or their customers, or otherwise adversely affect competition in clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments 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 has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and paragraph (f) of Rule 19b-4¹² thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-ICEEU-2020-015 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-ICEEU-2020-015. 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 such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at <https://www.theice.com/notices/Notices.shtml?regulatoryFilings>.

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-ICEEU-2020-015 and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020-26988 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90555; File No. SR-MEMX-2020-14]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

December 3, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

"Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 30, 2020, MEMX LLC ("MEMX" 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the fee schedule applicable to Members³ pursuant to Exchange Rules 15.1(a) and (c) in order to (i) provide pricing for Retail Orders⁴ that add displayed liquidity and are executed on the Exchange; and (ii) provide pricing for transactions in securities priced below \$1.00 per share that are executed on the Exchange. The text of the proposed rule change is provided in Exhibit 5.

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 modify its fee schedule to adopt the fees and rebates described herein applicable to Retail Orders that add displayed liquidity to the Exchange ("Added

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

⁴ A "Retail Order" means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Exchange Rule 11.21(a).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f).

¹³ 17 CFR 200.30-3(a)(12).

Displayed Retail Volume”) and transactions in securities priced below \$1.00 per share (“Sub-Dollar Securities”) that are executed on the Exchange, effective as of December 1, 2020.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.⁵ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents less than 1% of the overall market share.⁶

Rebate for Added Displayed Retail Volume

The Exchange recently adopted rules enabling Members to apply for status as Retail Member Organizations,⁷ and once approved as such by the Exchange, to designate qualifying orders as Retail Orders to the Exchange.⁸ Currently, there are no pricing incentives for Retail Orders, and Retail Orders are subject to the same standard fees and rebates applicable as if such orders were not designated as Retail Orders.

The Exchange proposes to modify its fee schedule to adopt pricing for executions of Added Displayed Retail Volume and to adopt a fee code applicable to executions of all Retail Orders. Specifically, the Exchange proposes to adopt a rebate of \$0.0034 per share for executions of Added Displayed Retail Volume transactions in

securities traded on the Exchange priced at or above \$1.00 per share (the “ADRV Rebate”).⁹ The Exchange notes that the proposed ADRV Rebate would not apply, and that the proposed standard pricing with respect to transactions in Sub-Dollar Securities, as further described below, would apply, to executions of Added Displayed Retail Volume transactions in Sub-Dollar Securities. The Exchange also notes that the proposed ADRV Rebate would not apply to executions of Retail Orders in securities priced at or above \$1.00 per share that add non-displayed liquidity to the Exchange or remove liquidity from the Exchange, and instead, the fees and rebates otherwise applicable to such transactions under the current fee schedule would continue to apply. Thus, under the proposal, an execution of a Retail Order in a security priced at or above \$1.00 per share that adds non-displayed liquidity to the Exchange would receive a rebate of \$0.0020 per share, which is the standard rebate for adding non-displayed liquidity to the Exchange, and an execution of a Retail Order in a security priced at or above \$1.00 per share that removes liquidity from the Exchange would be charged a fee of \$0.0025 per share, which is the standard fee for removing liquidity from the Exchange.

Pricing for Transactions in Sub-Dollar Securities

The Exchange currently does not charge any fees or provide any rebates for transactions in Sub-Dollar Securities that are executed on the Exchange. The Exchange now proposes to charge a standard fee of 0.30% of the total dollar value of any transaction (including a Retail Order) in Sub-Dollar Securities that removes liquidity from the Exchange (“Removed Sub-Dollar Volume”).¹⁰ The Exchange also

proposes to provide a standard rebate of 0.30% of the total dollar value of any transaction (including a Retail Order) in Sub-Dollar Securities that adds liquidity, displayed or non-displayed, to the Exchange (“Added Sub-Dollar Volume”).¹¹ The proposed pricing for Removed Sub-Dollar Volume and Added Sub-Dollar Volume would only apply to transactions that are executed on the Exchange, and as such there would continue to be no fee charged or rebate provided for transactions in Sub-Dollar Securities that are routed to and executed at another market center.

The proposed rebate for executions of Added Sub-Dollar Volume is intended to increase order flow in Sub-Dollar Securities to the Exchange by incentivizing Members to increase the liquidity-providing orders in Sub-Dollar Securities they submit to the Exchange, which would support price discovery on the Exchange and provide additional liquidity for incoming orders. The proposed fee for executions of Removed Sub-Dollar Volume is intended to be a direct offset of the rebate provided for Added Sub-Dollar Volume so that the Exchange may remain revenue neutral with respect to such transactions while attempting to compete with other venues to attract this order flow.

The proposed rule change does not include different fees or rebates for Retail Orders or transactions in Sub-Dollar Securities that depend on the amount of orders submitted to, and/or transactions executed on or through, the Exchange. Accordingly, all fees and rebates described above are applicable to all Members, regardless of the overall volume of a Member’s trading activities on the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹³ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is

⁵ Market share percentage calculated as of November 24, 2020. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

⁶ *Id.*

⁷ A “Retail Member Organization” or “RMO” is a Member (or a division thereof) that has been approved by the Exchange under Exchange Rule 11.21 to submit Retail Orders. See Exchange Rule 11.21(a).

⁸ See Securities Exchange Act Release No. 90278 (October 28, 2020), 85 FR 69667 (November 3, 2020) (SR-MEMX-2020-13). Retail Orders are only designated as such to the Exchange and are not identified as such on the Exchange’s market data feeds or otherwise identifiable as such to other market participants. See *id.*

⁹ This proposed pricing is referred to by the Exchange as “Added displayed volume, Retail Order” on the fee schedule. The Exchange is also proposing to adopt new fee code “r” to be appended as the second character after the applicable first fee code character for executions of all Retail Orders. The Exchange notes that, as indicated on the current fee schedule, the Exchange also appends as an additional character at the end of its fee codes either “A” or “B” to indicate whether an execution occurred: (A) In a security priced at or above \$1.00 per share or (B) in a Sub-Dollar Security. Accordingly, under the proposal, an execution of an Added Displayed Retail Volume transaction in a security priced at or above \$1.00 per share would be assigned a fee code of “BrA”, “DrA” or “JrA”, as applicable, by the Exchange. Similarly, under the proposal, an execution of an Added Displayed Retail Volume transaction in a Sub-Dollar Security would be assigned a fee code of “BrB”, “DrB” or “JrB”, as applicable, by the Exchange.

¹⁰ This pricing is referred to by the Exchange on the fee schedule under the existing description

“Removed volume from MEMX Book” with a fee code of “RB” or “RrB”, as applicable, assigned by the Exchange.

¹¹ This pricing is referred to by the Exchange on the fee schedule under the existing description “Added displayed volume”, the existing description “Added non-displayed volume” or the proposed new description “Added displayed volume, Retail Order”, as applicable, with a fee code of “BB”, “BrB”, “DB”, “DrB”, “JB”, “JrB”, “HB”, “HrB”, “MB” or “MrB”, as applicable, assigned by the Exchange.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4) and (5).

not designed to unfairly discriminate between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. 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, 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.”¹⁴

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange’s transaction fees and rebates, including with respect to Added Displayed Retail Volume and transactions in Sub-Dollar Securities, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposed rule change reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members and investors. The Exchange notes that the proposal does not include different fees or rebates for Retail Orders or transactions in Sub-Dollar Securities depending on the amount of orders submitted to, and/or transactions executed on or through, the Exchange. Accordingly, the proposed pricing structure is applicable to all Members, regardless of the overall volume of a Member’s trading activities on the Exchange.

Rebate for Added Displayed Retail Volume

The Exchange believes that the proposed ADRV Rebate is reasonable, equitable, and consistent with the Act because it would incentivize Members to submit additional displayed Retail Orders to the Exchange, which would enhance liquidity in Retail Orders on the Exchange and promote price discovery. The Exchange believes that this increased displayed liquidity would potentially stimulate further price competition for Retail Orders, thereby deepening the Exchange’s liquidity pool, enhancing market quality to the benefit of all Members and investors by providing more trading opportunities, supporting price discovery, and subjecting such transactions to the Exchange’s transparency, regulation, and oversight as a registered national securities exchange.

The Exchange notes that a significant percentage of the orders of individual (*i.e.*, retail) investors are executed over-the-counter.¹⁵ In addition, other exchanges maintain special pricing to encourage entry of retail orders to their markets, in part, to compete against the over-the-counter market.¹⁶ Without such pricing, the Exchange is not currently competitive with such other exchanges. The Exchange believes that it is thus appropriate to create a financial incentive to bring more Retail Order flow to the Exchange. The Exchange believes that investor protection and transparency is promoted by rewarding displayed liquidity on exchanges, including the Exchange. By offering a proposed ADRV Rebate of \$0.0034, which is higher than the Exchange’s standard rebate of \$0.0029 for executions of added displayed volume, the Exchange believes it will encourage use of Retail Orders, while maintaining consistency with the Exchange’s overall pricing philosophy of encouraging displayed liquidity. The Exchange places a higher value on displayed liquidity because the Exchange believes that displayed liquidity is a public good that benefits investors generally by providing greater price transparency and enhancing public price discovery, which ultimately lead to substantial reductions in transaction costs.

Furthermore, the Exchange believes that the proposed ADRV Rebate of \$0.0034 per share is reasonable and equitable because it is comparable to,

and competitive with, the rebates provided by other exchanges for added displayed retail liquidity in securities priced at or above \$1.00 per share.¹⁷ The Exchange also believes that providing a rebate to the liquidity adder, and charging a fee to the liquidity remover, with respect to the execution of a displayed Retail Order is reasonable, equitable and not unfairly discriminatory because it is designed, and the Exchange believes it is an appropriate effort, to incentivize displayable liquidity provision on the Exchange, thereby contributing to price discovery and price formation, consistent with the overall goal of enhancing market quality. Moreover, the Exchange notes that several other exchanges provide rebates to the liquidity adder, and charge fees to the liquidity remover, with respect to executions of retail orders, and that this aspect of the proposed ADRV Rebate does not raise any new or novel issues that have not previously been considered by the Commission in connection with the fees and rebates of other exchanges.¹⁸

The Exchange understands that Section 6(b)(5) of the Act¹⁹ prohibits an exchange from establishing rules that are designed to permit unfair discrimination between market participants. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of Retail Order flow from

¹⁷ See, e.g., The Nasdaq Stock Market LLC equities trading fee schedule on its public website (available at <http://www.nasdaqtrader.com/trader.aspx?id=pricelisttrading2>), which reflects rebates to add displayed designated retail liquidity ranging from \$0.00325–\$0.0033 per share depending on the percentage add to total volume ratio, and a standard fee that generally applies to retail orders that remove liquidity of \$0.0030 per share; the NYSE Arca, Inc. (“NYSE Arca”) equities trading fee schedule on its public website (available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf), which reflects rebates for retail orders that provide displayed liquidity ranging from \$0.0033–\$0.0038 per share depending on the applicable tier; the Cboe EDGX Exchange, Inc. (“Cboe EDGX”) equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/), which reflects rebates for retail orders that add liquidity ranging from \$0.0032–\$0.0037 per share depending on the applicable tier, and a standard fee that generally applies to retail orders that remove liquidity of \$0.0027 per share.

¹⁸ *Id.*

¹⁹ 15 U.S.C. 78f(b)(5).

¹⁴ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁵ See, e.g., SEC Staff Report on Algorithmic Trading in U.S. Capital Markets (August 5, 2020), available at https://www.sec.gov/files/Algo_Trading_Report_2020.pdf.

¹⁶ See *infra* note 17.

other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around Retail Order executions such that retail investors would receive better rebates on the Exchange than they do currently in order to encourage entry of retail orders to the Exchange. Accordingly, the Exchange believes the proposed ADRV Rebate is not unfairly discriminatory.

Pricing for Transactions in Sub-Dollar Securities

The Exchange believes that the proposed changes with respect to pricing for executions of transactions in Sub-Dollar Securities would incentivize submission of additional liquidity in Sub-Dollar Securities to the Exchange through the proposed rebate of 0.30% of the total dollar value of any Added Sub-Dollar Volume transactions, thereby promoting price discovery and transparency, and enhancing order execution opportunities for all Members. The Exchange believes that the proposed rebate for Added Sub-Dollar Volume is reasonable because it would incentivize Members to direct more order flow in Sub-Dollar Securities to the Exchange. The Exchange notes that other exchanges provide rebates for liquidity-adding transactions in Sub-Dollar Securities, but that these are denominated in dollar amounts per share rather than a percentage of the total dollar amount of the transaction.²⁰ The Exchange expects that the proposed rebate for Added Sub-Dollar Volume transactions would typically result in a higher overall credit for a given transaction than the rebates offered by other exchanges, although the Exchange notes that it may also result in a lower overall credit for such transaction depending on the number of shares traded and the total dollar value of the transaction.

The Exchange also believes that the proposed fee for Removed Sub-Dollar Volume is reasonable because it is in line with the fees charged by other exchanges for liquidity-removing transactions in Sub-Dollar Securities.²¹

²⁰ See, e.g., the Cboe EDGX equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/), which reflects a rebate of \$0.00009 per share for liquidity-adding transactions in securities priced below \$1.00 per share; the NYSE Arca equities trading fee schedule on its public website (available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf), which reflects a rebate of \$0.00004 per share for liquidity-adding transactions in securities priced below \$1.00 per share.

²¹ See, e.g., the Cboe EDGX equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/), which reflects a fee of 0.30% of the total dollar value of the transaction for liquidity-removing transactions in securities priced below \$1.00 per share; the Cboe BZX Exchange, Inc. equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/), which reflects a fee of 0.295% of the total dollar value for liquidity-taking transactions in securities priced below \$1.00 per share.

The Exchange believes that, given the competitive environment in which the Exchange currently operates, the proposed pricing structure, with an offsetting fee and rebate, with respect to executions of transactions in Sub-Dollar Securities, is a reasonable attempt to increase liquidity in Sub-Dollar Securities on the Exchange and improve the Exchange's market share relative to its competitors while remaining revenue neutral with respect to such transactions.

The Exchange also believes that the proposed fee and rebate structure applicable to executions of transactions in Sub-Dollar Securities is equitably allocated and not unfairly discriminatory because it applies equally to all Members and is reasonably related to the value of the Exchange's market quality associated with higher volume. A number of Members currently transact in Sub-Dollar Securities and they, along with additional Members that choose to direct order flow in Sub-Dollar Securities to the Exchange, would all qualify for the proposed fee and rebate. The Exchange believes that maintaining or increasing the proportion of transactions in Sub-Dollar Securities that are executed on the Exchange would benefit all investors by deepening the Exchange's liquidity pool, which would support price discovery, promote market transparency and improve investor protection, further rendering the proposed changes reasonable and equitable.

In conclusion, the Exchange also submits that its proposed fee structure satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act for the reasons discussed above in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the

markets.cboe.com/us/equities/membership/fee_schedule/edgx/), which reflects a fee of 0.30% of the total dollar value of the transaction for liquidity-removing transactions in securities priced below \$1.00 per share; the Cboe BZX Exchange, Inc. equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/), which reflects a fee of 0.295% of the total dollar value for liquidity-taking transactions in securities priced below \$1.00 per share.

burden on competition, the Exchange believes that its transaction pricing, including with respect to Retail Orders and transactions in Sub-Dollar Securities, is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow, including Retail Orders and orders in Sub-Dollar Securities, to the Exchange, thereby promoting market depth, enhanced execution opportunities, as well as price discovery and transparency for all Members. Furthermore, the Exchange believes that the proposed changes would allow the Exchange to compete more ably with other execution venues by providing more competitive pricing for Added Displayed Retail Volume and transactions in Sub-Dollar Securities, thereby making it a more desirable destination venue for its customers. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."²²

Intramarket Competition

The Exchange believes that the proposed changes would incentivize market participants to direct more order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all Members. The proposed fees and rebates for Added Displayed Retail Volume and transactions in Sub-Dollar Securities would be available to all similarly-situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. As such, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or

²² See *supra* note 14.

appropriate in furtherance of the purposes of the Act.

Intermarket Competition

The Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading, and the Exchange currently represents less than 1% of the overall market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to Added Displayed Retail Volume and transactions in Sub-Dollar Securities, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes are competitive proposals through which the Exchange is seeking to encourage certain order flow to be sent to the Exchange.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."²³ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. SEC*, 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'. . . ."²⁴ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

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 Act²⁵ and Rule 19b-4(f)(2)²⁶ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-MEMX-2020-14 on the subject line.

²⁴ *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-NYSE-2006-21)).

²⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁶ 17 CFR 240.19b-4(f)(2).

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-MEMX-2020-14. 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-MEMX-2020-14, and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020-26989 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-317, OMB Control No. 3235-0360]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services,

²⁷ 17 CFR 200.30-3(a)(12).

²³ See *supra* note 14.

100 F Street NE, Washington, DC
20549-02736

Extension:

Form N-17f-2

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form N-17f-2 (17 CFR 274.220) under the Investment Company Act is entitled "Certificate of Accounting of Securities and Similar Investments in the Custody of Management Investment Companies." Form N-17f-2 is the cover sheet for the accountant examination certificates filed under rule 17f-2 (17 CFR 270.17f-2) by registered management investment companies ("funds") maintaining custody of securities or other investments. Form N-17f-2 facilitates the filing of the accountant's examination certificates prepared under rule 17f-2. The use of the form allows the certificates to be filed electronically, and increases the accessibility of the examination certificates to both the Commission's examination staff and interested investors by ensuring that the certificates are filed under the proper Commission file number and the correct name of a fund.

Commission staff estimates that it takes: (i) On average 1.25 hours of fund accounting personnel at a total cost of \$272 to prepare each Form N-17f-2;¹ and (ii) .75 hours of administrative assistant time at a total cost of \$61 to file the Form N-17f-2 with the Commission.² Approximately 201 funds currently file Form N-17f-2 with the Commission. Commission staff estimates that on average each fund files Form N-17f-2 three times annually for a total annual hourly burden per fund of approximately 6 hours at a total cost of \$1,002. The total annual hour burden for Form N-17f-2 is therefore estimated to be approximately 1,206 hours with a total cost of approximately \$201,402.³ Form N-17f-2 does not impose any paperwork-related cost burden other than this internal hour cost.

The estimate of average burden hours is made solely for the purposes of the

Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by Form N-17f-2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. 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.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: December 4, 2020.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020-27028 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90559; File No. SR-NASDAQ-2020-027]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Apply Additional Initial Listing Criteria for Companies Primarily Operating in Restrictive Markets

December 3, 2020.

On May 29, 2020, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to apply additional initial listing criteria for companies primarily operating in a jurisdiction that has

secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction. The proposed rule change was published for comment in the **Federal Register** on June 12, 2020.³ On July 21, 2020, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On September 9, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷

Section 19(b)(2) of the Act⁸ provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The date of publication of notice of filing of the proposed rule change was June 12, 2020. December 9, 2020 is 180 days from that date, and February 7, 2021 is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁹ designates February 7, 2021, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR-NASDAQ-2020-027).

³ See Securities Exchange Act Release No. 89027 (June 8, 2020), 85 FR 35962. Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nasdaq-2020-027/srnasdaq2020027.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 89358, 85 FR 45275 (July 27, 2020). The Commission designated September 10, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 89799, 85 FR 57282 (September 15, 2020).

⁸ 15 U.S.C. 78s(b)(2).

⁹ *Id.*

¹ This estimate is based on the following calculation: 1.25 × \$218 (fund senior accountant's hourly rate) = \$272.

² This estimate is based on the following calculation: .75 × \$82 (administrative assistant hourly rate) = \$61.

³ This estimate is based on the following calculation: 201 funds × \$1,002 (total annual cost per fund) = \$201,402.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-26992 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90562; File No. SR-PEARL-2020-29]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Certificate of Formation

December 3, 2020.

Pursuant to the provisions of 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 24, 2020, MIAx PEARL, LLC ("MIAx PEARL" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Exchange's Amended and Restated Certificate of Formation (the "Certificate of Formation").

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/pearl> at MIAx PEARL's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of

the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Certificate of Formation to make several corrective edits and clarifying changes. On February 11, 2016, the Exchange executed the original Certificate of Formation. On October 28, 2020, the Exchange filed its proposal to amend the Certificate of Formation, among other corporate documents, to make several non-substantive, administrative and clarifying changes.³ The Initial Proposal included changes to the title of the Certificate of Formation to be amended to be titled the "Amended and Restated Certificate of Formation of MIAx PEARL, LLC." On November 10, 2020, the Commission published for comment the Initial Proposal, which granted the Exchange's request for waiver of the 30-day operative delay.⁴

The Exchange now proposes to amend the title of the Certificate of Formation to delete the words "Amended and" in order to accurately reflect the amended document that was filed with the Secretary of State for the State of Delaware, titled the "Restated Certificate of Formation of MIAx PEARL, LLC."⁵ The Exchange also proposes to amend the second sentence in the first paragraph of the Certificate of Formation to delete the words "amending and" in order to clarify that the amended document is the "Restated Certificate of Formation of MIAx PEARL, LLC." With the proposed changes, the first paragraph of the Certificate of Formation is as follows:

This filing has been executed and filed in accordance with Section 18-208 of the Limited Liability Company Act. This document is being executed for the purpose of restating the original Certificate of Formation, filed on February 11, 2016, under file number: 5880323.

The purpose of the proposed changes to the Certificate of Formation are to ensure that the Exchange's Certificate of

Formation accurately reflects the correct filed document in order to reduce potential investor or market participant confusion.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁶ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁷ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁸ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed changes to the Certificate of Formation are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest. The Exchange believes that the proposed changes are non-substantive, corrective edits and clarifying changes and will reduce potential investor or market participant confusion regarding the Exchange's Certificate of Formation. Further, the Exchange believes the proposed changes are not material and will have no impact on the governance, ownership, or operations of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

³ See Securities Exchange Act Release No. 90394 (November 10, 2020) (SR-PEARL-2020-23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Certificate of Formation, Amended and Restated Limited Liability Company Agreement, and the By-Laws) (the "Initial Proposal").

⁴ See *id.*

⁵ The Certificate of Formation is available the Exchange's website, at https://www.miaxoptions.com/sites/default/files/page-files/MIAx_PEARL_Restated_Certificate_of_Formation_11122020.pdf.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ *Id.*

¹⁰ 17 CFR 200.30-3(a)(57).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intra-market and inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes are not intended to address competitive issues but rather are corrective, non-substantive changes that are concerned solely with correcting the title of the Certificate of Formation to reflect current, accurate information.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6) thereunder.¹⁰

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹¹ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹² permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. As the proposed rule change raises no novel issues and merely corrects the title of the Exchange's Certificate of Formation, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the

proposed rule change operative upon filing.¹³

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-PEARL-2020-29 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-PEARL-2020-29. 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-PEARL-2020-29, and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-26994 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-238, OMB Control No. 3235-0214]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-02736

Extension:

Rule 17a-7

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information described below.

Rule 17a-7 (17 CFR 270.17a-7) (the "rule") under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) (the "Act") is entitled "Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof." It provides an exemption from section 17(a) of the Act for purchases and sales of securities between registered investment companies ("funds"), that are affiliated persons ("first-tier affiliates") or affiliated persons of affiliated persons ("second-tier affiliates"), or between a fund and a first- or second-tier affiliate other than another fund, when the affiliation arises

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹¹ 17 CFR 240.19b-4(f)(6).

¹² 17 CFR 240.19b-4(f)(6)(iii).

¹³ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

¹⁴ 17 CFR 200.30-3(a)(12).

solely because of a common investment adviser, director, or officer. Rule 17a-7 requires funds to keep various records in connection with purchase or sale transactions effected in reliance on the rule. The rule requires the fund's board of directors to establish procedures reasonably designed to ensure that the rule's conditions have been satisfied. The board is also required to determine, at least on a quarterly basis, that all affiliated transactions effected during the preceding quarter in reliance on the rule were made in compliance with these established procedures. If a fund enters into a purchase or sale transaction with an affiliated person, the rule requires the fund to compile and maintain written records of the transaction.¹ The Commission's examination staff uses these records to evaluate for compliance with the rule.

While most funds do not commonly engage in transactions covered by rule 17a-7, the Commission staff estimates that nearly all funds have adopted procedures for complying with the rule.² Of the approximately 2,915 currently active funds, the staff estimates that virtually all have already adopted procedures for compliance with rule 17a-7. This is a one-time burden, and the staff therefore does not estimate an ongoing burden related to the policies and procedures requirement of the rule for funds.³ The staff estimates that there are approximately 90 new funds that register each year, and that each of these funds adopts the relevant policies and procedures. The staff estimates that it takes approximately 4 hours to develop and adopt these policies and procedures. Therefore, the total annual burden related to developing and adopting these policies and procedures would be approximately 360 hours.⁴

Of the 2,915 existing funds, the staff assumes that approximately 25%, (or 729) enter into transactions affected by rule 17a-7 each year (either by the fund directly or through one of the fund's

series), and that the same percentage (25%, or 23 funds) of the estimated 90 funds that newly register each year will also enter into these transactions, for a total of 752⁵ companies that are affected by the recordkeeping requirements of rule 17a-7. These funds must keep records of each of these transactions, and the board of directors must quarterly determine that all relevant transactions were made in compliance with the company's policies and procedures. The rule generally imposes a minimal burden of collecting and storing records already generated for other purposes.⁶ The staff estimates that the burden related to making these records and for the board to review all transactions would be 3 hours annually for each respondent, (2 hours spent by compliance attorneys and 1 hour spent by the board of directors)⁷ or 2,256 total hours each year.⁸

Based on these estimates, the staff estimates the combined total annual burden hours associated with rule 17a-7 is 2,616 hours.⁹ The staff also estimates that there are approximately 752 respondents and 6,016 total responses.¹⁰

The estimates of burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. The collection of information required by rule 17a-7 is necessary to obtain the benefits of the rule. Responses will not be kept confidential. 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.

⁵ This estimate is based on the following calculation: $(729 + 23 = 752)$.

⁶ Commission staff believes that rule 17a-7 does not impose any costs associated with record preservation in addition to the costs that funds already incur to comply with the record preservation requirements of rule 31a-2 under the Act. Rule 31a-2 requires companies to preserve certain records for specified periods of time.

⁷ The staff estimates that funds that rely on rule 17a-7 annually enter into an average of 8 rule 17a-7 transactions each year. The staff estimates that the compliance attorneys of the companies spend approximately 15 minutes per transaction on this recordkeeping, and the board of directors spends a total of 1 hour annually in determining that all transactions made that year were done in compliance with the company's policies and procedures.

⁸ This estimate is based on the following calculation: $(3 \text{ hours} \times 752 \text{ companies} = 2,256 \text{ hours})$.

⁹ This estimate is based on the following calculation: $(360 \text{ hours} + 2,256 \text{ hours} = 2,616 \text{ total hours})$.

¹⁰ This estimate is based on the following calculations: $752 \text{ funds that engage in rule 17a-7 transactions} \times 8 \text{ transactions per year} = 6,016$.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: December 4, 2020.

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-27027 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90563; File No. SR-PEARL-2020-30]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing of a Proposed Rule Change To Amend the Exchange's By-Laws in Connection With an Equity Rights Program

December 3, 2020.

Pursuant to the provisions of 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 24, 2020, MIAX PEARL, LLC ("MIAX PEARL" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Exchange's By-Laws.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/pearl> at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹ The written records are required to set forth a description of the security purchased or sold, the identity of the person on the other side of the transaction, and the information or materials upon which the board of directors' determination that the transaction was in compliance with the procedures was made.

² Unless stated otherwise, these estimates are based on conversations with the examination and inspections staff of the Commission and fund representatives.

³ Based on our reviews and conversations with fund representatives, we understand that funds rarely, if ever, need to make changes to these policies and procedures once adopted, and therefore we do not estimate a paperwork burden for such updates.

⁴ This estimate is based on the following calculations: $(4 \text{ hours} \times 90 \text{ new funds} = 360 \text{ hours})$.

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 certain sections of its By-Laws to: (i) Correspond with an Equity Rights Program ("ERP") recently established by the Exchange;³ and (ii) make non-substantive changes to the current By-Laws.

On August 14, 2020, the Commission approved a proposed rule change to adopt rules governing the trading of equity securities on the Exchange (the platform for the trading of equity securities is referred to herein as "MIAX PEARL Equities").⁴ This filing corresponds with the recently implemented ERP pursuant to which units representing the right to acquire equity in the Exchange's parent holding company, Miami International Holdings, Inc., were issued to participating Members⁵ in exchange for

the prepayment of certain ERP Exchange Fees⁶ for trading equity securities on MIAX PEARL Equities and the achievement of certain liquidity volume thresholds on MIAX PEARL Equities over a 42-month period. This filing amends the By-Laws to the extent necessary to incorporate rights to participating Members in an ERP to appoint representation to the MIAX PEARL Board.

Article I, Definitions

The Exchange proposes to amend the By-Laws to provide definitions for key terms used to incorporate provisions related to the ERP. Specifically, the Exchange proposes the following definitions:

- "ERP Agreement" means the agreement between the Exchange's parent holding company, Miami International Holdings, Inc., and ERP Members dated September 11, 2020 pursuant to which Units were issued.
- "ERP Director" means a MIAX PEARL Equities Industry Director who has been nominated by an ERP Member and appointed to the Board of Directors.
- "ERP Member" means an Exchange Member who acquired Units pursuant to an ERP Agreement sufficient to acquire an ERP Director or an Observer position.
- "Measurement Period" means the time period over which Units are vested.
- "MIAX PEARL Equities" means the market of the Exchange on which equity securities are traded.
- "Observer" has the meaning set forth in Article II, Section 2.2 of the By-Laws.
- "Performance Criteria" means the trades on MIAX PEARL Equities in an amount equal to a percentage of the average daily volume for National Market System securities on MIAX PEARL Equities as reported by the Consolidated Tape Association (CTA) and Unlisted Traded Privileges (UTP) Plans, or any successor plans, for a specified Measurement Period in an

amount such that the ERP Member earns Units during such specified Measurement Period and as more fully set forth in the ERP Agreement.

- "Unit" means the securities issued pursuant to the ERP Agreement.

The Exchange also proposes to delete the definition of the term "Exchange Contract" from the By-Laws because it is no longer used. The term "Exchange Contract" is currently defined as "a contract that is then listed for trading by the Exchange or that is contemplated by the then current business plan of the Company to be listed for trading by the Exchange within ninety (90) days following such date."

The Exchange proposes to renumber the existing definitions accordingly to accommodate the proposed additions and deletions.

Article II, Section 2.2, Composition of the Board

The Exchange proposed to amend the title of Article II, Section 2.2 to include reference to Observer Rights. The Exchange also proposes to amend Article II, Section 2.2(b)(i) to provide that ERP Directors will be included in the number of Industry Directors for purposes of calculating the composition of the Board. In addition, the Exchange proposes to amend Article II, Section 2.2 (b)(ii) to specify that Member Representative Directors will not include ERP Directors for purposes of calculating the Board composition.

In addition, the Exchange proposes to amend Article II, Section 2.2(e) to replace the existing text with text that provides that an ERP Member has a right to nominate one (1) ERP Director or appoint an Observer to the Board of Directors. If at any time such ERP Member is otherwise able to nominate an ERP Director, but is unable to fill such position as a result of such ERP Member already having a representative on the Board, such ERP Member will have the right to nominate such Director in accordance with amended Article II, Section 2.2(e) upon the resignation or removal of such Director already serving on the Board.⁷ The nominee shall be appointed at the first annual meeting of the Company following the effective date of the By-Law amendment.

The Exchange proposes to adopt paragraph (f) under Article II, Section 2.2, to provide that if an ERP Director position needs to be added pursuant to amended Article II, Section 2.2(e), such ERP Director shall be nominated by the

³ See Securities Exchange Act Release No. 89730 (September 1, 2020), 85 FR 55530 (September 8, 2020) (SR-PEARL-2020-10) ("ERP Notice"). This filing is also based on a past filing by the Exchange's affiliate, Miami International Securities Exchange, LLC ("MIAX"). See Securities Exchange Act Release Nos. 71541 (February 12, 2014), 79 FR 9572 (February 19, 2014) (SR-MIAX-2013-58) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend the Exchange's ByLaws); and 77876 (May 20, 2016), 81 FR 33283 (May 25, 2016) (SR-MIAX-2016-08) (collectively, the "MIAX Approval Orders").

⁴ See Securities Exchange Act Release Nos. 88132 (February 6, 2020), 85 FR 8053 (February 12, 2020) (SR-PEARL-2020-03) (Notice of Filing of a Proposed Rule Change to Adopt Rules Governing the Trading of Equity Securities); and 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (Order Approving Proposed Rule Change to Adopt Rules Governing the Trading of Equity Securities).

⁵ The term "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of the Exchange's Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Exchange Act. See Exchange Rule 100.

⁶ The ERP Exchange fees under the Program consist of: (a) Transaction fees as set forth in Section (1)a of the MIAX PEARL Options Fee Schedule; (b) membership fees as set forth in Section 3 of the MIAX PEARL Options Fee Schedule; (c) system connectivity fees as set forth in Section 5 of the MIAX PEARL Options Fee Schedule; (d) market data fees as set forth in Section 6 of the MIAX PEARL Options Fee Schedule; (a) transaction fees as set forth under Section (1)a of the MIAX PEARL Equities Fee Schedule; (b) system connectivity fees as set forth under Section (2) of the MIAX PEARL Equities Fee Schedule; and (c) market data fees as set forth under Section (3) of the MIAX PEARL Equities Fee Schedule (collectively, the "ERP Exchange Fees"). The Exchange notes that proprietary real-time market data will be provided free of charge for a period of time.

⁷ At this time, an ERP Member that is represented by a Member Representative Director may also have an Observer. But, an ERP Member that is represented by an ERP Director may not also have an Observer.

applicable ERP Member and elected by the LLC Member and additional Director positions shall be added and filled at the same time as the election of the new ERP Director, as required to comply with the requirements set forth in Article II, Section 2.2(a) and (b).

The Exchange also proposes to adopt paragraph (g) under Article II, Section 2.2 to provide that, per amended Article II, Section 2.2(e), a person may be invited to attend meetings of the Board in a nonvoting Observer capacity as follows. Proposed Article II, Section 2.2(g)(i) would provide that any ERP Member that is not otherwise represented on the Board shall have the right to appoint one individual as an Observer. If the ERP Member is otherwise able to nominate an ERP Director, an Observer appointment would be in lieu of such ERP Director nomination. Proposed Article II, Section 2.2(g)(ii) would provide that the ERP Member's right to appoint an Observer pursuant to proposed Section 2.2(g) shall be perpetual, subject to the provisions of Section 2.3 discussed below. An Observer may not be subject to a statutory disqualification.

Lastly, proposed Article II, Section 2.2(g)(iii) would provide that Observers will have the right to attend all meetings of the Board of Directors in a nonvoting observer capacity and, in this respect, the Company shall give such representative copies of all notices, minutes, consents, and other materials that it provides to its directors at the same time and in the same manner as provided to such Directors; provided, however, that such representative shall agree to hold in confidence and trust and to act in a fiduciary manner with respect to all information so provided; and provided further, that the Company reserves the right to withhold any information and to exclude such representative from any meeting or portion thereof if access to such information or attendance at such meeting could adversely affect the attorney-client privilege between the Company and its counsel or result in disclosure of trade secrets or a conflict of interest.

The Exchange believes these changes are reasonably designed to ensure that the Board of Directors maintains the appropriate composition after the ERP and that Directors and Observers are qualified to represent ERP Members on the Board. The changes will also help to ensure that Directors, ERP Directors, and Observers, are qualified and held to the same restrictions against statutory disqualification. The Exchange notes that no substantive changes are being proposed to the Board's composition;

the Board size will increase, but the current composition will remain.

Lastly, the Exchange proposes to amend the title of Article II, Section 2.2 to refer to Observer Rights and reflect the above-proposed changes.

Article II, Section 2.3, Terms of Office

The Exchange proposes to amend Article II, Section 2.3(b) to specify that it does not apply to ERP Directors. The Exchange also proposes to adopt paragraph (c) under Article II, Section 2.3 to provide that in the event that an ERP Member (either by itself or its affiliates) who has the right to nominate an ERP Director and which fails to meet its Performance Criteria under the ERP Agreement for three consecutive Measurement Periods such that it only meets the required performance criteria of an ERP Member that may appoint an Observer, then the individual designated by the non-performing ERP Member shall immediately cease to be an ERP Director of the Company and such ERP Member shall cease to have the right to nominate an ERP Director. Such non-performing ERP Member shall continue to maintain Observer rights as set forth in the By-Laws.

Notwithstanding the foregoing, in the event that the non-performing ERP Member satisfies the Performance Criteria for a subsequent Measurement Period, then such ERP Member may reappoint an ERP Director at the immediately following annual meeting of the Company. The Exchange believes that it is fair and reasonable to treat non-performing ERP Member's that can nominate an ERP Director differently than non-performing ERP Member's that can only appoint Observers. ERP Members that can nominate ERP Directors have assumed greater performance obligations under the ERP Agreement, and thus even at the non-performing level are entitled to more protections to their representation on the Board than non-performing ERP Members that can only appoint Observers.

The Exchange also proposes to adopt paragraph (d) under Article II, Section 2.3 to provide that an individual ERP Director or Observer position shall be immediately terminated following the transfer of common stock or warrants of the LLC Member acquired pursuant to the ERP Agreement by an ERP Member which, after giving effect to such transfer, results in such ERP Member holding less than 25% of the aggregate number of shares of common stock of the LLC Member issued or issuable pursuant to the Units acquired pursuant to the ERP Agreement collectively.

The Exchange believes these changes regarding Terms of Office are reasonably designed to account for the removal of Directors or Observers of non-performing ERP Members and Members that no longer have a controlling interest in the shares that provided them the right to such appointments.

Article II, Section 2.4, Nomination and Election

The Exchange proposes to amend Article II, Section 2.4(a) to provide that the Nominating Committee shall nominate to ERP Director positions only those persons whose names have been approved and submitted by the applicable ERP Members having the right to nominate such person. As mentioned above, the LLC Member is then obligated to vote for the nominated ERP Director. The nominee shall be appointed at the first annual meeting of the Company following September 11, 2020, which was the closing date of the ERP established by the Exchange.⁸

Article II, Section 2.8, Vacancies

The Exchange proposes to adopt paragraph (c) under Article II, Section 2.8 to provide that if an ERP Director position becomes vacant that the applicable ERP Member will retain the ability to nominate a person to fill the vacant ERP Director position. To eliminate any potential confusion between the treatment of true vacancies and the non-performance provisions in proposed Article II, Section 2.3(c), the Exchange proposes to specify that proposed Article II, Section 2.8(c) will not apply for a vacancy resulting from an ERP Director position becoming vacant due to a non-performing ERP Member. In the situation of non-performance of an ERP Member, the provisions of proposed Article II, Section 2.3(c) would apply.

Article II, Section 2.9, Removal and Resignation

The Exchange proposes to amend Article II, Section 2.9 to provide that ERP Directors may only be removed for cause, which shall include, without limitation, such Director being subject to a statutory disqualification.

Article X, Sections 10.3 and 10.4

The Exchange proposes to amend Article X, Section 10.3 to provide that Observers will be subject to the same participation rights on the Board during meetings pertaining to the self-regulatory function of the Company as other members of the Board. In addition, Article X, Section 10.4 would be

⁸ See ERP Notice, *supra* note 3.

amended to provide that Observers will be subject to the same requirements to maintain the confidentiality of all books and records of the Company reflecting confidential information pertaining to the self-regulatory function of the Company.

Miscellaneous Non-Substantive Changes

In addition to the changes set forth above, the Exchange proposes to make the following non-substantive changes to the current By-Laws. The Exchange proposes to delete dated references to time periods and events that have expired since the proposal of the new By-Laws. Specifically, the Exchange proposes to delete provisions in Article II, Section 2.5, and Article III, Section 3.1(b), regarding Interim Directors and Interim Member Representative Directors since these appointments have already occurred. Consistent with this change, the Exchange proposes to remove references to Article II, Section 2.5 and Interim Directors and Interim Member Representative Directors from current Article I(x) (proposed to be renumbered as Article I(aa)) and Article II, Section 2.2(b)(i).

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act⁹ in general, and furthers the objectives of Sections 6(b)(1) and 6(b)(5) of the Act¹⁰ in particular, in that it enables the Exchange to be so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; and that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the proposed change is consistent with Section 6(b)(3) of the Act,¹¹ in that it enables the Exchange to assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors

and not be associated with a member of the exchange, broker, or dealer.

Specifically, the proposed amendments to the By-Laws are reasonably designed to incorporate provisions related to the ERP in a manner that ensures that the Exchange will remain so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The changes will also help to ensure that Directors, ERP Directors, Observers, and committee members are qualified and held to the same restrictions against statutory disqualification. The proposed ERP Directors will be subject to the same restrictions as current Directors including evaluating proposals with the Company's self-regulatory status in mind, restricting participation in activities where there is a conflict of interest, and requirement to maintain the confidentiality of information related to the Company's self-regulatory function. The proposed Observers will be subject to the same restrictions as current Directors regarding maintaining the confidentiality of information related to the Company's self-regulatory function. However, Observers will not be subject to the same restrictions as current Directors regarding evaluating proposals with the Company's self-regulatory status in mind and restricting participation in activities where there is a conflict of interest. The Exchange believes that treating Observers differently than Directors in these circumstances is reasonable because Observers will not be affirmatively voting on any such proposals in their non-voting observer capacity.

In addition, the Exchange's proposed amendments address other non-substantive revisions to reflect changes since the Commission granted the Exchange's registration as a national securities exchange.

The proposal will continue to assure a fair representation of its Members in that ERP Directors will not affect the current Member Representation Director calculation or process in any way. The Exchange notes that no substantive changes are being proposed to the Board's composition; the Board size will increase, but the current composition will remain.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not

necessary or appropriate in furtherance of the purposes of the Act. The proposed changes to the Exchange By-Laws are designed to enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. As such, this is not a competitive filing and thus should not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-PEARL-2020-30 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-PEARL-2020-30. 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

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(3).

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-PEARL-2020-30, and should be submitted on or before December 30, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-26995 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-173, OMB Control No. 3235-0178]

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-02736

Extension:
Rule 31a-1

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 31a-1 (17 CFR 270.31a-1) under the Investment Company Act of 1940 (the "Act") (15 U.S.C. 80a) is entitled "Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies." Rule 31a-1 requires registered investment companies ("funds"), and every underwriter, broker, dealer, or investment adviser that is a majority-owned subsidiary of a fund, to maintain and keep current accounts, books, and other documents which constitute the record forming the basis for financial statements required to be filed pursuant to section 31 of the Act (15 U.S.C. 80a-30) and of the auditor's certificates relating thereto. The rule lists specific records to be maintained by funds. The rule also requires certain underwriters, brokers, dealers, depositors, and investment advisers to maintain the records that they are required to maintain under federal securities laws. The Commission periodically inspects the operations of funds to insure their compliance with the provisions of the Act and the rules thereunder. The books and records required to be maintained by rule 31a-1 constitute a major focus of the Commission's inspection program.

There are approximately 3,964 investment companies registered with the Commission, all of which are required to comply with rule 31a-1. For purposes of determining the burden imposed by rule 31a-1, the Commission staff estimates that each fund is divided into approximately four series, on average, and that each series is required to comply with the recordkeeping requirements of rule 31a-1. Based on conversations with fund representatives, it is estimated that rule 31a-1 imposes an average burden of approximately 1,750 hours annually per series for a total of 7,000 annual hours per fund. The estimated total annual burden for all 3,964 funds subject to the rule therefore is approximately 27,748,000 hours. Based on conversations with fund representatives, however, the Commission staff estimates that even absent the requirements of rule 31a-1, 90 percent of the records created pursuant to the rule are the type that generally would be created as a matter of normal business practice and to prepare financial statements. Thus, the Commission staff estimates that the total annual burden associated with rule 31a-1 is 2,774,800 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even

a representative survey or study. The collection of information required by rule 31a-1 is mandatory. Responses will not be kept confidential. The records required by rule 31a-1 are required to be preserved pursuant to rule 31a-2 under the Investment Company Act (17 CFR 270.31a-2). Rule 31a-2 requires that certain of these records be preserved permanently, and that others be preserved six years from the end of the fiscal year in which any transaction occurred. In both cases, the records should be kept in an easily accessible place for the first two years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: December 4, 2020.

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-27029 Filed 12-8-20; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2120-0671]

Agency Information Collection Activities: Request for Renewal of a Previously Approved Information Collection(s): Safety Management Systems for Part 121 Certificate Holders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

¹² 17 CFR 200.30-3(a)(12).

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection used to support the analysis of safety data as part of Safety Management Systems required for part 121 certificate holders. The information to be collected will be used to identify hazards and show ongoing compliance with part 5, Safety Management Systems. All collected data and records are maintained by the certificate holders and not submitted to the FAA.

DATES: Written comments should be submitted by February 8, 2021.

ADDRESSES: Please send written comments:

By Electronic Docket:
www.regulations.gov (Enter docket number into search field).

By Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m.

By Fax: 202-493-2251.

FOR FURTHER INFORMATION CONTACT:

Sean Denniston, Safety Management Program Office (AFS-910), by email at: sean.denniston@faa.gov or by phone: 202-267-1493.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this

information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for the FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120-0763.

Title: Safety Management Systems for Part 121.

Form Numbers: None.

Type of Review: Renewal of an Information Collection with changes.

Background: The information collection involves the collection and analysis of safety data as part of a Safety Management System (SMS), as required for Part 121 certificate holders by 14 CFR Part 5, Safety Management Systems. The information to be collected will continue to be used to identify hazards and show compliance with Part 5.

The existing information collection included the submission of SMS Implementation Plans to the FAA by March 9, 2018. That portion of the information collection has been completed and only new applicants for a Part 121 certificate will be required to submit SMS Implementation Plans in

the future. While the burden for existing Part 121 certificate holders is significantly reduced, it is anticipated there will be some ongoing recordkeeping requirements for Part 5 compliance.

The FAA previously published a 60-Day **Federal Register** Notice on June 20, 2018 (83 FR 28758) and a 30-Day **Federal Register** Notice on September 17, 2018 (83 FR 46990). The FAA did not receive any comments on either notice. Since the 60-Day and 30-Day notices there have been changes to the original request. The current number of Part 121 certificate holders in 2020 is 68 compared to 90 in 2015. The 68 Part 121 certificate holders implemented a Safety Management System by the March 9, 2018 Part 5 deadline. The burden analysis has been revised reflecting Part 121 SMS implementation, revised industry numbers, and analysis of post-implementation recordkeeping.

Respondents: All 68 existing Part 121 certificate holders.

Frequency: Implementation plan collection: 1 future applicant for Part 121 certificate (anticipating no more than one new applicant a year). Recordkeeping requirement: Annual recordkeeping requirements for all 68 existing Part 121 certificates.

Estimated Average Burden per Response:

Air carrier groups		Number of air carriers
Part 121 Certificate Holders		
Large (50+ aircraft)		25
Medium (10-49 aircraft)		19
Small (<9 aircraft)		24
Number of Operators		68

Respondents:

Summary (annual numbers)	Reporting	Recordkeeping	Disclosure
Large and Medium Air Carrier			
Number of Respondents	44	N/A
Number of Responses per respondent	1	N/A
Time per Response	2,000	N/A
Total number of responses	44	N/A
Total burden (hours)	99,440	N/A
Summary (annual numbers)	Reporting	Recordkeeping	Disclosure
Small Air Carrier			
Number of Respondents	24	N/A
Number of Responses per respondent	1	N/A
Time per Response	1,000	N/A
Total number of responses	24	N/A
Total burden (hours)	24,000	N/A

Estimated annual collection activity for one new medium Part 121 air carrier.

Summary (annual numbers)	GAP analysis	Implementation plan	SMS
Medium Air Carrier			
Number of Respondents	1	.....
Number of Responses per respondent	1	.....
Time per Response	2,732	.....
Total number of responses	1	.....
Total burden (hours)	2,732	.....

Estimated Total Annual Burden:
Total annual burden for existing Part 121 certificate holders 123,400 hours.
Total annual burden for new Part 121 certificate applicant 2,732 hours.

Issued in Washington, DC.

Robert C. Carty,

Deputy Executive Director, Flight Standards Service.

[FR Doc. 2020-27000 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Intent To Prepare a Draft Environmental Impact Statement for the El Camino Real Roadway Renewal Project on State Route 82, in San Mateo County, California

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

ACTION: Notice of Intent (NOI) to prepare a Draft Environmental Impact Statement (Draft EIS) for the El Camino Real Roadway Renewal Project.

SUMMARY: The FHWA on behalf of the California Department of Transportation (Caltrans), is issuing this notice to advise the public that a Draft EIS will be prepared for the El Camino Real Roadway Renewal Project (Project), a proposed highway project on State Route 82 in San Mateo County, California.

DATES: This notice will be accompanied by a 30-day public scoping comment period from Monday, November 16, 2020, to December 17, 2020. The deadline for public comments is 5:00 p.m. (PST) on December 17, 2020. Because COVID-19 social distancing advisories are still in effect, no physical public meetings will be held during the public scoping comment period. However, Caltrans will be making project information available on the internet at www.ECRalternatives.com throughout the entire public comment period. A link to the above website is

accessible through the project website at www.ElCaminoRealProject.com or <https://dot.ca.gov/caltrans-near-me/district-4/d4-projects/d4-san-mateo-82-el-camino-real-project>. Project materials will be posted on the www.ECRalternatives.com website and will include project background, project schedule, frequently asked questions, archival information from prior public outreach presentations, the El Camino Real Task Force effort 2017–2018, newly developed narrated presentation slides about the ECR Project's purpose and need, the alternatives being considered, tree survey information, and information regarding the Howard-Ralston Eucalyptus Tree Rows, a resource on the National Register of Historic Places, and other historic resources in the project area. A poster gallery will also be available that features project alternatives and key slide content.

The virtual public information tour will also include a virtual public forum for the public to share thoughts on the project material, the project alternatives under consideration, suggest other alternatives, and read what other members of the public are saying about the project. All comments offered through the virtual public forum will be moderated to maintain respectful discourse. Comments shared through the virtual public forum will become part of the public record.

In addition, the public can submit formal scoping comments through the www.ECRalternatives.com website via an electronic comment submission form, via email at ECRproject@dot.ca.gov, or via USPS at the contact information listed below. In addition to email notifications, Caltrans has mailed notification postcards via USPS to the public, based on information collected from early public outreach efforts, and to city, county and state officials with jurisdiction in the project area. Postcards provide contact information for requesting information in alternative formats or alternative language translation services.

More information can also be found at the project website at www.ElCaminoRealProject.com or <https://dot.ca.gov/caltrans-near-me/district-4/d4-projects/d4-san-mateo-82-el-camino-real-project>.

FOR FURTHER INFORMATION CONTACT:

Yolanda Rivas, Senior Environmental Planner, Caltrans District 4, P.O. Box 23660, MS-8B, Oakland, CA 94623-0660, telephone (510) 506-1461, or email Yolanda.rivas@dot.ca.gov. For FHWA, contact David Tedrick, telephone (916) 498-5024, or email david.tedrick@dot.gov.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans as the assigned National Environmental Policy Act (NEPA) agency, will prepare a Draft EIS on a proposal for 3.6-mile roadway rehabilitation project in San Mateo County, California. The project limits extend from East Santa Inez Avenue in the City of San Mateo to Millbrae Avenue in the City of Millbrae.

The project is needed to address the overall condition of the existing roadway by correcting the following deficiencies: The pavement is currently rated as poor, with moderate alligator cracking and very poor ride quality indicating roadway structural inadequacy; water ponding and frequent localized flooding occurs due to uneven roadway surfaces and inadequate or impacted drainage systems; pedestrian access is impaired due to lack of updated curb ramps and uneven sidewalks; pedestrian infrastructure is not compliant with state and federal Americans with Disabilities Act (ADA) requirements; existing sidewalks lack accessible pedestrian signals systems, countdown pedestrian systems, high-visibility striping, or current devices; and pavement markings.

The purpose of the project is to preserve and extend the life of the roadway and improve ride quality, improve drainage efficiency to reduce localized flooding, improve visibility for

all users, and enhance pedestrian infrastructure by bringing it into compliance with Title II of the ADA. Currently, the range of alternatives being considered includes either taking no action on the 3.6-mile segment of El Camino Real, or proceeding with one of several potential build alternatives. The build alternatives would all involve performing roadway rehabilitation with upgrades to drainage, pedestrian, and roadway infrastructure to achieve the purpose and need of the project. The roadway rehabilitation alternatives may include the following: Rehabilitation while keeping utilities overhead; rehabilitation while relocating utilities underground; rehabilitation while reducing the number of travel lanes from 4 to 2 and including a 12-foot center-turning lane while keeping utilities overhead; and rehabilitation while reducing the number of travel lanes from 4 to 2 and including a 12-foot center-turning lane while relocating utilities underground. Varying roadway widths (ranging 44–46 feet), travel lane widths (ranging 10–11 feet), and sidewalk widths (ranging 4–6 feet) are being considered to avoid and minimize impacts to the Howard-Ralston Eucalyptus Tree Rows, where feasible. Avoidance and minimization measures will be studied and implemented depending upon the limits of state right of way, Caltrans' ability to meet state highway design and safety provisions, and/or other factors.

The only anticipated Federal approval includes a permit under the National Pollutant Discharge Elimination System (NPDES). Other Federal administrative activities include coordination with the Department of the Interior under Section 4(f) of the Department of Transportation Act (1966) and the Advisory Council on Historic Preservation under Section 106 of the National Historic Preservation Act (1966). Notices describing the proposed action and soliciting comments will be sent to appropriate Federal cooperating and participating agencies.

Since June 2019, Caltrans has been in consultation under Section 106 of the National Historic Preservation Act to evaluate potential effects to the Howard-Ralston Eucalyptus Tree Rows, a historic property listed on the National Register of Historic Places (NRHP), and to evaluate potential effects to other historic properties determined eligible for the NRHP. Notifications have been sent to appropriate State, tribal governments, local agencies, private organizations, and citizens who have previously expressed or are known to have interest in this proposal.

The project team anticipates reviewing all public comments received during the public scoping period and circulating a Draft EIS. A public hearing will be held once the Draft EIS is completed. Public notice will be given of the time and place of the meeting and hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing to ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified, and comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the Draft EIS should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 19, 2020.

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2020-27032 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

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

ACTION: Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans).

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans, that are final. The actions relate to a proposed highway project, bridge replacement on US Route 101 in Del Norte County, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 10, 2021. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150

days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Brandon Larsen, Environmental Branch Chief, 1656 Union Street, Eureka, CA, 8 a.m. to 4 p.m., (707) 441-5730, brandon.larsen@dot.ca.gov. For FHWA, contact David Tedrick at (916) 498-5024 or email david.tedrick@dot.gov.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, FHWA assigned, and the Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Replace the Dr. Fine Bridge over the Smith River on Route 101 north of Crescent City. Built in 1940, the existing bridge is near the end of its useful life. A new bridge will better accommodate vehicles, pedestrians, and bicyclists. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (FEA) for the project, approved on March 19, 2020, in the FHWA Finding of No Significant Impact (FONSI) issued on March 19, 2020, and in other documents in the FHWA project records. The FEA, NOD, and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans FEA and FONSI can be viewed at public libraries in the project area or an electronic document can be requested. Contact information for requesting digital copies can be found at <https://dot.ca.gov/caltrans-near-me/district-1/d1-projects/d1-dr-fine-bridge-replacement>.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. Council on Environmental Quality Regulations
2. National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332(2)(c)
3. 49 U.S.C. 303 for Section 4(f)
4. Federal-Aid Highway Act of 1970, 23 U.S.C. 109
5. MAP-21, the Moving Ahead for Progress in the 21st Century Act (Pub. L. 112-141)
6. Clean Air Act Amendments of 1990 (CAAA)
7. Clean Water Act of 1977 and 1987
8. Federal Water Pollution Control Act of 1972 (see Clean Water Act of 1977 & 1987)

9. Federal Land Policy and Management Act of 1976 (Paleontological Resources)
10. The National Historic Preservation Act of 1966 (NHPA)
11. Noise Control Act of 1972
12. Safe Drinking Water Act of 1944, as amended
13. Endangered Species Act of 1973
14. Executive Order 11990, Protection of Wetlands
15. Executive Order 13112, Invasive Species
16. Executive Order 13186, Migratory Birds
17. Fish and Wildlife Coordination Act of 1934, as amended
18. Migratory Bird Treaty Act
19. Wildflowers, Surface Transportation and Uniform Relocation Act of 1987 Section 130
20. Executive Order 11988, Floodplain Management
21. Department of Transportation (DOT) Executive Order 5650.2—Floodplain Management and Protection (April 23, 1979)
22. Title VI of the Civil Rights Act of 1964, as amended
23. Executive Order 12898, Federal Actions to Address Environmental Justice and Low-Income Populations

(Authority: 23 U.S.C. 139(l)(1))

Issued on: November 19, 2020.

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2020-27038 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2012-0032]

Commercial Driver's License Standards: Application for Exemption; Daimler Trucks North America, LLC (Daimler)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of correction; extension of comment period.

SUMMARY: FMCSA corrects the September 8, 2020 notice seeking public comment on Daimler Trucks North America, LLC's (Daimler) request for an exemption from the commercial driver's license (CDL) requirements for nine of its commercial motor vehicle (CMV) drivers. Daimler also requested an exemption for the same drivers from the requirement to register CDL holders in

the Drug and Alcohol Clearinghouse (DAC). Due to an error, the public comment period was not published. This notice establishes a deadline for the submission of public comments.

DATES: Comments must be received on or before January 8, 2021.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA-2012-0032 using any of the following methods:

- **Federal eRulemaking Portal:** www.regulations.gov. Follow the online instructions for submitting comments.

- **Mail:** Send comments to Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

- **Hand Delivery or Courier:** Deliver comments to Dockets Operations, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

- **Fax:** (202) 493-2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards, (202) 366-4225, MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2012-0032), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to www.regulations.gov and put the docket number, "FMCSA-2012-0032" in the "Keyword" box, and click "Search." When the new screen appears, click on "Comment Now!" button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to www.regulations.gov and insert the docket number, "FMCSA-2012-0032" in the "Keyword" box and click "Search." Next, click "Open Docket Folder" button and choose the document listed to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

II. Correction

On September 8, 2020 (85 FR 55572), FMCSA published a notice announcing Daimler's request for an exemption from the CDL requirements for nine of its CMV drivers. The notice sought public comment, but did not include a closing date for the public comment period. Through this notice, FMCSA provides a deadline for the comment period.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020-26981 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION**Pipeline and Hazardous Materials Safety Administration****Hazardous Materials: Notice of Actions on Special Permits**

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on special permit applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before January 8, 2021.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of

Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington, DC 20590-0001, (202) 366-4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington DC.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 1, 2020.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
Special Permits Data—Granted			
11380-M	Baker Hughes Oilfield Operations LLC.	173.302(a)(1)	To modify the special permit to authorize an improved design of the cylinders.
13250-M	Pacific Consolidated Industries LLC.	173.302(a)(1)	To modify the special permit to authorize an extension of cylinder life utilizing the Modal Acoustic Emission (MAE) test method.
14509-M	Pacific Consolidated Industries LLC.	173.302(a), 173.302(f)(3), 173.302(f)(4), 173.302(f)(5), 173.304(a), 175.501(e)(3).	To modify the special permit to authorize an extension of cylinder life utilizing the Modal Acoustic Emission (MAE) test method.
16560-M	Lightstore, Inc	173.302(a)	To modify the special permit to authorize additional 2.1 and 2.2 hazmat and to authorize an increase in the allowable maximum working pressure of certain cylinders.
20973-M	Olin Winchester LLC	172.203(a), 173.63(b)(2)(v) ...	To modify the special permit to remove the requirement for carrying a copy of the permit on each vessel, aircraft or motor vehicle transporting packages covered by the permit.
21014-N	Volvo Cars of North America, LLC.	.....	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight by cargo-only aircraft.
21059-N	Union Pacific Railroad Company Inc.	172.203(a), 174.24, 174.26(a)	To authorize the use of electronic means to maintain and communicate on-board train consist information in lieu of paper documentation when hazardous materials are transported by rail.
21063-N	Cobham Mission Systems Orchard Park Inc.	173.302(a)(1)	To authorize the transportation in commerce of certain gases in non-refillable, non-DOT specification cylinders.
21067-N	Stainless Tank & Equipment Co., LLC.	172.203(a), 178.345-2, 178.346-2, 178.347-2, 178.348-2.	To authorize the manufacture, mark, sale, and use of DOT 400 series cargo tanks fabricated using certain stainless steels and other materials not authorized as materials of construction by § 178.345-2.
21084-N	Samsung SDI America, Inc ...	172.101(j)	To authorize the transportation in commerce of lithium batteries in excess of 35 kg by cargo-only aircraft.
21085-N	Omron Robotics and Safety Technologies, Inc.	172.101(j), 173.185(b)(3)	To authorize the transportation in commerce of certain lithium batteries in alternative packaging and exceeding 35 kg aboard cargo-only aircraft.
21104-N	Kelley Fuels, Inc	172.336(c)	To authorize the transportation in commerce of cargo tanks containing either gasoline or diesel fuel with a placard permanently marked with a "1203" UN number identification mark.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21130-N	Tatonduk Outfitters Limited ...	175.9(b)	To authorize the acceptance and transportation in commerce of hazardous materials to be used for zero-gravity research experiments conducted aboard the aircraft during parabolic flight operations for from the point of origin airport to the return of the aircraft to that same airport.
21131-N	Department of Defense US Army Military Surface Deployment & Distribution Command.	173.185(a), 173.185(e)(6)	To authorize the transportation in commerce of low production lithium ion batteries that have not passed the required tests in the UN Manual of Tests and Criteria.
21132-N	Northwest Energetic Services LLC.	173.56(a)	To authorize the transportation in commerce of bags of explosives which are marked with an incorrect EX number.
21138-N	LG Chem, Ltd	173.185(f)(3)	To authorize the transportation in commerce aboard motor vehicle of defective lithium-ion batteries in 4G fiberboard outer boxes that were used to transport replacement batteries.

Special Permits Data—Denied

20245-M	Jaguar Instruments Inc	173.302(a), 173.304(a)	To modify the special permit to update reporting procedure, update cylinder design drawings and incorporate ICAO references to the permit.
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Special Permits Data—Withdrawn

15689-M	Mercedes-Benz Research & Development North America, Inc.	172.200, 172.301(c), 177.834(h).	To modify the permit to authorize a larger cylinder to be utilized in the test equipment.
21121-N	Mountain Flame Propane, Inc	173.315(j)(2)(iv)	To authorize the transportation in commerce of more than one container of liquid propane gas on a motor vehicle.

[FR Doc. 2020-27017 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Modifications to Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that

the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before December 24, 2020.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of

Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington, DC 20590-0001, (202) 366-4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington DC.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 1, 2020.

Donald P. Burger,
Chief, General Approvals and Permits Branch.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
Special Permits Data			
5749-M	Chemours Company Fc LLC	173.315(a)	To modify the special permit to authorize a new distillate trailer. (mode 1)
14372-M	Kidde Technologies Inc	173.309(a), 180.213(a)	To modify the special permit to update the permit with the addition of a new part number. (modes 1, 2, 3, 4, 5)
16308-M	Vero Biotech LLC	173.175	To modify the special permit to authorize a new absorbent filler surrounding the ampules being transported. (modes 1, 2, 3, 4, 5)

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
20584-M	Battery Solutions, LLC	173.185(f)(3), 173.185(c)(1)(iii), 173.185(c)(1)(iv), 173.185(c)(1)(v), 173.185(c)(3), 173.185(f), 173.185(f)(1).	To modify the special permit to authorize up to 400 lbs. of damaged/defective batteries in individual packaging to be shipped in a 55-gallon drum. (modes 1, 2, 3)
20986-M	Olin Corporation	172.302(c), 173.26, 173.314(c), 179.13(b).	To modify the special permit to clarify the GRL limit. (mode 2)

[FR Doc. 2020-27018 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF TRANSPORTATION**Pipeline and Hazardous Materials Safety Administration****Hazardous Materials: Notice of Applications for New Special Permits**

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety

has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before January 8, 2021.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of

Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington, DC 20590-0001, (202) 366-4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington DC.

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 1, 2020.

Donald P. Burger,
Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21139-N	KULR Technology Corporation.	172.200, 172.700(a)	To authorize the transportation in commerce of lithium batteries with limited relief from the shipping papers and training required in 49 CFR Subparts C and H of Part 172 of the U.S. HMR when shipped in a thermal containment packaging manufactured by KULR for recycling. (modes 1, 2)
21140-N	Philips Medical Systems MR, Inc.	172.101(j)	To authorize the transportation of MRI machines that contain compressed helium in non-specification pressure vessels. (modes 1, 2, 3, 4, 5)
21141-N	Pollution Control Inc	172.320, 173.56(b)	To authorize the transportation in commerce, for the purpose of disposal only, of certain waste energetic substances and/or articles classed as Division 1.1D, subject to the packaging and special provisions prescribed herein. (mode 1)
21142-N	Atlas Air, Inc	172.101(j), 172.204(c)(3), 173.27(b)(2), 173.27(b)(3).	To authorize the transportation in commerce of explosives forbidden aboard cargo-only aircraft by cargo-only aircraft. (mode 4)
21143-N	Tradewater LLC	172.700(a), 173.306(a)	To authorize the transportation in commerce of refrigerant gases in DOT 2Q receptacles as limited quantities by motor vehicle and rail without requiring training in accordance with Part 172 subpart H. (modes 1, 2)
21144-N	Consolidated Nuclear Security LLC.	173.56(b)	To authorize the transportation in commerce of certain materials containing low quantities of explosive substances without requiring approval in accordance with 173.56(b). (modes 1, 4)
21145-N	Reg Grays Harbor LLC	173.31(d)(1)(ii)	To authorize the transportation in commerce of tank cars that have been pneumatic positive pressure tested in lieu of visually inspected prior to shipping. (mode 2)

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21147-N	IPACKCHEM Group SAS	173.158(f)(3)	To authorize the manufacture, mark, sale, and use of UN 4G specification packagings for the transport of nitric acid where the primary receptacles are not individually over-packed in tightly closed metal packagings. (modes 1, 2, 3)
21150-N	ZECO, Inc	172.203(a), 172.302(c), 173.225(h).	To authorize the transportation in commerce of Division 5.2 materials in non-authorized bulk packagings. (modes 1, 2)

[FR Doc. 2020-27019 Filed 12-8-20; 8:45 am]

BILLING CODE 4910-60-P



FEDERAL REGISTER

Vol. 85

Wednesday,

No. 237

December 9, 2020

Part II

Department of the Interior

Bureau of Safety and Environmental Enforcement

30 CFR Part 250

Bureau of Ocean Energy Management

30 CFR Part 550

Oil and Gas and Sulfur Operations on the Outer Continental Shelf—
Revisions to the Requirements for Exploratory Drilling on the Arctic Outer
Continental Shelf; Proposed Rule

DEPARTMENT OF THE INTERIOR**Bureau of Safety and Environmental Enforcement****30 CFR Part 250****Bureau of Ocean Energy Management****30 CFR Part 550**

[Docket ID: BSEE–2019–0008, EEEE500000, 21XE1700DX, EX1SF0000.EAQ000]

RIN 1082–AA01

Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf

AGENCIES: Bureau of Safety and Environmental Enforcement (BSEE); Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior (DOI or Department), acting through BOEM and BSEE, has reviewed and is proposing to revise its existing regulations for exploratory drilling and related operations on the Arctic Outer Continental Shelf (OCS), to reduce unnecessary burdens on stakeholders while ensuring that energy exploration on the Arctic OCS is safe and environmentally responsible. In particular, this proposed rule would revise certain requirements promulgated through the rule entitled, *Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf* (“2016 Arctic Exploratory Drilling Rule”). This proposed rule would also add new provisions to BSEE’s regulations pertaining to suspensions of operations (SOO), and BOEM’s Exploration Plan (EP) and Development and Production Plan (DPP) regulations.

DATES: Submit comments by February 8, 2021. BSEE and BOEM may not fully consider comments received after this date. You may submit comments to the Office of Management and Budget (OMB) on the information collection burden in this proposed rule by January 8, 2021. The deadline for comments on the information collection burden does not affect the deadline for the public to comment to BSEE and BOEM on the proposed regulations.

ADDRESSES: You may submit comments on BSEE’s or BOEM’s sections of the rulemaking by any of the following methods. For comments on this proposed rule, please use the Regulation

Identifier Number (RIN) 1082–AA01 as an identifier in your message. For comments specifically related to the draft Environmental Assessment (EA) conducted under the National Environmental Policy Act of 1969 (NEPA), please refer to NEPA in the heading of your message. See also Public Availability of Comments under Procedural Matters.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. In the entry entitled, “Enter Keyword or ID,” enter BSEE–2019–0008, then click search. Follow the instructions to submit public comments and view supporting and related materials available for this rulemaking. BSEE and BOEM may post all submitted comments.

- *Mail or hand-carry comments to the DOI, BSEE and BOEM:* Attention: Regulations and Standards Branch, 45600 Woodland Road, VAE–ORP, Sterling VA 20166. Please reference RIN 1082–AA01, “Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf,” in your comments, and include your name and return address.

- Send comments on the information collection in this rule to: Interior Desk Officer 1082–AA01, Office of Management and Budget; 202–395–5806 (fax); or via the online portal at RegInfo.gov. Please also send a copy to BSEE and BOEM by one of the means previously described.

- Public Availability of Comments—Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. For BSEE and BOEM to withhold from disclosure your personal identifying 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 consequence(s) of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: For technical questions related to regulatory changes BSEE is proposing in Part 250, contact Mark E. Fesmire, BSEE, Alaska Regional Office, mark.fesmire@bsee.gov,

(907) 334–5300. For technical questions related to regulatory changes BOEM is proposing in Part 550, contact Joel Immeraj, BOEM, Alaska Regional Office, joel.immaraj@boem.gov, (907) 334–5238. For procedural questions contact Bryce Barlan, BSEE, Regulations and Standards Branch, regs@bsee.gov, (703) 787–1126.

SUPPLEMENTARY INFORMATION:**Executive Summary**

In response to BSEE- and BOEM-initiated environmental and safety reviews of potential oil and gas operations on the Arctic OCS, experiences gained from Shell’s 2012 and 2015 Arctic operations, and concerns expressed by environmental organizations and Alaska Natives, BSEE and BOEM published the 2016 Arctic Exploratory Drilling Rule (*see* 81 FR 46478, July 15, 2016). The rule was narrowly focused, applying solely to exploratory drilling operations conducted during the Arctic OCS open-water drilling season by drilling vessels and “jack-up rigs” (collectively known as mobile offshore drilling units or MODU) in the Beaufort Sea and Chukchi Sea Planning Areas. The regulations were intended to ensure that Arctic OCS exploratory drilling operations are conducted in a safe and responsible manner, while taking into account the unique conditions of the Arctic OCS, as well as Alaska Natives’ cultural traditions and their need for access to subsistence resources. BSEE and BOEM have since reviewed the 2016 Arctic Exploratory Drilling Rule taking into account a Congressional declaration of purposes in the Outer Continental Shelf Lands Act (OCSLA) to “establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.”¹ The bureaus have also reviewed new information about technological developments in an ice environment. Based on that review, BSEE and BOEM are proposing revisions in this proposed rule that are consistent with OCSLA, and would reduce unnecessary burdens on stakeholders while still maintaining safety and environmental protection.

Since publication of the 2016 Arctic Exploratory Drilling Rule, new

¹ Outer Continental Shelf Lands Act, Public Law 95–372, sec. 102 (Sept. 8, 1978), 43 U.S.C. 1802(1).

Executive Orders (E.O.) and Secretary's Orders (S.O.) called on Federal agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately begin processes to potentially suspend, revise, or rescind those regulations that are determined to unduly burden the development of domestic energy resources, beyond the degree necessary to protect the public interest or otherwise comply with the law. Executive Order 13795, *Implementing an America-First Offshore Energy Strategy* (82 FR 20815) and Secretary's Order 3350, *America-First Offshore Energy Strategy*, which are discussed in more detail below in *Section I. Background, Subsection C. Executive and Secretary's Orders*, specifically called for a review of the 2016 Arctic Exploratory Drilling Rule.² In response to these E.O.s and S.O.s, BSEE and BOEM undertook a review of the regulations promulgated through the 2016 Arctic Exploratory Drilling Rule with a view toward encouraging energy exploration and production on the Arctic OCS, as appropriate and consistent with applicable law, and reducing unnecessary regulatory burdens, while ensuring that any such activity is safe and environmentally responsible.

BSEE's and BOEM's views about certain features of the existing regulations were also informed by new information that has become available since the 2016 rule was finalized. This new information includes a BSEE-commissioned Technology Assessment Program (TAP) study entitled, *Suitability of Source Control and Containment Equipment versus Same Season Relief Well in the Alaska Outer Continental Shelf Region* (Bratslavsky and SolstenXP, 2018) and a National Petroleum Council (NPC) report entitled, *Supplemental Assessment to the 2015 Report on Arctic Potential: Realizing the Promise of U.S. Arctic Oil and Gas Resources* (NPC 2019 Report). BSEE also re-assessed the original NPC report entitled, *Arctic Potential: Realizing the Promise of U.S. Arctic Oil and Gas Resources* (NPC 2015 Report; together with the NPC 2019 Report, the NPC reports). Both NPC reports include discussions about global Arctic operations. These global operations are discussed in further detail below in *Subsection 5. Industry Interest in the Arctic OCS of Section I. Background*, under the subheading entitled, *Global*

Arctic Exploration Activities. The Bratslavsky and SolstenXP study was finalized in October 2018 and may be downloaded from BSEE's TAP website at: <https://www.bsee.gov/research-record/suitability-of-source-control-containment-equipment-versus-same-season-relief-well>. The NPC 2019 Report was finalized in April 2019 and may be downloaded from an NPC website at: <https://www.npc.org/ARSA-FINAL-052219-LoRes.pdf>. The NPC 2015 Report was finalized in March 2015 and may be downloaded from an NPC website at: <http://www.npcarcticpotentialreport.org/index.html>.

Based on the results of these reports, BSEE and BOEM are proposing to amend, revise, or remove certain current regulatory provisions promulgated through the 2016 Arctic Exploratory Drilling Rule, to reduce unnecessary burdens on stakeholders while still maintaining safety and environmental protection. This proposed rulemaking is consistent with OCSLA's Congressional declaration of purposes to "establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." 43 U.S.C. 1802(1).

BSEE and BOEM also considered another issue on the Arctic OCS in addition to those addressed in the 2016 Arctic Exploratory Drilling Rule, but is logical to address as part of this rulemaking to further encourage safe and environmentally responsible exploration of this region, where the areas known to have oil and gas have been explored or studied. This issue pertains to the effective means by which BSEE and the operator could address seasonal weather-related constraints in the Arctic OCS that severely impact the operator's ability to safely perform leaseholding operations for a significant portion of the term on a lease.

Accordingly, this proposed rule would revise certain provisions in 30 Code of Federal Regulations (CFR) Part 250, Subparts A, C, D, and G, and 30 CFR part 550, subpart B, that pertain to:

1. The factors that the BSEE Regional Supervisor may evaluate in assessing whether to grant an SOO, to address unique and specific conditions relevant only to exploration and development activities on the Arctic OCS;
2. Pollution prevention;

3. Arctic OCS Source Control and Containment Equipment (SCCE);
4. Relief rig capabilities for the Arctic OCS;

5. Timing and submission requirements related to Integrated Operations Plans (IOP) for proposed Arctic exploratory drilling;

6. What must be included in the IOP; and

7. What data and information must accompany the EP and DPP.

This proposed rule is designed to reflect the need to ensure the safe, effective, and responsible exploration of Arctic OCS oil and gas resources, while protecting the marine, coastal, and human environments, and preserving Alaska Natives' cultural traditions and their access to subsistence resources. This proposed rule is intended to revise the regulations promulgated through the 2016 Arctic Exploratory Drilling Rule by creating more flexible and less costly compliance options in BSEE's and BOEM's regulations that could achieve these objectives. While this proposed rule seeks to promulgate new provisions in addition to those addressed in the 2016 Arctic Exploratory Drilling Rule, these new provisions (*i.e.*, provisions to address leaseholding operations impacted by seasonal weather-related constraints on the Arctic OCS) would further enhance BSEE's and BOEM's abilities to ensure the safe, effective, and responsible exploration of Arctic OCS oil and gas resources. They would do so while protecting the marine, coastal, and human environments, and preserving Alaska Natives' cultural traditions and access to subsistence resources. Through lease stipulations related to the Conflict Avoidance Agreements (CAA), BOEM currently requires operators to consult with affected subsistence communities and describe in exploration and development plans the mitigating practices the operator would undertake to avoid conflicts with the communities. Conflict Avoidance Agreements provide a framework for mitigating the adverse impacts a drilling project may have on subsistence activities, values, and uses.

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² These Orders did no dictate outcomes; rather, they directed a review in accordance with applicable law.

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LIST OF ACRONYMS AND REFERENCES

60-Day report	Report to the Secretary of the Interior, review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program
2016 Arctic Exploratory Drilling Rule ..	Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf, 81 FR 46478, July 15, 2016 (available at https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf).
ABS	American Bureau of Shipping.
ACP	Alternative Compliance Program.
ADNR	Alaska Department of Natural Resources.
AEWC	Alaska Eskimo Whaling Commission.
ANILCA	Alaska National Interest Lands Conservation Act.
ANCSA	Alaska Native Claims Settlement Act.
ANWR	Arctic National Wildlife Refuge.
APD	Application for Permit to Drill.
API	American Petroleum Institute.
Arctic OCS	OCS within the Beaufort Sea and Chukchi Sea Planning Areas.
AWKS	Alternative Well Kill System.
BOEM	Bureau of Ocean Energy Management.
BOEMRE	Bureau of Ocean Energy Management, Regulation and Enforcement.
BOP	Blowout Preventer.
Bratslavsky and SolstenXP, 2018	Suitability of Source Control and Containment Equipment versus Same Season Relief Well in the Alaska Outer Continental Shelf Region, October 2018.
BSEE	Bureau of Safety and Environmental Enforcement.
BLM	Bureau of Land Management.
CAA	Conflict Avoidance Agreement.
CFR	Code of Federal Regulations.
CZMA	Coastal Zone Management Act.
CWA	Clean Water Act.
Department	Department of the Interior.
DNV GL	Det Norske Veritas and Germanischer Lloyd.
DOCD	Development Operations Coordination Document.
DOI	Department of the Interior.
DPP	Development and Production Plan.
EA	Environmental Assessment.
EIA	Environmental Impact Analysis.
EIS	Environmental Impact Statement.
E.O.	Executive Order.
EP	Exploration Plan.
EPA	Environmental Protection Agency.
ESA	Endangered Species Act.
G&G	Geological and geophysical.
IC	Information Collection.
ICAS	Inupiat Community of the Arctic Slope.
IOP	Integrated Operations Plan.
IRIA	Initial Regulatory Impact Analysis.
IWC	International Whaling Commission.
LMRP	Lower Marine Riser Package.
MASP	Maximum Anticipated Surface Pressures.
MMPA	Marine Mammal Protection Act.
MMS	Minerals Management Service.
MODU	Mobile Offshore Drilling Unit.

LIST OF ACRONYMS AND REFERENCES—Continued

60-Day report	Report to the Secretary of the Interior, review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program
NAICS	North American Industry Classification System.
NEPA	National Environmental Policy Act of 1969.
NMFS	National Marine Fisheries Service.
NOAA	National Oceanic and Atmospheric Administration.
NPC	National Petroleum Council.
NPC 2015 Report	Arctic Potential: Realizing the Promise of U.S. Arctic Oil and Gas Resources.
NPC 2019 Report	Supplemental Assessment to the 2015 Report on Arctic Potential: Realizing the Promise of U.S. Arctic Oil and Gas Resources.
NPDES	National Pollutant Discharge Elimination System.
NPR-A	National Petroleum Reserve—Alaska.
NSB	North Slope Borough.
NTL	Notice to Lessees and Operators.
OCS	Outer Continental Shelf.
OCSLA	Outer Continental Shelf Lands Act.
ODCE	Ocean Discharge Criteria Evaluations.
OIRA	Office of Information and Regulatory Affairs.
OMB	Office of Management and Budget.
ONRR	Office of Natural Resources Revenue.
OSRP	Oil Spill Response Plan.
PFD	Permanent Fund Dividend.
PRA	Paperwork Reduction Act.
psi/ft	pounds per square inch per foot.
RIN	Regulation Identifier Number.
ROV	Remotely Operated Vehicle.
RP	Recommended Practice.
SCCE	Source Control and Containment Equipment.
Secretary	Secretary of the Interior.
S.O.	Secretary's Orders.
SEMS	Safety and Environmental Management Systems.
SSID	Subsea Isolation Device.
SSRW	Same Season Relief Well.
SOO	Suspensions of Operations.
TAP	Technology Assessment Program.
TAPS	Trans-Alaska Pipeline System.
TCF	Trillion Cubic Feet.
UMRA	Unfunded Mandates Reform Act of 1995.
U.S.	United States.
USCG	U.S. Coast Guard.
USFWS	U.S. Fish and Wildlife Service.
USGS	United States Geological Survey.
Utquaviak	Barrow.
WCD	Worst Case Discharge.

I. Background

A. Overview of the Alaska Arctic Region

1. History of Arctic Oil and Gas Development

Although Alaska's first oil production is attributable to the 1957 Swanson River discovery on the Kenai Peninsula, oil and gas resources have been known to exist in the Arctic since as early as 1839. Early explorers had reported that Alaska Natives on the Arctic coast used oil-soaked tundra for fuel. The oil came from natural oil seeps on the ground. However, the extent of the resource, as well as the State's overall oil and gas endowment, would not be realized until the discovery of the Arctic's Prudhoe Bay oil field on the North Slope and completion of the Trans-Alaska Pipeline System (TAPS) in 1977.

The Prudhoe Bay field was discovered on March 12, 1968, with the drilling of

the Prudhoe Bay State #1 well. BP Exploration drilled a confirmation well the following year. However, production did not come online until June 20, 1977, after the TAPS was completed and other companies with lease holdings in the area undertook a host of activities to delineate the reservoir, resolve equity participation, and put together initial infrastructure for the field. After over 40 years of production, Prudhoe Bay remains the largest oil field in North America and is the 18th largest field ever discovered worldwide.³ According to data maintained by the Alaska Oil and Gas Conservation Commission, Alaska's North Slope has produced over 17.3 billion barrels of oil, with Prudhoe Bay contributing approximately 68

percent of that amount.⁴ Currently, the only offshore Federal production in the Arctic OCS⁵ is Hilcorp's Northstar field, which includes both State and Federal acreage in the 8(g) Zone.⁶ Located in the Beaufort Sea about 12 miles northwest of Prudhoe Bay, this prospect has been producing since 2001. Over 150 million barrels of oil have been produced to date at Northstar. In 2019, the Federal Government received nearly \$5 million in royalty payments from oil production on Federal leases at Northstar, and from 2003 to 2018, royalty payments ranged

³ https://dec.alaska.gov/spar/ppr/response/summary06/060302301/factsheets/060302301_factsheet_PB.pdf.

⁴ <http://aogweb.state.ak.us/DataMiner3/Forms/Production.aspx>.

⁵ There are Federal OCS leases that do not have ongoing production in the Cook Inlet, which is not considered part of the Arctic.

⁶ Section 8(g) of the OCSLA requires the Federal Government to share with the State of Alaska 27% of revenue from leases in the 8(g) Zone (the first three nautical miles of the Outer Continental Shelf). 43 U.S.C. 1337(g).

from \$3 million to over \$20 million in any given year. In 2019, the Federal Government disbursed just over \$1.5 million to the State of Alaska for Northstar Federal leases in the 8(g) Zone.⁷

The construction of TAPS enhanced the significance of the Arctic's production to the State of Alaska. TAPS is an 800-mile-long pipeline system that was designed to accommodate the transport of over 2 million barrels of oil per day. The pipeline begins at Prudhoe Bay and stretches south to Valdez in southern Alaska, which is the northernmost ice-free port in North America. TAPS is one of the world's largest pipeline systems, an engineering icon that was the biggest privately funded construction project when it was constructed in the 1970s. At peak flow in 1988, 11 pump stations helped to move 2.1 million barrels of oil a day.⁸

2. Budgetary Economic Impact on the People of Alaska

North Slope Alaska oil and gas exploration and production has been a significant economic driver, not only to the State of Alaska and Alaskan Native communities, but also to the national domestic energy supply. The State's oil and gas endowments have provided greater economic prosperity to its people than other important resources in the State. Specifically, Alaska relies on revenues generated from oil and gas resources, along with other revenue-generating streams, to fund a major portion of the State's operating and capital budgets. This has allowed Alaska to be the only State in the United States that does not have either a State sales tax or personal income tax. Oil and gas revenues are generated by means of a variety of taxes, royalties, and other charges related to oil and gas development and production. Other examples of revenue-generating streams for Alaska include corporate income, fuel, alcohol, and tobacco taxes. In 2016, 72 percent of Alaska's unrestricted general funds, which come from the State's overall revenue-generating stream, were derived from oil and gas revenues and were available to the State's budget.⁹ In 2012, as much as 93 percent of Alaska's unrestricted general funds were derived from oil and gas revenues and were also available to the State's budget.¹⁰ The reduced contribution of oil and gas-generated

revenue to the State's budget since 2012 is due primarily to declining oil production in the North Slope, but also due to a general downward trend in oil prices.

Aside from annual State operating and capital budgets, several Statewide government programs established for the benefit of the people of Alaska are largely dependent on oil and gas-related revenues, most notably the Alaska Permanent Fund. In 1976, Alaska's State constitution was amended to establish the Alaska Permanent Fund, which provides that at least 25 percent of all mineral lease rentals, royalties, royalty sale proceeds, Federal mineral revenue sharing payments, and bonuses received by the State are to be placed in a permanent fund, known as the Alaska Permanent Fund, the principal of which is used only for income-producing investments. All income generated from the permanent fund is available for distribution to all Alaskan residents—adults and children—on an annual basis through the State's Permanent Fund Dividend (PFD) program.¹¹ Since 1978, this fund has grown to a total fund value of \$60 billion as of March 2020.¹² Individual distributions to Alaskans from the fund have ranged from \$386 per person to as high as \$2,072 per person.¹³ These annual payments are estimated to have lifted between 15,000 and 25,000 Alaskans above the Federal poverty line.¹⁴

Much of the North Slope Borough's economy is tied to the oil and gas industry, primarily in the greater Prudhoe Bay region. Some borough residents have rotational work in the oilfields or in a position supporting the oil industry, but the greatest contribution to the economy is through tax revenue. The borough assesses property taxes on infrastructure, the primary funding source for the borough's operations and capital projects, which include building roads, operating schools, and funding for other public services, such as health clinics and fire departments.¹⁵

In March and April of 2020, global oil prices experienced significant volatility

due to a confluence of events, including decreased demand from coronavirus effects, as well as production output negotiations between OPEC and Russia. These events caused the price of oil to slide to 17-year lows. While prices have already partially recovered and stabilized, this could affect interest and activity in the region if the low-price environment continues into the future, as drilling and other exploration activities in the Arctic are more expensive than other regions. Given the long period of time before exploratory drilling in the Arctic is expected to start and the short-term nature of the underlying price events, the Bureaus expect that prices will continue to rebound. The events in 2020 also underscore the importance of ensuring that BOEM and BSEE regulations are no more burdensome than necessary to protect safety and the environment.

3. Arctic Resource Potential and Geology

The Arctic region is characterized by its extensive oil and gas resources. The Arctic Alaska Petroleum Province, which consists of up to 43 geologic plays between the Chukchi Sea and the Beaufort Sea planning areas, extends about 684 miles from the United States-Canadian border westward to the maritime boundary with Russia, and from 62 to 372 miles northward from the Brooks Range to the approximate edge of the Continental Shelf. Although the edge of the Continental Shelf provides a well-defined physiographic boundary for the province, this edge does not represent a geologic limit to potential petroleum resources. The offshore part of the province is characterized by a relatively narrow (62-mile-wide) shelf in the Beaufort Sea and a broad (372-mile-wide) shelf in the Chukchi Sea. The province is bounded onshore on the south by the Brooks Range-Herald mountain range and offshore to the north by the passive continental margin of the Canada Basin.¹⁶ In general, the formations are fairly continuous across the Arctic Alaska Petroleum Province.

Although most of the Arctic's oil production to date is attributed to the North Slope, most of the undiscovered resources are located off the Arctic coast, within the Chukchi Sea and Beaufort Sea Planning Areas. According to BOEM's 2016 Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's

⁷ <https://revenue.data.doi.gov/downloads/dispbursements/>.

⁸ <https://www.alaska-pipe.com/TAPS>.

⁹ <https://www.legfin.akleg.gov/>, Budget History Data (Excel) (posted 1–15–2020), Row 59.

¹⁰ <https://www.legfin.akleg.gov/>, Budget History Data (Excel) (posted 1–15–2020), Row 55.

¹¹ <https://apfc.org/frequently-asked-questions/#why-did-alaskans-create-the-fund>.

¹² <https://apfc.org/our-performance/>.

¹³ <https://pfd.alaska.gov/Division-Info/Summary-of-Applications-and-Payments>.

¹⁴ Berman, Matt., Random Reamy. "Permanent Fund Dividends and Poverty in Alaska." Institute of Social and Economic Research, University of Alaska Anchorage. (November 2016), available online at: https://iseralaska.org/static/legacy_publication_links/2016_12-PFDandPoverty.pdf. p. 25 of pdf.

¹⁵ http://www.north-slope.org/assets/images/uploads/13_Economic_Development_-_NSB_Comprehensive_Plan.pdf.

¹⁶ Houseknecht, D.W., and Bird, K.J., 2006, Oil and gas resources of the Arctic Alaska petroleum province: U.S. Geological Survey Professional Paper 1732-A, 11 p., available online at: <http://pubs.usgs.gov/pp/pp1732/pp1732a/>.

OCS (mean estimates available at <http://www.boem.gov/National-Assessment-2016/>), there are approximately 23.6 billion barrels of undiscovered technically recoverable oil and about 104.4 trillion cubic feet (TCF) of technically recoverable natural gas (mean estimates) in the combined Beaufort Sea and Chukchi Sea Planning Areas. BOEM re-assessed its Beaufort Sea Planning Area estimates due to recent onshore discoveries in the National Petroleum Reserve-Alaska (NPR-A) from two formations that extended offshore. In December 2017, BOEM published its updated re-assessment (mean estimates available at <https://www.boem.gov/2016a-National-Assessment-Fact-Sheet/>), which estimated that there are approximately 24.3 billion barrels of technically recoverable oil and about 104 TCF of technically recoverable natural gas in the combined Beaufort Sea and Chukchi Sea Planning Areas; an increase of about 680 million barrels of oil and 100 billion cubic feet of natural gas. Of the 24.3 billion barrels of oil, the Chukchi Sea Planning Area makes up about 63% of the estimate, while the Beaufort Sea Planning Area makes up 37%. With respect to gas, the Chukchi Sea Planning Area makes up about 73% of the 104.5 TCF of gas and the Beaufort Sea Planning Area makes up 27% of the estimate. These estimates represent about one-quarter of the technically recoverable oil resources and one-third of the technically recoverable gas resources on the OCS.

While not as large, the Arctic's onshore undiscovered oil and gas resources are also considerable. In January 2020, the United States Geological Survey (USGS) published an assessment of undiscovered oil and gas resources in the central portion of the Alaska North Slope, (mean estimates available at <https://pubs.usgs.gov/fs/2020/3001/fs20203001.pdf>). The assessment estimated that there are approximately 3.6 billion barrels of undiscovered technically recoverable oil and about 8.9 TCF of undiscovered technically recoverable natural gas resources on State and Native lands, and State waters, east of the NPR-A and west of the Arctic National Wildlife Refuge (ANWR). According to a 2017 USGS assessment of undiscovered oil and gas resources in the Alaska North Slope, (mean estimates available at <https://pubs.usgs.gov/fs/2017/3088/fs20173088.pdf>), there are approximately 8.8 billion barrels of undiscovered technically recoverable oil and about 39 TCF of undiscovered technically recoverable natural gas in

the NPR-A. In addition, USGS's assessment of the 1002 Area¹⁷ of the ANWR estimated (mean estimates available at <https://pubs.usgs.gov/of/2005/1217/pdf/2005-1217.pdf>) there are 7.6 billion barrels of technically recoverable oil and 7.04¹⁸ TCF of technically recoverable natural gas. Efforts are already underway to bring some of these new onshore resources online. Collectively, these offshore and onshore assets are enormous, and most of the resources are located offshore.¹⁹ However, the Arctic OCS's vast potential has yet to be realized.

In the Arctic, the circumstances associated with drilling from a MODU can be different than those in the Gulf of Mexico. The geological pressures in the hydrocarbon bearing zones in the shallow seas of Alaska's Arctic are, in many cases, likely to be substantially lower than those encountered during the Deepwater Horizon incident, reducing certain risk factors of a major blowout. As reviewed by the NPC, through the NPC 2019 Report, subsurface conditions (below the seafloor) for the Arctic OCS—geology, pressure, resource depth, and drilling depth—are much simpler as compared to other areas, such as the deepwater Gulf of Mexico OCS. The NPC 2019 Report states that the targeted Arctic potential reservoirs are shallow and normally pressured, but that exploration and development are dominated by other challenges, such as water depth, ice conditions, and the length of the open-water season, which make the Arctic unique (NPC 2019 Report at 10). The NPC 2015 Report found, however, that most of the U.S. Arctic offshore conventional oil and gas potential can

be developed using existing field-proven technology, which was reaffirmed by the NPC 2019 Report (NPC 2015 Report at 28).

As identified by the NPC, targeted potential reservoirs in the Arctic OCS may be shallow and normally pressured.²⁰ However, this condition is not consistent throughout all areas in the Arctic OCS that have already been explored. For example, a study published by the American Rock Mechanics Association²¹ analyzed wells drilled in the Chukchi Sea in order to provide an improved interpretation and delineation of pore pressure in the Chukchi shelf region. A majority of the wells contained significant overpressure at depths ranging from 1,098 to 2,317 meters (*i.e.*, 3,602 to 7,601 feet) subsea. In the Beaufort Sea, the Alaska Department of Natural Resources (ADNR) noted that, as part of its findings to support Beaufort Sea areawide oil and gas lease sales,²² operators may reasonably expect to encounter extremely high pore pressures along the central Beaufort Sea region where “. . . Cenozoic strata (sedimentary layers) are very thick, such as in the Kaktovik, Camden, and Nuwuk Basins,” and suggests that challenges from over pressured areas could be reduced by “. . . identifying locations of overpressured sediments via seismic data analysis, and then adjusting the mud mixture accordingly as the well is drilled.” In the Point Thomson area, for example, where drilling has taken place from an onshore facility into a reservoir located primarily offshore, the pore pressure gradients were measured as high as 0.8 pounds per square inch per foot (psi/ft) at depths of 2.5 miles (13,200 feet). A pore pressure gradient of 0.433 psi/ft is considered normal in this area.²³

¹⁷ The Alaska National Interest Lands Conservation Act (ANILCA) of 1980 required ANWR to be managed as a protected wilderness. Section 1002 of ANILCA, however, deferred a decision regarding future management of a 1.5 million-acre coastal plain portion of ANWR (known as the “1002” area) in order to continuously study the various natural resources on the coastal plain, and analyze how oil and gas exploration, development, and production could potentially impact those resources. Section 20001 of the Tax Cuts and Jobs Act of 2017 lifted a provision in Section 1003 of ANILCA that prohibits oil and gas leasing and production in the 1002 area, and the BLM is in the process of developing an oil and gas leasing program for that area.

¹⁸ This value represents the combined estimates of natural gas that could technically be produced from gas fields as well as associated gas that could be produced from oil fields.

¹⁹ D.L. Gautier *et al.*, “Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle,” U.S. Geological Survey, USGS Fact Sheet 2008–3049, 2008. M.E. Brownfield *et al.*, “An Estimate of Undiscovered Conventional Oil and Gas Resources of the World,” U.S. Geological Survey, USGS Fact Sheet 2012–3024, 2012, available at <https://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

²⁰ “Normally pressured” is not defined in the NPC 2019 Report. However, as a general matter, normal pressure generally refers to the hydrostatic pressure within a well. “Normally pressured” refers to conditions present when formation pressures are predictable at any given depth and follow a normal formation pressure gradient or “hydrostatic pressure gradient.” Normal formation pressure, at any given depth, equals the normal formation pressure gradient multiplied by the depth. The normal pressure is expressed in pounds per square inch (psi).

²¹ Elowe, K.E., & Sherwood, K.W., 2017, “Abnormal Formation Pressure in the Chukchi Shelf, Alaska,” American Rock Mechanics Association Conference Paper, Document ID ARMA–2017–0194, available online at <https://www.onepetro.org/conference-paper/ARMA-2017-0194>.

²² Alaska Department of Natural Resources, 2019, “Beaufort Sea Areawide Oil and Gas Lease Sales,” p. 3–20, available online at <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=193811>.

²³ Craig, J.D., K.W. Sherwood, and P.P. Johnson. 1985. Geologic report for the Beaufort Sea planning

While these reports' findings do not fully align with the NPC's findings, there are other sources of information confirming that, to a certain degree, typical geologic conditions in the Arctic OCS are normally pressured. For example, a BOEM report that studied the Chukchi Sea's Burger gas discovery calculated the pore pressure gradient for one of the Chukchi Sea wells in the study to be 0.44 psi/ft up to 4,850 feet subsea, which the report determined to be normally pressured. However, beneath 4,850 feet, the pore pressure gradient became over-pressurized having a pore pressure gradient of 0.88 psi/ft.²⁴ For the Beaufort Sea, a USGS report analyzed pressure data from five offshore wells and found that the pressures in the area where the wells were located were normally pressured (*i.e.*, at hydrostatic pressure) up to 2,000 feet subsea, and increased only slightly above hydrostatic pressure deeper into the well. By 10,000 feet, however, the pressure in all five wells were over-pressured, 1.5 times higher than the hydrostatic pressure.²⁵ Over-pressure started to occur at around 6,700 feet subsea.

While it is not possible to confirm that all targeted potential reservoirs would be shallow and normally pressured in all exploratory drilling situations, BSEE and BOEM will have access to the relevant geologic and geophysical information to help identify hydrocarbon bearing zones and zones with potential geologic risk, such as over-pressurized zones, that may be encountered during drilling operations. These higher pressured, hydrocarbon zones are, in fact, the targeted formations the industry has attempted to produce. For example, the BOEM report analyzing the Chukchi Sea's Burger gas discovery illustrated the regional geology of all the wells included in the study, and showed that the higher pressured zones in the wells occurred at the same point where the

oil-bearing zones were located.²⁶ The Bureaus have the means, through access to relevant geological and geophysical (G&G) data and drilling application regulatory reviews, to confirm that operators identify and plan for these potential risks. For example, the bureaus confirm that operators have properly designed well casing and drilling programs and ensure that operators have access to properly designed equipment that is readily available to quickly respond to an incident, such as the availability of a capping stack in advance of drilling into the targeted productive zones.

4. Partnership With Alaska Natives in Northern Alaska

The bowhead whale provides the largest subsistence resource available to the native villages of Alaska's northern shores. In 1977, Eskimo whalers from these villages established the Alaska Eskimo Whaling Commission (AEWC), whose mission is to safeguard the bowhead whale and its habitat, defend the Aboriginal Subsistence Whaling Rights of their members, and preserve the cultural and traditional values of their villages. Eskimo whalers established the AEWC in response to actions taken by the International Whaling Commission (IWC) that resulted in the IWC's assumption of direct jurisdiction over the Alaskan Native bowhead whale subsistence hunt, without Alaska Native input. The IWC assumed direct jurisdiction over Alaska Native's bowhead whale subsistence in response to the IWC's concerns regarding the decline in the western Arctic bowhead whale stock. The IWC's only mechanism for protecting whale stocks is the setting of hunting quotas. Therefore, the IWC's only recourse for addressing its concerns was to prohibit the Alaska Native bowhead whale subsistence hunt. This action devastated local communities, creating immediate and severe food shortages. In response, in 1981, the AEWC was able to establish an agreement with the Federal Government to co-manage the bowhead whale hunting quotas.

Although the AEWC was able to regain control of its bowhead whale hunting quotas, the organization shared a similar concern with the IWC regarding the potential effects of

offshore oil exploration and development on the bowhead whale. Whalers observed how bowhead whales were responding to the presence of ocean-going oil and gas industry exploration vessels, which were making the whales skittish and affecting the whalers' ability to effectively meet the quotas for their communities. In response, the AEWC worked with industry stakeholders to establish the "Oil/Whaler Agreement," which was a communication plan between whalers and exploration vessels that was intended to prevent direct threats to the whalers' safety from industry vessels.

The AEWC and industry stakeholders eventually turned the "Oil/Whaler Agreement" into a framework for understanding and addressing indirect interference with hunting activities, resulting from behavioral changes in bowhead whales as they react to the noise and other pollutants accompanying oil and gas work. This framework of understanding eventually formed the basis of what is now known as a CAA.²⁷ While DOI does not require executing a CAA, BSEE and BOEM highly encourage operators to work with the AEWC to establish CAAs, since these agreements essentially acknowledge, within CAA provisions, that both subsistence hunting activities and oil and gas development can and should coexist. See discussion in *Section I.E.3, History and Background on the Conflict Avoidance Agreement*, of this preamble describing the provisions typically included in a CAA. This longstanding process allows for industry representatives to sit, in council, with members of the AEWC, local tribes, and village and regional corporations to determine cultural circumstances and situations that could cause conflict—and thus avoid them. For example, during whale (or walrus) hunting seasons in the spring and fall, the CAA may include provisions whereby industry will avoid construction or production noise and related activities during those times when whales are transiting nearby, and the hunters are in the area. With this early initiative, direct collaboration with local hunters, specifically the whaling captains and their representative organization, the AEWC, became a critical element of offshore industrial development planning and management in the Alaskan Arctic.

Today, the AEWC includes registered whaling captains and their crews from eleven whaling communities of the

area, Alaska: Regional geology, petroleum geology, environmental geology. U.S. Department of the Interior, Minerals Management Service, Alaska OCS Region, OCS Report MMS 85-0111. Anchorage, Alaska. https://www.boem.gov/BOEM-Newsroom/Library/Publications/1985/85_0111.aspx.

²⁴ Craig, J.D., & Sherwood, K.W., 2001 (revised 2004), "Economic Study of the Burger Gas Discovery, Chukchi Shelf, Northwest Alaska," U.S. Department of the Interior, Minerals Management Service, p. 67, available online at <https://www.boem.gov/sites/default/files/boem-newsroom/Library/Publications/2004/Economic-Study-of-the-Burger-Gas-Discovery.pdf>.

²⁵ Hayba, D.O., Houseknecht, D.W., and Rowan, E., 1999, "Stratigraphic, Hydrogeologic, and Thermal Evolution of the Canning River Region, North Slope, Alaska," U.S. Department of the Interior, U.S. Geological Survey, p. FF-21, available online at <https://pubs.usgs.gov/of/1998/ofr-98-0034/FF.pdf>.

²⁶ Craig, J.D., & Sherwood, K.W., 2001 (revised 2004), "Economic Study of the Burger Gas Discovery, Chukchi Shelf, Northwest Alaska," U.S. Department of the Interior, Minerals Management Service, p. 72, available online at <https://www.boem.gov/sites/default/files/boem-newsroom/Library/Publications/2004/Economic-Study-of-the-Burger-Gas-Discovery.pdf>.

²⁷ Conflict Avoidance Agreements are contracts signed by the operators and the Alaska native communities to which BOEM is not a party.

Arctic Alaska coast: Gambell, Savoonga, Wales, Little Diomed, Kivalina, Point Hope, Point Lay, Wainwright, Barrow ²⁸ (Utquaviak), Nuiqsut, and Kaktovik. The AEWC often represents the Inupiat Community of the Arctic Slope (ICAS) in matters pertaining to energy exploration or development specifically for the OCS. The ICAS is a unique federally recognized tribal entity. ICAS membership is based on an individual's ancestral lineage to a village tribe; it includes the peoples of eight Native Villages: Kaktovik, Atkasuk, Nuiqsut, Anaktuvuk Pass, Barrow, Wainwright, Point Lay, and Point Hope. Each village tribe acts independently but will interact with ICAS and its membership as it relates to Federal and State energy issues.

Conflict avoidance tools are often incorporated into leasing stipulations addressing consultation with subsistence communities, and will continue to be essential to help satisfy the need to provide a secure source of energy for the Nation while at the same time protecting the subsistence resources and uses of the local communities where these energy resources are located.

5. Industry Interest in the Arctic OCS

In 1979, a year after the first Arctic offshore discovery (*i.e.*, the Endicott oil

field) was made in State waters, the Department, acting through the Bureau of Land Management (BLM), held the first oil and gas lease sale in the Arctic OCS, offering tracts adjacent to Prudhoe Bay in the Beaufort Sea Planning Area. That sale resulted in 24 leases, covering 85,776 acres, being issued. Although it was the first sale ever conducted for the Arctic OCS, the revenues generated from that sale, over \$491 million, make it the 4th largest sale in Arctic OCS history. That dollar amount would represent almost \$1.9 billion dollars in 2019 after adjusting for inflation. Between 1979 and 2008, the Department, acting through the BLM and Minerals Management Service (MMS),²⁹ held 13 oil and gas lease sales, and issued nearly 1,800 leases, covering over 9.7 million acres, on the Arctic OCS. These sales generated over \$6.8 billion in bonus bids. As many as 23 companies/bidders have participated in an Alaska OCS lease sale and, while the number of companies/bidders participating from one sale to the next varied, an average of 10 companies/bidders participated in each sale.

By 2008, U.S. oil production had been steadily declining for 5 years to an average of 5 million barrels per day, while U.S. consumption of crude oil and petroleum products reached an all-time high of 20.68 million barrels per

day.³⁰ The price of oil increased steadily through 2007 from approximately \$50 to \$90 per barrel by the time the most recent Arctic sale, Lease Sale 193, was held in February of 2008.³¹ These market factors may have contributed to the outcome of Lease Sale 193, one of the most successful in Arctic OCS history, based on multiple metrics—the number of bids received, the number of tracts receiving bids, and the total amount of bonus bids received from the sale. The MMS received a total of 667 bids on 488 blocks; both record-setting numbers for the Arctic OCS. A total of 487 leases, covering over 2.7 million acres, were issued, and the sale generated over \$2.6 billion in bonus bids, which went to the U.S. Treasury. Since 2008, however, the Department has not conducted any new lease sales for the Arctic OCS. A description of the status of active leases in the Arctic OCS is discussed in further detail below within this subsection, prior to the subheading entitled, *Global Arctic Exploration Activities*.

Sale 193 was significant, not only in number of tracts sold and the amount received from the sale, but in that the industry's interest spurred a flurry of activities on the Arctic OCS prior to and after the sale. The following table lists those activities:

2006	
June 20	MMS authorizes ConocoPhillips, Shell, and GX Technology Corporation to conduct geophysical operations for a portion of Chukchi Sea Planning Area, which covered the Sale 193 area.
2007	
July 13	MMS authorizes Shell to conduct additional geophysical operations in Chukchi Sea Planning Area covering the same area as their 2006 geophysical permit.
2008	
February 6	MMS holds Chukchi Sea Lease Sale 193. Seven companies were issued leases from this sale—NACRA; Repsol; Shell; ConocoPhillips; Eni Petroleum; StatoilHydro; and Iona Energy Company.
February 15	MMS authorizes Shell to conduct even further geophysical operations, also covering the same area as their 2006 geophysical permit.
2009	
May 9	Shell submits its initial EP for the Chukchi Sea.
2010	
April 10	BP Deepwater Horizon Incident—Blowout of the Macondo well (Gulf of Mexico).
May 19	Secretary's Order 3299 reorganizing the Minerals Management Service and dividing its functions between three separate bureaus.
June 18	Secretary's Order 3302 creating the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).
August 8	BOEMRE authorizes Statoil to conduct geophysical operations within and around the area where their leases were located in the Chukchi Sea Planning Area.

²⁸ Although the Alaska Native tribe is based in Utquaviak, at any given time, the whaling may involve members of the Apugauti and Nalukataq tribes, whose native lands do not border the coast. For this reason, the AEWC prefers to refer to this

group of whaling captains collectively by the broader term "Barrow."

²⁹ MMS was the predecessor agency of BSEE and BOEM.

³⁰ <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MTTUPUS2&f=A>,

table entitled, "U.S. Product Supplied of Crude Oil and Petroleum Products (Thousand Barrels per Day)".

³¹ https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=F000000__3&f=M.

December 7 BOEMRE conditionally approves Shell's initial EP for the Chukchi Sea.

2011

May 11 Shell submits a revised EP for the Chukchi Sea.

August 29 Secretary's Order 3299 was amended to divide BOEMRE into the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Natural Resources Revenue (ONRR).

December 16 BOEM conditionally approves Shell's revised EP for the Chukchi Sea.

2012

August 30 BSEE authorizes Shell to initiate certain limited preparatory exploration drilling activities; drilling of the top hole for Burger A exploration well in the Chukchi Sea.

September 9 Shell begins drilling operations for its Burger A exploration well in the Chukchi Sea, but was not able to complete its well operations. Shell returned in 2016 to complete its well operations, ultimately plugging and abandoning the well.

September 20 While not applicable to the Chukchi Sea, BSEE also authorizes Shell to initiate drilling of the top hole for the Sivuliq N exploration well in the Beaufort Sea.

October 3 Shell begins drilling operations for its Sivuliq N exploration well in the Beaufort Sea, but was not able to complete its well operations. Shell returned in 2016 to complete its well operations, ultimately plugging and abandoning the well.

2013

August 5 BOEM authorizes TGS to conduct geophysical operations for a portion of Chukchi Sea Planning Area covering a portion of the Sale 193 area.

November 6 Shell submits a revised EP for the Chukchi Sea in response to lessons learned from its 2012 drilling operations of the Sivuliq N and Burger A exploration wells.

2014

August 28 Shell submits a revised EP for the Chukchi Sea, replacing its November 2013 submission.

2015

January 21 President Obama signed E.O. 13689, which calls for multiple agencies that may have jurisdictional responsibilities in the Arctic to enhance their coordination efforts to protect the nation's various interests in the region.

January 27 President Obama issues Presidential Memorandum withdrawing certain areas of the OCS within the Beaufort and Chukchi Seas from leasing. These areas included the Hannah Shoal in the Chukchi Sea and lease deferral areas identified in BOEM's 2012–2017 National OCS Oil and Gas Leasing Program.

February 24 BSEE and BOEM published the 2015 Proposed Arctic Exploratory Drilling Rule, providing a 90-day period for the public to review and comment on the proposed rule.

May 11 BOEM conditionally approves Shell's revised EP for the Chukchi Sea.

July 22 BSEE authorizes Shell to initiate certain limited preparatory exploration drilling activities; drilling of the top hole for Burger J exploration well in the Chukchi Sea.

July 31 Shell begins drilling operations for its Burger J exploration well in the Chukchi Sea.

September 21 Shell completes its Burger J exploration operations, and ultimately plugs and abandons the well.

October 16 The Department cancels all Beaufort and Chukchi lease sales that were scheduled to take place as part of BOEM's 2012–2017 National OCS Oil and Gas Leasing Program.

2016

December 30 President Obama issues a Presidential Memorandum that expands the withdrawal to all areas of the Chukchi Sea planning area and much of the Beaufort Sea planning area that were not currently withdrawn at that time. The withdrawal excludes Beaufort tracts located nearshore in an area that included existing leases at the time.

A key factor that contributed to the length of time taken to authorize Shell's exploration drilling activities was a lawsuit filed by the Native Village of Point Hope challenging the Department's decision to hold Sale 193. *See Native Village of Point Hope v. Salazar*, 730 F. Supp.2d 1009 (D. Ak., 2010); *see also Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir., 2014). The original Environmental Impact Statement (EIS) for Sale 193 was published in 2007, and the lease sale was held, but subsequent legal challenges and Federal court decisions remanded the lease sale to BOEM for further analysis. In response to the court remand, BOEM conducted additional analysis and incorporated that

information into a Supplemental EIS that was published in February 2015 and affirmed the sale as held. Only thereafter were BOEM and BSEE able to complete their formal review of Shell's exploration plan for the Chukchi Sea and approve the drilling activities that took place in the summer of 2015.

Between 2008 and 2019, oil prices remained unstable, increasing to an all-time high of almost \$96 per barrel in 2013 to \$44 per barrel in 2015, which increased to \$56 per barrel in 2019.³² Domestic oil production had grown since 2008, in part due to developments in tight oil onshore and Gulf of Mexico production, to about 9.4 million barrels

per day in 2015 and 12.2 million barrels in 2019.³³ Demand for oil remained relatively stable between 2008 and 2019, with only a minor increase in 2019 over 2008—approximately a 4% increase.³⁴

On September 28, 2015, Shell announced that it would cease further exploration activity in offshore Alaska for the foreseeable future. Shell stated that its decision was based on the results of their Burger J well, which found indications of oil and gas, but were insufficient to warrant further

³³ <https://www.eia.gov/todayinenergy/detail.php?id=4910>.

³⁴ <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MTTUPUS2&f=A>, table titled "U.S. Product Supplied of Crude Oil and Petroleum Products (Thousand Barrels per Day)".

³² https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=F000000__3&f=M.

exploration in the Burger prospect. The company also stated that its decision was motivated by the high costs associated with the project, and the challenging and unpredictable Federal regulatory environment offshore Alaska.³⁵ On November 17, 2015, Statoil announced its decision to exit Alaska and relinquish its leases acquired from Sale 193. All leaseholders that acquired leases in Sale 193 eventually relinquished their leases.

Despite these setbacks, industry interest in the Arctic OCS and other areas of the Arctic, globally, has shown to be consistent amidst fluctuating commodity prices and concerns about regulatory challenges. Since 1998, nineteen geological and geophysical seismic surveys were permitted and completed for the Beaufort Sea and Chukchi Sea Planning Areas. The data from these surveys provide information to both industry and the government for use in lease sales and for design and evaluation of activities described in EPs and DPPs. Several different companies participated in each of the four Beaufort Sea Planning Area lease sales and the one Chukchi Sea Planning Area lease sale indicating on-going industry interest in the area. Companies submitted EPs, three in the Beaufort and one in the Chukchi Sea. These plans, and their revisions, received evaluation and conditional approval. BOEM approved two DPPs, both for the Beaufort Sea. Currently, there are 19 oil and gas leases in the Arctic OCS, all of which are located in the Beaufort Sea Planning Area. Exploratory drilling and development on these leases have taken place from gravel islands in State waters.

Global Arctic Exploration Activities

In addition to the Arctic OCS activities just described, global interest and development has taken place in other parts of the Arctic. Countries, such as Russia, Norway, Canada, and Greenland have been diligently exploring their oil and gas resources in or near the Arctic.

Greenland—Since the 1970s, exploration activities have taken place on the offshore waters of western Greenland. While these exploration activities have taken place in sub-Arctic regions, operators do experience some of the key challenges present in the Arctic. It is not uncommon for icebergs to pose dangers to drilling operations. Operators use ice management plans to identify, monitor, and tow away any

icebergs that may impact their exploration operations. Operators also have contingency plans that may require disconnecting their drilling rig from the well and moving off location to avoid contact with icebergs.

Canada—In the Jeanne d'Arc, Orphan, and Flemish Pass oil and gas basins on the Grand Banks of Newfoundland, operators have conducted exploration drilling from MODUs in shallow and deep waters. Like Greenland, the areas with oil and gas potential are located in sub-Arctic regions that experience some seasonal sea ice and significant iceberg incursions. In these areas, operators also employ strong ice management and contingency plans.

Norway—In Norway's portion of the Barents Sea, which is located entirely within the Arctic, exploration activities have taken place since 1980. Most of the area is free of sea ice year-round, but drilling has taken place in areas that do experience challenging Arctic OCS conditions. As late as 2014, exploration drilling took place in Norway's northern portion of the Barents Seas in what is known as the Hoop area. Those exploration operations entailed the use of winterized semisubmersible rigs and the availability of a capping stack.

Russia—Russia's latest drilling operations also took place in 2014 when ExxonMobil drilled a well in the South Kara Sea. The operation took place in an area of the Arctic where drilling could not take place during the winter months, similar to the Chukchi and Beaufort Seas. Exploration activities took place during the summer, when little to no sea ice was present at the drilling location and were completed in mid-fall. The operation was similar to the operations from the other countries just described—a winterized MODU and robust ice management and contingency plans. However, unique to this project was the use of a subsea isolation device (SSID). (NPC Report 2015 at 6–17 and 6–18, and NPC Report 2019 at C–10). The Kara Sea project is discussed in more detail below in *Section II. Section-by-Section Discussion of Proposed Changes, Subsection A. Key Revisions Proposed by BSEE*, under the subheading entitled, *Supplemental Assessment to the 2015 Report on Arctic Potential: Realizing the Promise of U.S. Arctic Oil and Gas Resources (NPC 2019 Report)*.

Global Arctic Exploration Requirements

Norway, Canada, and Greenland have similar regulatory requirements to the United States for Arctic offshore drilling operations performed from a MODU. The Bratslavsky and SolstenXP study also included a review of the regulatory

requirements from these countries that pertain to relief wells, SCCE, and approval of alternative technologies. The study did not include Russia in its review because the country's regulations could not be accessed. Here is a summary of that review:

- *Relief Wells*—All the Arctic countries that were reviewed specifically require relief wells, but regulations among them differ. For example, Canada simply requires a “same-season” relief well capacity, whereby the operator demonstrates its capability to drill a relief well and kill an out-of-control well in the same drilling season. Whereas the U.S. requires the ability to bring in a relief-drilling rig and complete the plug and abandonment within 45 days, Norway and Greenland require a relief-drilling rig to be on site within 12 days.

- *SCCE*—Canada is the only country besides the U.S. that has specific SCCE requirements. Canada's requirements, however, are less prescriptive in that they include a more general requirement for “cap and containment methods and same-well intervention methods,” as compared to the U.S. requirement for access to specific SCCE equipment within a specified time period.

- *Alternative Technologies*—With respect to approval of alternative technologies in lieu of a relief rig or SCCE, the U.S. has specific regulations that allow for potential substitutions and accommodations for innovative technologies. Canada also provides for the approval of alternative technologies through specific approval processes. Norway's regulations, in general, are largely performance-based. As such, their regulations allow for the consideration of different technologies at the onset when planning a project.

B. BSEE and BOEM Statutory and Regulatory Authority and Responsibilities

The Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, was first enacted in 1953 and substantially amended in 1978. In amending OCSLA, Congress established a national policy of making the OCS “available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.” (43 U.S.C. 1332(3)). OCSLA authorizes the Secretary of the Interior (Secretary) to lease the OCS for mineral development and to regulate oil and gas exploration, development, and production operations on the OCS.

On May 19, 2010, Secretary Ken Salazar issued S.O. 3299, which

³⁵ <https://www.shell.com/media/news-and-media-releases/2015/shell-updates-on-alaska-exploration.html>.

restructured and divided the former MMS's responsibilities under OCSLA among three new bureaus: (i) BOEM; (ii) BSEE; and the (iii) Office of Natural Resources Revenue (ONRR). S.O. 3299 delegated those responsibilities for oil and gas operations to BSEE and BOEM, both of which are charged with administering and regulating aspects of the Nation's OCS oil and gas program (see 30 CFR parts 250 and 550).

On June 18, 2010, Secretary Salazar issued S.O. No. 3302, which announced the name change of part of the former MMS to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). This name, BOEMRE, would remain in effect until BOEM and BSEE were officially created under S.O. 3299, effective October 1, 2011.

On October 1, 2010, the revenue-collection functions of the former MMS were transferred to ONRR, reporting to the Assistant Secretary for Policy, Management and Budget.

S.O. 3299 assigned BOEM the responsibility for managing the development of the Nation's offshore conventional and renewable energy resources. BOEM's mission is to manage the development of the OCS energy and mineral resources in an environmentally and economically responsible way. BOEM's functions include: Leasing; EP administration; DPP administration; permitting of geological and geophysical activities; environmental analyses in compliance with NEPA; environmental studies; compliance with relevant laws (e.g., the Endangered Species Act (ESA), the Marine Mammal Protection Act, the Magnuson-Stevens Fishery Conservation and Management Act, and the Coastal Zone Management Act ³⁶ (CZMA)); resource evaluation; oil spill worst case discharge (WCD) determination; economic analysis and fair market value bid/lease evaluations; management of the OCS renewable energy and marine mineral programs; and consultation with other entities at the local (e.g., North Slope Borough, Native Villages), tribal (e.g., Federally recognized tribes and Alaska Native Claims Settlement Act Corporations), State, and Federal levels (e.g., National Oceanic and Atmospheric Administration (NOAA) Fisheries, U.S. Coast Guard (USCG)) related to

activities within BOEM's activities and areas of responsibility.

Secretary's Order 3299 made BSEE responsible for safety and environmental enforcement functions, including, but not limited to, the authority to permit activities, inspect, investigate, summon witnesses and produce evidence; Levy penalties; cancel or suspend activities; and oversee safety, and oil spill response and removal preparedness. BSEE's mission is to promote safety, protect the environment, and conserve resources through vigorous regulatory oversight and enforcement. BSEE's functions include evaluating permit applications for post-lease oil and natural gas exploration and development activities on the OCS and conducting inspections to ensure compliance with laws, regulations, lease terms, and approved plans and permits.

BOEM evaluates EPs, and BSEE, thereafter, evaluates Applications for Permits to Drill (APDs) and other permits and applications, to determine whether the operator's proposed activities meet OCSLA's standards and each Bureau's regulations governing OCS exploration. Based on their respective evaluations, BSEE and BOEM will either approve the operator's EP and APD, require the operator to modify its submissions, or disapprove the EP or APD (§ 250.410, *How do I obtain approval to drill a well?*). The review and approval of these activities is outlined below in the following section.

1. BOEM Approval of the EP

As promulgated through the 2016 Arctic Exploratory Drilling Rule, § 550.204, *When must I submit my IOP for proposed Arctic exploratory drilling operations and what must the IOP include?*, requires that a lessee submit an IOP at least 90 days before filing an EP with BOEM, if that EP would involve exploration for oil and gas on the Arctic OCS. While the IOP is not subject to approval, the submission was intended to facilitate the prompt sharing of information among the relevant Federal agencies that may be involved in overseeing exploratory drilling operations conducted from MODUs. The operator may then submit an EP to BOEM for approval. An EP must include information such as a schedule of anticipated exploration activities, equipment to be used, the general location of each well to be drilled, and any other information deemed pertinent by BOEM (§§ 550.211 through 550.228).

2. BSEE Approval of the APD

Approval of an EP does not, by itself, permit the operator to proceed with

exploratory drilling. After BOEM approves the EP, the operator must submit to BSEE an APD, which BSEE must approve before an operator may drill a well (43 U.S.C. 1340(d); § 250.410). Among other things, the APD must be consistent with the approved EP and include information on the well location, the drilling design and procedures, casing and cementing programs, the diverter and blowout preventer (BOP) systems, MODU (if one is to be used), and any additional information requested by the BSEE District Manager.

C. Executive and Secretary's Orders

On March 28, 2017, the President issued E.O. 13783—Promoting Energy Independence and Economic Growth (82 FR 16093). The E.O. directed Federal agencies to review all existing regulations and other similar agency actions, which potentially burden the development or use of domestically produced energy resources with the goal of “avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.” It made it U.S. policy for agencies to “review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.”

On April 28, 2017, the President issued E.O. 13795—Implementing an America-First Offshore Energy Strategy (82 FR 20815), which directed the Secretary to “take all steps necessary to review” the 2016 Arctic Exploratory Drilling Rule and, “if appropriate, [to.] as soon as practicable and consistent with law, publish for notice and comment a proposed rule suspending, revising, or rescinding this rule.” The policy underlying E.O. 13795 is “to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible.” These E.O.s did not dictate outcomes; rather, they provided direction for review in accordance with all relevant laws.

To further implement E.O. 13795, on May 1, 2017, the Secretary issued S.O. 3350, *America-First Offshore Energy Strategy*, directing BSEE and BOEM to review the 2016 Arctic Exploratory

³⁶ BOEM is not subject to the requirements of the CZMA in Alaska as it is on the rest of the OCS, where it is required to provide opportunities to the coastal State to review the proposed Federal actions for consistency with the state's federally approved coastal management program. More specifically, on July 1, 2011, Alaska repealed its CZMA program.

Drilling Rule “for consistency with the policy set forth in section 2 of E.O. 13795” and to prepare a report “summarizing the review and providing recommendations on whether to suspend, revise, or rescind the rule.”

Consistent with E.O.s 13783 and 13795, and S.O. 3350, BSEE and BOEM reviewed the regulations promulgated through the 2016 Arctic Exploratory Drilling Rule and are proposing revisions to those regulations to reduce unnecessary burdens on industry while maintaining safety and environmental protection.

D. Purpose and Summary of the Rulemaking

BSEE and BOEM promulgated the 2016 Arctic Exploratory Drilling Rule based on experiences gained from Shell’s 2012 and 2015 Arctic operations, internal reviews conducted on potential oil and gas operations on the Arctic OCS, and concerns expressed by environmental organizations and Alaska Natives.

Since publication of the 2016 Arctic Exploratory Drilling Rule, however, BSEE and BOEM have become aware of additional information informing and warranting the bureaus’ reconsideration of certain regulatory provisions promulgated through that rule. BSEE commissioned a Technology Assessment Program study (Bratslavsky and SolstenXP, 2018) that entailed a historical statistical analysis of recent Alaska Arctic OCS drilling seasons (5-year period between 2012 and 2016), in which meteorology and physical oceanographic (“metocean”) and operational conditions would support the safe deployment of SCCE, the drilling of a relief well, or both. The study included a comprehensive review and gap analysis of U.S. and international regulations, standards, recommended practices, specifications, technical reports, and common industry methods regarding the safe deployment of SCCE, as compared to the effectiveness of drilling a relief well in Arctic conditions.

The Bratslavsky and SolstenXP study determined that metocean conditions prevalent in the Chukchi Sea and Beaufort Sea (*i.e.*, rough sea states and sea ice conditions, primarily) are key factors that limit the ability to safely deploy SCCE throughout the Arctic OCS. The study determined that, when operating in the presence of sea ice in the Chukchi Sea and the Beaufort Sea, there is a greater probability for safe relief well deployment versus SCCE deployment. When operating in open water conditions (*i.e.*, those prone to rough sea states) in the Chukchi Sea,

there is also a greater probability for safe deployment of a relief rig versus SCCE. In the Beaufort Sea, the probability for safely deploying relief wells and SCCE is the same. This is because the Beaufort Sea has fewer ice-free days than the Chukchi and ice helps maintain calm sea state conditions.

The study also determined that water depth in the Arctic OCS is also a factor limiting the safe deployment of SCCE. According to the Bratslavsky and SolstenXP study, safe deployment of SCCE is likely to be impaired in water depths shallower than 984 feet because the equipment would potentially encounter a gas boil at the surface caused by a subsea blowing well (Bratslavsky and SolstenXP at 143). Water depths in the majority of the Chukchi Sea and Beaufort Sea where exploration has historically occurred are relatively shallow—167 feet or less (*id.* at 7 to 9). This water depth range limits the fleet of support vessels that could be used for the safe deployment of SCCE.

The NPC also published its NPC 2019 Report as a supplemental assessment to the NPC 2015 Report. The NPC prepared the NPC 2019 Report in response to an April 2018 request from the Secretary of Energy. The Secretary of Energy requested that the NPC provide recommendations for enhancing the Nation’s regulatory environment by improving reliability, safety, efficiency, and environmental stewardship of oil and gas activities on the OCS. That report specifically addressed the regulatory burdens associated with U.S. Arctic OCS development.

Key findings from the NPC’s supplemental assessment that helped inform the preparation of this proposed rule include the NPC’s determination that the requirement to drill an SSRW to mitigate the risk of a late season well control event continuing over the winter season is “outdated.” The report concluded that SSIDs and capping stacks are superior solutions that could stop the flow of oil and allow intervention through the original borehole before a relief well could be completed (NPC 2109 Report at 19). Details in the report regarding Russia’s 2014 drilling operation that included the use of an SSID in the South Kara Sea also informs this proposed rule.

In this proposed rule, the Bureau also address other issues in addition to those addressed in the 2016 Arctic Exploratory Drilling Rule, including seasonal weather-related constraints in the Arctic that severely impact an operator’s ability to safely perform leaseholding operations for a significant portion of the term on a lease. While these issues are in addition to the issues

addressed by the 2016 Arctic Exploratory Drilling Rule, they are unique to the Arctic OCS and, therefore, are appropriate to address as part of this proposed rulemaking.

BSEE and BOEM recognize that the 2016 Arctic Exploratory Drilling Rule addressed specific operational and environmental conditions that are unique to the Arctic OCS. While this proposed rule would leave most of the regulations promulgated by the 2016 rule unaltered, certain of these regulations are worth reconsidering to accommodate technological innovation and encourage energy exploration on the Arctic OCS. Based on the new scientific information gathered from the Bratslavsky and SolstenXP study, and global practical experience gained in recent years, as described in the NPC Reports, the bureaus believe that these proposed revisions reduce unnecessary regulatory burdens on stakeholders and increase the ability to review and apply advancing technological innovations, while ensuring safety and environmental protection.

The following paragraphs briefly summarize the key elements of this proposed rule, which are more fully explained in *Section II. Section-by-Section Discussion of Proposed Changes* of this preamble:

1. Seasonal Conditions SOO—The unique seasonal conditions in the Arctic make it difficult or physically impossible for operators to explore their leases for a significant portion of each year. To facilitate the proper development of Arctic leases in accordance with OCSLA sec. 5,³⁷ BSEE proposes to add a new provision to its regulations that would provide those operators that are conducting drilling operations, but are prevented from completing those leaseholding operations due to seasonal constraints unique to the Arctic, with the opportunity to obtain an SOO. If granted, this type of SOO would suspend the running of the lease term and effectively extend the term of the affected lease by a period equivalent to the period of such suspension. This would provide operators that are otherwise ready and able to conduct drilling operations with additional time to diligently explore their leases, without facing lease expiration due to

³⁷ OCSLA sec. 5 (as amended) provides in pertinent part: “The regulations prescribed by the Secretary . . . shall include . . . provisions . . . for the suspension . . . of any operation or activity . . . at the request of a lessee, in the national interest, [or] to facilitate proper development of a lease . . . and for the extension of any permit or lease affected by [such] suspension . . . by a period equivalent to the period of such suspension” 43 U.S.C. 1334(a)(1).

interference by seasonal constraints unique to the Arctic.

2. Water-Based Mud and Cuttings—BSEE proposes to eliminate references to the Regional Supervisor's discretionary authority to require the capture of water-based muds and cuttings in those cases where subsistence values might be impacted by such discharges. While not intended, BSEE understands that this reference created some uncertainty for the regulated industry, because it appeared to overlap with regulation by the Environmental Protection Agency (EPA) and, if implemented, might result in BSEE issuing requirements that contradict EPA's requirements.

3. SCCE—BSEE would preserve the requirement for the operator to have access to its SCCE when drilling below or working below the surface casing. However, with respect to the capping stack, the Bureau proposes to provide an opportunity to the operator to adjust the point in time during operations when it must position its capping stack so that it is available to arrive at the well location within 24 hours after a loss of well control. The existing regulations also impose a positioning requirement on the cap and flow system, and containment dome—slightly different from the capping stack—“positioned to ensure that it will arrive at the well location within 7 days after a loss of well control.” BSEE's proposed changes to the positioning requirement for the cap and flow system and containment dome are discussed in more detail later in this paragraph. If the operator is able to demonstrate to BSEE, based on documentation it submits as part of its APD, that the operations it plans to conduct below the surface casing would not encounter any abnormally high-pressured zones or other geological hazards before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, then BSEE will allow the operator to delay its positioning of the capping stack until reaching that casing point. BSEE's proposal to delay the positioning of the capping stack would be based on the documentation that the operator provides as well as any other available data and information. As previously mentioned, BSEE also proposes to eliminate the requirement for the operator to ensure that the containment dome and cap and flow system are positioned so as to arrive at the well location within seven days after a loss of well control. The Bratslavsky and SolstenXP study evaluated current industry methods and standards for deploying SCCE in Arctic OCS conditions, and determined that

meteorological conditions (e.g., rough sea state and sea ice conditions) prevalent in the Chukchi Sea and Beaufort Sea are the key factors limiting the time periods when SCCE may be safely deployed throughout the Arctic OCS. This is discussed in further detail below in *Section II. Section-by-Section Discussion of Proposed Changes*, under the subheading *What are the requirements for Arctic OCS source control and containment?* (§ 250.471). It is not practical for BSEE's regulations to prescribe that certain SCCE (containment dome and cap and flow system, in particular) be positioned within proximity to a well location when the conditions for safely deploying this equipment in the Arctic OCS are limiting. However, BSEE would retain other existing containment dome and cap and flow system requirements in § 250.471, which provide that the operator must:

(i) Demonstrate that it has access to a containment dome and cap and flow system;

(ii) Provide a containment dome and cap and flow system that meets BSEE's operating standards;

(iii) Conduct tests or exercises for all SCCE; and

(iv) Maintain records pertaining to the testing, inspection, maintenance, and use of the SCCE and make these available to BSEE upon request. The changes BSEE proposes to the SCCE requirements in § 250.471 would preserve the regulations' requirement that operators have redundant protective measures that are appropriate for Arctic OCS conditions because there is no guarantee that a single measure could control or contain a WCD.

4. Same Season Relief Well (SSRW) Requirement and Subsea Isolation Devices (SSID)—BSEE proposes to revise the relief rig and SSRW requirements by providing the operator with the option of using an SSID or having access to a relief rig as an additional means to secure the well in the event of a loss of well control, if the operator will be conducting exploratory drilling operations from a MODU. In addition, BSEE proposes to provide an opportunity to the operator to adjust the point in time during operations when it must stage its relief rig (if the operator elects to have access to a relief rig) when conducting Arctic OCS exploratory drilling operations—from when drilling below or working below the “surface casing” to when drilling below or working below the “last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.” If the operator is able to demonstrate to BSEE, based on

documentation it submits as part of its APD, that the operations it plans to conduct below the surface casing would not encounter any abnormally high-pressured zones or other geological hazards before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, then BSEE will allow the operator to delay its staging of the relief rig until reaching that casing point. BSEE's proposal to permit the delay of the staging of the relief rig will be based on the documentation that operator provides, as well as any other available data and information. In the relief rig and SSRW regulation, BSEE would also eliminate the reference to expected seasonal ice encroachment because the relevant timeframes for operations should be based on the capabilities of the operator's rig and equipment to operate in the applicable ice conditions, rather than an absolute date.

5. Mudline Cellars—BSEE proposes to clarify the requirement for the operator, in areas of ice scour, to use a mudline cellar when drilling that is designed to minimize the risk of damage to the well head and wellbore. The existing regulation could be read to require the operator to use a mudline cellar in all cases, except when the operator can prove that the mudline cellar would present an operational risk, and that was not BSEE's intent. This proposed change would make it clear that the operator has more flexibility to propose to employ alternate procedures or equipment instead of the mudline cellar under appropriate circumstances, as provided by the longstanding provisions of § 250.141, *May I ever use alternate procedures or equipment?*; not just when a mudline cellar would present an operational risk and if the operator is able to demonstrate that the alternate procedure or equipment would provide a level of safety and environmental protection that equals or surpasses the mudline cellar requirement.

6. IOP—BOEM proposes to eliminate the requirement that the operator submit an IOP because it requires submission of information that overlaps with that required in the EP and the IOP's early information sharing is unnecessary in light of BOEM's practice for reviewing and coordinating review of the EP. Consequently, the operator is already aware that it must plan for how it will reduce operational risks and address the challenges associated with operations on the Arctic OCS through its EP.

E. Partner Engagement in Preparation for This Proposed Rule

1. Summary of Partner Interaction

In advance of publishing this proposed rule, BSEE and BOEM reached out to Alaska Native tribal leaders, ANCSA corporations, and native village leaders in Northern Alaska for Government-to-Government consultations and municipal meetings. These Bureaus arranged consultations and meetings to receive input from these groups on potential regulatory changes that could encourage energy exploration and production and reduce unnecessary regulatory burdens, while maintaining safety and environmental protection. Between November 29, 2018 and January 30, 2019, BSEE and BOEM officials met with 23 tribal, ANCSA corporation, and municipal leaders at villages throughout Northern Alaska (Kotzebue, Point Hope, Utqiagvik [i.e., Barrow], Nuiqsut, and Kaktovik), in Fairbanks, and in Anchorage. In addition, BSEE and BOEM held a consultation meeting via a conference call with tribal representatives from the Native Village of Point Lay. The following list identifies the entities with which BSEE and BOEM met:

- Tribal Governments—Native Village of Utqiagvik, Native Village of Wainwright, Native Village of Kotzebue, Native Village of Point Hope, Native Village of Nuiqsut, Native Village of Kaktovik, Tanana Chiefs Conference, and Native Village of Point Lay;
- Native Corporations—Olgoonik Native Corporation, Doyon Limited, Arctic Slope Regional Corporation, Tikigaq Native Corporation, Cully Corporation, Kuukpik Corporation, and Kaktovik Inupiat Corporation;
- Municipal Governments—Northwest Arctic Borough, Point Hope, North Slope Borough, City of Utqiagvik, Nuiqsut, and Kaktovik; and,
- Other Tribal Organizations—ICAS and the AEWC.

BSEE and BOEM shared information with the tribal representatives describing potential options for regulatory change that the Bureaus were considering at the time the meetings took place. BSEE and BOEM made multiple attempts to contact two corporations—Kikiktagruk Corporation and NANA Regional Corporation but did not receive a response from them.

2. Summary of Comments Received

BSEE and BOEM heard a variety of perspectives during these meetings with Alaska Natives. The most common comment received was a concern over food security. Subsistence resources, including bowhead and beluga whales,

other marine mammals, fish, and birds, are a key food source for many peoples' diets in the native villages. The Alaska Natives' primary concerns pertained to protecting their food sources. BSEE and BOEM are fully aware that subsistence resources play a key role in offsetting the high costs of conventional food supplies and that subsistence hunting and fishing play a key role in the cultural identity of Alaska Natives. BOEM's leases all contain provisions related to the protection of these subsistence uses and BOEM's regulations at §§ 550.227(b)(7) and 550.261(b)(7) require lessees to explain how they propose to protect these subsistence uses. In addition, BSEE and BOEM are not proposing any regulatory changes that would adversely affect protection of subsistence uses.

Certain tribal representatives, and most ANCSA corporations, were supportive of this rulemaking, and explained that it could help attract more economic opportunities to their villages. In some cases, tribes or corporations advocated for the use of their villages to support safer oil and gas operations, because the villages have deeper ports that could support larger vessels, or because they may be located closer to potential drilling operations than those ports or facilities that have been used in the past. This could allow for quicker response to emergency incidents.

BSEE did not include any regulatory changes in this proposed rule specifically designed to respond to this comment. While requiring the staging of equipment at strategically located coastal depots could have a positive impact on oil spill responses in the Arctic, the identification and placement of depots for such resources falls to the discretion of the operator (within the parameters established by existing regulation). To provide each plan holder with the flexibility needed to respond to their WCD scenarios, BSEE's Oil Spill Response Plan (OSRP) regulations do not mandate the use of any particular staging location(s) for equipment and personnel. BSEE will review the operator's staging arrangements submitted as part of the proposed OSRP to ensure that the OSRP would fully comply with the planning requirements in the governing regulations.

Other comments provided during the consultation meetings included a recommendation for BSEE and BOEM to provide broader outreach by presenting this proposed rule to their tribal assembly and to citizens within the communities.

DOI strives to strengthen its government-to-government relationship with federally recognized tribes through

a commitment to consultation with tribes and recognition of their right to self-governance and tribal sovereignty. E.O. 13175, *Consultation and Coordination with Indian Tribal Governments* and DOI's tribal consultation policy, which implements the E.O., provide for procedures for consultation with tribes when taking an action with tribal implications. DOI has extended its consultation policy to ANCSA corporations. Furthermore, BSEE and BOEM recently issued their own expanded tribal consultation guidance on August 20, 2019 and June 29, 2018, respectively. BSEE's guidance (*Bureau of Safety and Environmental Enforcement (BSEE) Tribal Consultation Guidance*, August 20, 2019, available at <https://www.bsee.gov/bsee-tribal-guidance-2019>) and BOEM's guidance (*BOEM Tribal Consultation Guidance*, June 29, 2018, available at <https://www.boem.gov/Tribal-Engagement/>), identify various consultation authorities that BSEE and BOEM will follow in consulting with tribes and ANCSA corporations.

DOI recognizes and respects the distinct, unique, and individual cultural traditions and values of Alaska Native people and the statutory relationship between ANCSA Corporations and the Federal Government. BSEE and BOEM will endeavor to go above and beyond their consultation responsibilities where and when appropriate throughout the rulemaking process to maintain a strong working relationship with their tribal and ANCSA corporation partners.

BSEE and BOEM also received a comment from one of the ANCSA corporations recommending that this rulemaking take into account the NPC 2019 Report. BSEE and BOEM considered the NPC reports when preparing this proposed rule and based some of the proposed regulatory revisions on that report's recommendations, as discussed more fully below.

Another common comment that BSEE and BOEM received was a recommendation to include a requirement for a CAA between the oil and gas operator and those whaling communities potentially affected by an operator's proposed drilling project. A CAA is typically established through a collaborative process whereby both parties work to create mitigation strategies that would avoid adverse impacts to bowhead whales and other marine mammals, their habitat, and hunting opportunities. Historically, operators have voluntarily used the CAA process and, currently, existing lessees are required to do so through

lease stipulations.³⁸ See discussion in *Section I.E.3, History and Background on the Conflict Avoidance Agreement*, of this preamble describing the history and background of the CAA. In addition, under the MMPA, the taking of marine mammals without a permit or exception is prohibited in order to prevent the decline of species and populations. To avoid liability for take, operators must obtain an Incidental Take Authorization or Incidental Harassment Authorization for activities related to offshore exploration, development and production. Implementation of the MMPA is shared between NMFS and USFWS.

Section 7(a)(2) of the ESA requires every Federal agency to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the adverse modification of designated critical habitat. When any exploration or development plan, or G&G permit application, is submitted to BOEM, BOEM evaluates the proposal, and consults with NMFS and USFWS on species listed under the ESA. During this process, mitigation measures (e.g., vessel speed restrictions, rig lighting specifications, and protected species observer requirements) are developed to reduce impacts to protected species. These measures are then included in BOEM's conditions of approval for the EP, DPP, or G&G permit.

BOEM did not include any regulatory changes in this proposed rule specifically designed to respond to this comment. BOEM cannot require whaling communities to establish agreements with operators, since BOEM has no jurisdiction over such

communities. Such a requirement for lessees and operators to execute an agreement could give a third-party power to set conditions for, or veto, OCS activities over which they otherwise have no authority.

For those reasons, BOEM has concluded that a regulation would not result in any additional protections of subsistence whaling beyond those provided by its longstanding practice of addressing the issue in a lease stipulation. BOEM has included as a lease stipulation for all Arctic OCS lease sales since 1991 that the lessee must make every reasonable effort, including such mechanisms as a CAA, to assure that exploration, development, and production activities are compatible with whaling and other subsistence hunting activities and will not result in unreasonable interference with subsistence harvests. Implementation of the stipulation must be described in an EP under § 550.222. In addition, either BOEM or BSEE may require additional mitigation measures at the EP or the APD stages, as necessary, to appropriately address potential interference with subsistence activities. For example, because subsistence hunters are concerned that the effects of offshore oil and gas exploration might displace migrating bowhead whales and other marine mammals (like beluga whales), the Bureaus will meet with the AEWC and its whaling captains to help document traditional knowledge pertaining to bowhead whales, including movement and behavior.

Given the importance of subsistence activities and related socio-cultural activities to the Alaska Native communities, BOEM has long encouraged operators to work directly with interested parties to help mitigate potential impacts to subsistence activities. In addition, BOEM funds and supports studies to better understand the potential impacts from OCS operations on marine mammals and subsistence activities. Over the last 46 years, the environmental studies program has provided more than \$1.2 billion nationally for scientific research on the OCS. Nearly \$500 million of that amount has funded studies in Alaska to produce more than 1,000 technical reports and innumerable peer reviewed publications. BOEM uses information from the studies program to evaluate the potential environmental effects of leasing OCS lands for exploration and development. Since July 2016, BOEM has completed 35 environmental studies and has 23 ongoing studies that cover the Arctic, totaling nearly \$72 million. While environmental conditions change and continue to change (e.g., walrus

habitat, bowhead whale migration, and ice coverage), BOEM's environmental studies program both adds to our understanding and tracks these changes to have the best science available for the public, industry, and federal permitting decisions. While BOEM has observed changes through these studies, these changes follow the trajectory that BOEM has been studying and documenting for several decades. While this proposed rule would change how operators could explore for OCS resources in the Arctic, there are ample opportunities to permit these activities consistent with ESA, MMPA, NEPA, and consultation with Alaska Native communities.

3. History and Background on the Conflict Avoidance Agreement

In 1977, the IWC expressed concern over the low bowhead whale population. Its report specifically mentioned that the future expansion of offshore oil and gas extraction in the Arctic posed a potential risk to the bowhead whale population. At that time, Inuit subsistence hunters knew that bowhead whales were sensitive to anthropogenic noise, movements, and even smells. There were concerns that increased activity would affect their hunt. Traditional hunters had noticed that boat traffic, seismic exploration, and drilling were causing migrating whales to deflect away from the shore and beyond the hunters' reach.

Beginning in 1986, offshore stakeholders, such as representatives from whaling villages, the AEWC, and oil and gas companies, have all met to identify sources of potential conflict, and have relied on local traditional knowledge as well as other information. CAAs were developed first in the 1980s to address these sources of potential conflict and have been referenced in lease stipulations since 1991.

Since 1991, all leases in the Arctic issued by BOEM or its predecessors have included a stipulation requiring the operator to coordinate their activities with potentially affected Alaska native communities. While the text of these stipulations has varied from time to time, all of them have included certain important components. The following is an extract from such a stipulation, incorporated into the leases issued from the Oil and Gas Lease Sale Number 202, issued on April 18, 2007:

Prior to submitting an exploration plan or development and production plan (including associated oil-spill contingency plans) to MMS for activities proposed during the bowhead whale migration period, the lessee shall consult with the directly affected subsistence communities, Barrow, Kaktovik, or Nuiqsut, the North Slope Borough (NSB),

³⁸ Every BOEM Arctic lease contains a variant of the following stipulation: "Prior to submitting an exploration plan or development and production plan (including associated oil-spill contingency plans) to MMS for activities proposed during the bowhead whale migration period, the lessee shall consult with the directly affected subsistence communities, Barrow, Kaktovik, or Nuiqsut, the North Slope Borough (NSB), and the AEWC to discuss potential conflicts with the siting, timing, and methods of proposed operations and safeguards or mitigating measures which could be implemented by the operator to prevent unreasonable conflicts. Through this consultation, the lessee shall make every reasonable effort, including such mechanisms as a conflict avoidance agreement, to assure that exploration, development, and production activities are compatible with whaling and other subsistence hunting activities and will not result in unreasonable interference with subsistence harvests.

A discussion of resolutions reached during this consultation process and plans for continued consultation shall be included in the exploration plan or the development and production plan. In particular, the lessee shall show in the plan how its activities, in combination with other activities in the area, will be scheduled and located to prevent unreasonable conflicts with subsistence activities."

and the Alaska Eskimo Whaling Commission (AEWC) to discuss potential conflicts with the siting, timing, and methods of proposed operations and safeguards or mitigating measures which could be implemented by the operator to prevent unreasonable conflicts. Through this consultation, the lessee shall make every reasonable effort, including such mechanisms as a conflict avoidance agreement, to assure that exploration, development, and production activities are compatible with whaling and other subsistence hunting activities and will not result in unreasonable interference with subsistence harvests.

Because this stipulation was provided for in the lease sale notice and included in the lease agreements resulting from the lease sale, its requirements became binding for all leases issued as a result of that particular lease sale.

The intent of this stipulation is for the operator to make a reasonable effort to establish a CAA with potentially affected whaling or subsistence hunting communities. It is the operator's responsibility to attempt to reach agreement on a CAA with those communities.

II. Section-by-Section Discussion of Proposed Changes

This section provides explanations of and justifications for each of the specific regulatory changes proposed in this document. Since this is a joint BSEE and BOEM proposed rulemaking, this Section-by-Section discussion is organized according to the order in which the relevant provisions would appear in the CFR. BSEE's and BOEM's regulations are found in the CFR at Title 30—Mineral Resources, Volume 2; BSEE's regulations are in Chapter II, and BOEM's regulations are in Chapter V.

A. Key Revisions Proposed by BSEE

Title 30, Chapter II, Subchapter B, Part 250

Subpart A—General

Definitions. (§ 250.105)

BSEE proposes to revise the definition of *Capping Stack* by deleting the phrase “including one that is pre-positioned” from the definition. BSEE included this phrase as part of the 2016 Arctic Exploratory Drilling Rule in response to a suggestion that the definition in the 2015 Arctic Proposed Rule should be expanded to allow pre-positioned capping stacks to be used below subsea BOPs when deemed technically and operationally appropriate. Recognizing that the comment was helpful, BSEE agreed with the suggestion and added the phrase “including one that is pre-positioned” to the capping stack definition (see 81 FR 46492). As a practical matter, pre-positioned capping

stacks are similar to SSIDs. Accordingly, this modification in the 2016 final rule effectively allows the operator to install an SSID below a subsea BOP and would be in compliance with the capping stack requirement in the existing § 250.471, *What are the requirements for Arctic OCS source control and containment?* Existing § 250.471(a)(1), specifically requires the operator, when drilling below or working below the surface casing, to have access to a capping stack that is positioned to ensure that it will be able to arrive at the well location within 24 hours after a loss of well control. Typically, an operator would comply with this requirement by having one or more support vessels capable of handling and deploying the capping stack down to the subsea wellhead, when needed. Installing an SSID below the subsea BOP allows the operator to comply with § 250.471(a)(1) and forgo the need to provide support vessels and a capping stack on standby at the surface.

However, BSEE is proposing to eliminate this language because a pre-positioned capping stack is a piece of equipment that, as previously mentioned, aligns closely with an SSID. The Bureau is currently proposing distinct SSID requirements under § 250.472, *What are the additional well control equipment or relief rig requirements for the Arctic OCS?* This proposed revision would provide clarity concerning the capping stack requirements under § 250.471, specifically that installation of an SSID under § 250.472 does not constitute compliance with the capping stack requirements under § 250.471. For purposes of BSEE's proposed regulations, an SSID is not considered to be the same as, or to satisfy the requirement to have, a capping stack. The new SSID option that BSEE is proposing under § 250.472 does not, and is not intended to, replace any of the SCCE requirements in proposed § 250.471(a), where BSEE's capping stack requirement is addressed.

When may the Regional Supervisor grant an SOO? (§ 250.175)

BSEE proposes to revise § 250.175 by adding a new paragraph (d), which would allow an operator to request an SOO under certain situations that may be present in the Arctic OCS. This proposed revision is consistent with OCSLA's requirement that the Secretary promulgate suspensions regulations that “facilitate proper development of a lease”³⁹ The proposed regulation

³⁹ OCSLA sec. 5, as amended, codified at 43 U.S.C. 1334(a)(1).

would list the factors upon which BSEE may rely when determining whether to grant an SOO and include when an operator:

(1) Has conducted operations on the lease during the drilling season immediately preceding the period for which the operator is seeking a suspension;

(2) is drilling from: A MODU, an artificial gravel island or a gravity-based structure, or an artificial ice island; and

(3) is not able to safely continue its operations due to the presence of seasonal ice, temporary seasonal drilling restrictions in its approved oil spill response plan, or seasonal temperature changes (respectively, for each facility type).

Currently, BOEM issues Alaska OCS leases with the maximum 10-year primary lease term allowed under OCSLA.⁴⁰ However, operators may be precluded from properly developing leases because it is not possible to conduct leaseholding operations for significant portions of those 10-year terms. Offshore drilling locations on the Arctic OCS are inaccessible for a significant portion of each year, due to seasonal changes that make operating conditions unsafe or otherwise preclude operations. Moreover, it is difficult to predict precisely when sea ice will persist or break-up.

MODUs—For example, drilling operations performed from a MODU may occur only during the open-water drilling season (generally late June to early November), when sea ice is non-existent or minimal. This practical limitation, without considering other logistical problems unique to the Arctic OCS, could mean that during a consecutive 10-year period, a lease may be unavailable for operations for approximately 70 percent of the time.

Artificial Gravel Islands or Gravity-based Structures—Drilling from artificial gravel islands and gravity-based structures is prohibited during the spring/summer ice break-up and the fall/early winter freeze-up periods, because of the potential impact of weather and ice conditions on potential oil spill response and cleanup efforts. In particular, response and cleanup techniques for a large spill are not as effective when sea ice is broken and unconsolidated around the drilling location. By contrast, response and

⁴⁰ OCSLA sec. 8, as amended, states in part: “An oil and gas lease issued pursuant [OCSLA] shall be for an initial period of (A) five years; or (B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions” 43 U.S.C. 1337(b).

cleanup efforts for a large oil spill from an artificial gravel island or a gravity-based structure could be executed effectively during the summer (*i.e.*, in open-water conditions) using existing oil spill response technologies. During the winter (*i.e.*, under solid ice conditions), the ice, and any snow on the ice, could provide an effective platform for oil spill response and cleanup efforts, and help absorb the spill and contain it to an area relatively close to the gravel island or gravity-based structure. Land-based equipment could then be used to collect and transport the oil-covered ice out of the location. For context, a gravity-based structure would include a concrete island drilling structure and a steel drilling caisson(s).

Artificial Ice Islands—A similar issue would be encountered if drilling were to take place from a man-made ice island. In those cases, the drilling location would be accessible only during the winter season when temperatures are very low, and the area is completely covered by ice stable enough to safely support a drilling rig and associated equipment. As temperatures rise during the spring and summer seasons, the ice breaks or melts away, making the drilling location inaccessible until the next winter season.

The new paragraph (d) of § 250.175 would facilitate the proper development of a lease by addressing those seasonal conditions that limit leaseholding operations by providing an operator ready and able to complete its operations with the opportunity to obtain an SOO. If granted, this SOO would suspend the running of the lease term and effectively extend the term of the affected lease by a period equivalent to the period of such suspension. The SOO would allow a diligent operator to use the full 10 years in a 10-year lease term to explore for hydrocarbons, without the concern for a lease expiring because Arctic seasonal constraints prevented operations.

BSEE would continue to require the operator to comply with the existing requirements for requesting a suspension under existing § 250.171, *How do I request a suspension?* For example, § 250.171 requires the operator to submit a reasonable schedule of work for resuming the suspended operations on the subject lease for which the operator requests the suspension. A schedule of work typically includes milestones describing what activities the operator will perform to resume operations and when those operations will be performed. If the operator submits a schedule of work that demonstrates a reasonable plan and

schedule for resuming operations, BSEE will typically grant the SOO (assuming the other requirements are satisfied). BSEE will use the reasonable schedule of work as an established measuring stick by which the Bureau would assess the operator's diligence and progress toward prudent development. If the operator does not adhere to its approved work schedule, BSEE may terminate the SOO under existing regulations. Paragraph (e) of existing § 250.170, *How long does a suspension last?* authorizes BSEE to terminate any suspension when the Regional Supervisor determines the circumstances that justified the suspension no longer exist. Because a reasonable schedule of work serves as a required foundation for BSEE's SOO approval, the operator's adherence to that schedule is necessary to maintain the SOO. This allows BSEE to ensure that the operator complies with the OCSLA Congressional declaration of purpose. Other regulations under Subpart A that would also apply to BSEE's implementation of proposed paragraph (d) of § 250.175 includes § 250.170, *How long does a suspension last?* which allows BSEE to issue a suspension for up to five years and provides that the suspension automatically ends when the suspended operation commences.

BSEE understands the requirement in OCSLA to supervise operations in a manner that assures due diligence in the exploration and development of each lease. Therefore, BSEE is contemplating the option of limiting the period for when the suspension would remain in effect; only during the period between one drilling season and the next when the operator is prevented from continuing its drilling or other leaseholding activities due to seasonal conditions. This option would still provide operators more time to effectively explore their leases without fear of an expiring lease. It could also provide BSEE with a better means of tracking an operator's diligence efforts. This option, however, could result in additional unnecessary burdens, since an operator would have to "reapply" for a new suspension if the operator is unable to return to the location during the next open-water season. BSEE is seeking comment on this regulatory option for the SOO or any other option that could avoid or minimize additional burden, but still assure diligent lease exploration and development.

BSEE's proposed regulatory change would address concerns raised in the NPC reports, which suggested that the current approach toward administration of the 10-year primary lease term allowed under OCSLA "comes from

other offshore areas in the U.S., where operators have access to the leases all year-round." (NPC 2015 Report at 31 and NPC 2019 Report at 25). The NPC 2019 Report pointed out that a "10-year lease in the U.S. Arctic equates to about 3 to 4 years of working time, compared with the equivalent 10 years working time in the Gulf of Mexico." (NPC 2019 Report at 25). While it is not possible for BOEM to award leases with more than the maximum ten-year primary lease term allowed under OCSLA, this proposed regulatory change would rely on the Secretary's statutorily delegated authority, which has, in turn, been delegated to BSEE, to administer suspensions to address, as appropriate, the effects of Arctic working conditions when they may limit the operator's ability to perform leaseholding activities.

Documents Incorporated by Reference. (§ 250.198)

BSEE proposes to revise the existing relief rig and SSRW requirements in § 250.472 by providing the operator with an option to either use an SSID or have access to a relief rig if the operator will conduct exploratory drilling operations from a MODU. As part of that proposed regulatory change, which is discussed in detail later below in the *What are the relief rig or additional well control equipment or relief rig requirements for the Arctic OCS?* (§ 250.472) section-by-section discussion, BSEE proposes to require the SSID to include Remotely Operated Vehicle (ROV) intervention equipment that has the capabilities to function the SSID. Under proposed § 250.472(a)(3)(ii), BSEE would require the ROV to have panels that are compliant with API RP 17H, *Remotely Operated Tools and Interfaces on Subsea Production Systems*, Second Edition, June 2013; Errata, January 2014, to ensure that the operator's ROV capabilities for the SSID follow BSEE's existing ROV panel requirements for BOP systems. In conjunction with proposed paragraph (a)(3)(ii) that would require the operator's ROV panels to be compliant with API RP 17H, BSEE proposes to add the citation for proposed § 250.472(a)(3) to § 250.198(e)(73). Paragraph (e)(73) of § 250.198 documents the locations in the regulations where API RP 17H is incorporated by reference as a regulatory requirement, which would include § 250.472(a)(3) under this proposed rule. Adding the citation for § 250.472(a)(3) to § 250.198(e)(73) would clarify that API RP 17H is a regulatory requirement when complying with § 250.472 and is subject to BSEE

oversight and enforcement in the same manner as other regulatory requirements.

API Recommended Practice 17H—Remotely Operated Tools and Interfaces on Subsea Production Systems

This recommended practice provides general recommendations and overall guidance for the design and operation of remotely operated tools (ROT) and remotely operated vehicle (ROV) tooling used on offshore subsea systems. ROT and ROV performance is critical to ensuring safe and reliable subsea operations and this document provides general performance guidelines for this and associated equipment. This second edition also includes provisions on high flow Type D hot stabs.

The American Petroleum Institute (API) provides free online public access to view read only copies of its key industry standards, including a broad range of technical standards. All API standards that are safety-related and that are incorporated into Federal regulations are available to the public for free viewing online in the Incorporation by Reference Reading Room on API's website at: <http://publications.api.org> ^[1]. In addition to the free online availability of these standards for viewing on API's website, hardcopies and printable versions are available for purchase from API. The API website address to purchase standards is: <https://www.api.org/products-and-services/standards/purchase>.

^[1] To view these standards online, go to the API publications website at: <http://publications.api.org>. You must then log-in or create a new account, accept API's "Terms and Conditions," click on the "Browse Documents" button, and then select the applicable category (e.g., "Exploration and Production") for the standard(s) you wish to review.

For the convenience of the viewing public who may not wish to purchase or view the incorporated documents online, the documents may be inspected at BSEE's offices at: 3801 Centerpoint Dr, Anchorage, Alaska, 99503 (phone: 907-334-5300); 1919 Smith Street, Suite 14042, Houston, Texas 77002 (phone: 1-844-259-4779); or 45600 Woodland Road, Sterling, Virginia 20166 (email: regs@bsee.gov), by appointment only. BSEE will make documents incorporated in the rule available for viewing at the time and date agreed upon for the appointment. Additional information on where these documents can be inspected or purchased can be found at 30 CFR 250.198, *Documents incorporated by*

reference, or by sending a request by email to regs@bsee.gov.

Subpart C—Pollution Prevention and Control

Pollution prevention. (§ 250.300)

BSEE proposes to revise paragraphs (b)(1) and (2) of § 250.300 by eliminating the existing language that states the Regional Supervisor may require the capture of all water-based mud, and associated cuttings, from operations after completion of the hole for the conductor casing to prevent its discharge into the marine environment. While this proposed rule would eliminate the language regarding the Regional Supervisor's discretionary authority to require the capture of water-based muds and cuttings, it would maintain the existing requirement in § 250.300(b)(1) and (2) that operators capture all petroleum-based mud and associated cuttings while operating on the Arctic OCS.

Existing § 250.300(b)(1) and (2) state that the BSEE Regional Supervisor may exercise his or her discretionary authority to restrict discharges of water-based muds and associated cuttings from Arctic OCS exploratory drilling based on various factors, such as: Proximity of drilling operations to subsistence hunting and fishing locations; the extent to which discharged water-based mud or cuttings may cause marine mammals to alter their migratory patterns in a manner that impedes subsistence users' access to or use of those resources, or increases the risk of injury to subsistence users; or the extent to which discharged mud or cuttings may adversely affect marine mammals, fish, or their habitat. BSEE promulgated the existing provisions in response to concerns raised by Alaska Native Tribes during preparation of the 2015 Arctic Proposed Rule. These concerns included how water-based muds or cuttings could adversely affect marine species (e.g., whales and fish) and their habitats and compromise the effectiveness of subsistence hunting activities.

BSEE re-examined the language in paragraphs (b)(1) and (2) of this section in light of EPA's authority to address water-based muds and cuttings discharges. The Clean Water Act (CWA) (Section 301(a), 33 U.S.C. 1311(a)) provides EPA with the authority to issue National Pollutant Discharge Elimination System (NPDES) general permits, which authorize certain discharges, including certain restricted discharges of water-based muds and cuttings, from oil and gas exploratory facilities on the OCS in the Beaufort Sea

and the Chukchi Sea. Those general permits additionally prohibit the discharge of oil-based and non-aqueous based muds and cuttings. The EPA must issue an NPDES general permit before an operator may seek coverage under that general permit. Compliance with the CWA, including gaining coverage under an applicable NPDES general permit, is necessary before an operator may discharge pollutants from its exploratory drilling operations.

Before issuing an NPDES permit, EPA must make specific determinations to ensure that issuance of a permit will not lead to unreasonable degradation of the marine environment. EPA's determination is guided by an Ocean Discharge Criteria Evaluation (ODCE). The ODCE requires the agency to consider multiple environmental factors, such as potential impacts on human health through direct and indirect pathways, and the importance of the receiving water area to the surrounding biological community. These factors take into consideration how discharges could impact subsistence activities, marine resources, and coastal areas. The most relevant NPDES permits issued for offshore oil and gas exploration activities conducted from a MODU on the Arctic OCS are two 2012 general permits that covered oil and gas exploration facilities conducting operations in Federal waters of the Beaufort Sea and the Chukchi Sea. The Beaufort Sea permit ⁴¹ does not allow the discharge of water-based muds and cuttings during the fall bowhead whale hunt. However, the Chukchi Sea permit ⁴² did not include a similar restriction. According to the ODCE for the Chukchi Sea permit, the restriction was not necessary because the migration of bowhead whales would be over before discharge-related activities would begin. ⁴³

Under this proposed rule, BSEE would preserve the requirements in § 250.300(b)(1) and (2) that the operator capture all petroleum-based mud and associated cuttings. This requirement is consistent with a longstanding, OCS-wide regulatory authority that existed prior to the promulgation of the 2016 Arctic Exploratory Drilling Rule. BSEE must preserve the petroleum-based muds and cuttings requirement since it is not unusual for petroleum-based

⁴¹ <https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-beaufort-oil-gas-gp-akg282100-final-permit-2012.pdf>.

⁴² <https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-chukchi-oil-gas-gp-akg288100-final-permit-2012.pdf>.

⁴³ <https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-chukchi-oil-gas-gp-akg288100-odce-2012.pdf>, pp. 6-14 to 6-17.

muds to contain constituents that are toxic and harmful to the environment. Although water-based muds may not be a feasible option for all drilling operations, such as when drilling through hydrophobic geologic formations that could be damaged by water-based muds, its use is a more environmentally benign approach in comparison to the use of petroleum-based muds. However, BSEE's proposed revisions reflect the Bureau's understanding that the express statements regarding the Regional Supervisor's discretionary authority to require the capture of water-based muds and cuttings in existing § 250.300(b)(1) and (2) are not necessary. In particular, the EPA already addresses the goals of protecting water quality through the NPDES program, protecting marine species and their habitats, as well as the effectiveness of subsistence hunting activities, through the exercise of that agency's authorities. Thus, BSEE does not expect the Regional Supervisor to need to exercise the discretionary authority under existing § 250.300(b)(1) and (2) in the foreseeable future.

Furthermore, BSEE understands, and did so even while it was preparing the 2016 Arctic Exploratory Drilling rule, that the references to the BSEE Regional Supervisor's authority in existing paragraphs (b)(1) and (2) created some uncertainty for the regulated industry because it appeared to overlap with EPA's jurisdiction and, if implemented, might result in BSEE issuing duplicative or conflicting requirements. BSEE addressed this concern by explaining that the amendments were meant to clarify the Regional Supervisor's authority to impose operational measures that complement EPA's discharge limitations by considering potential impacts to specific components of the Arctic environment, such as subsistence activities, marine resources, and coastal areas (81 FR 46505). Given the policy in E.O. 13783 to review existing regulations that potentially burden the development or use of domestically produced energy resources and the general principles in Section 1 of E.O. 13563—*Improving Regulation and Regulatory Review* (76 FR 3821)—to promote predictability and reduce uncertainty, BSEE believes it is appropriate to propose eliminating the water-based mud, and associated cuttings, provisions in § 250.300(b)(1) and (2).

This proposed regulatory change does not suggest any change in BSEE's recognition that it is responsible for ensuring that oil and gas exploration and production activities on the OCS are conducted in a safe and

environmentally responsible manner pursuant to OCSLA. Therefore, the proposed rule would not alter the longstanding regulation at § 250.300(b)(1), under which the District Manager (or Regional Supervisor) retains the ability to restrict the rate of drilling fluid discharges or prescribe alternative discharge methods where warranted. Pursuant to § 250.300(b)(1), BSEE would be able to determine whether there is a need to require capture of water-based muds and cuttings on a case-by-case basis, if the EPA has not done so. In particular, the District Manager would consider and determine whether such a requirement would be appropriate for any facility. The District Manager would make this determination on a case-by-case basis, in conjunction with the EP and APD approval process. This process includes coordinating with BOEM, particularly at the EP stage, when BOEM conducts an environmental review to identify the direct, indirect, and cumulative environmental effects that may be expected as a result of implementing the EP. That environmental review also incorporates input about potential environmental effects that may be obtained through consultations and review by interested parties, Federal agencies (e.g., EPA), State or local agencies, Tribes, or the public. Nothing would change BSEE's position from the 2016 rule to communicate with other agencies responsible for oversight of discharges related to oil and gas exploration drilling in the Arctic. This communication will help ensure that conflicts do not arise (81 FR 46504). BSEE expects that such input from EPA would address whether that agency has issued or plans to issue a permit for the same exploratory drilling facilities, and whether that agency believes that capture of water-based muds in a specific case is warranted. Through BSEE's longstanding authority under § 250.300(b)(1), the District Manager could require an operator to restrict the rate of drilling fluid discharges or prescribe alternative discharge methods. Such a restriction on the discharge of water-based muds and cuttings might be appropriate if identified in the EP environmental review process.

In addition to the proposed revisions just described, BSEE proposes a minor modification to the second sentence in existing paragraph (b)(2), which requires the operator to capture all cuttings from operations that “utilize” petroleum-based mud to prevent their discharge into the marine environment. BSEE proposes to replace the word “utilize”

with “use” to improve the readability of the regulation.

Subpart D—Oil and Gas Drilling Operations

What additional information must I submit with my APD for Arctic OCS exploratory drilling operations? (§ 250.470)

BSEE proposes to revise paragraph (b) of § 250.470 by adding paragraph (b)(13) to include “Recover the subsea isolation device (SSID), where applicable.” This revision is necessary to address the SSID alternative proposed in § 250.472, and to ensure the operator's permit addresses how it would recover the SSID, if one is used. For operations relying on an SSID, the SSID is a critical piece of equipment. Therefore, BSEE must understand how the operators will handle it, prior to and after drilling operations. We also propose minor, non-substantive edits to paragraphs (b)(11) and (12) to accommodate this addition.

In cases where an operator obtains SCCE capabilities through contracting, paragraph (f)(3) currently requires the operator to provide proof of contracts or membership agreements with cooperatives, service providers, or other contractors. This includes information demonstrating the availability of the personnel and/or equipment on a 24-hour per day basis during operations below the surface casing. BSEE proposes to revise paragraph (f)(3) by replacing the “below the surface casing” language in this paragraph with the phrase “below the surface casing, or before the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, as approved by the Regional Supervisor.” This change would make the requirement in paragraph (f)(3) consistent with the changes BSEE is proposing to § 250.471, which houses the substance of the Arctic OCS SCCE requirements. This proposed change is discussed in further detail in connection with that provision.

Finally, BSEE proposes to add a new paragraph (h) to complement the proposed revisions to § 250.472, which would provide the operator with the option to use an SSID or have access to a relief rig, as an additional means to secure the well in the event of a loss of well control, if the operator will be conducting exploratory drilling operations from a MODU (that change is discussed in further detail in connection with that provision). Under proposed paragraph (h), if the operator elects to use an SSID, BSEE would require the operator to provide a certification, signed by a registered professional engineer, confirming that its SSID and

well design (including casing and cementing program) meet the design requirements in proposed § 250.472(a), and the design is appropriate for the purpose for which it is intended under expected wellbore conditions. BSEE is proposing this new provision to be consistent with existing requirements under existing § 250.420 (a)(7)(i), which require the operator to include with the APD a certification signed by a registered professional engineer that the casing and cementing design is appropriate for the purpose for which it is intended under expected wellbore conditions.

What are the requirements for Arctic OCS source control and containment? (§ 250.471)

Section 250.471(a) currently requires the operator to have access to the SCCE described in paragraphs (a)(1) through (3), which must be capable of stopping or capturing the flow of an out-of-control well if the operator will be using a MODU when drilling below or working below the surface casing. Paragraph (a)(1) specifically requires the capping stack to be positioned to ensure that it will be able to arrive at the well location within 24 hours after a loss of well control. Paragraphs (a)(2) and (3) require the cap and flow system and the containment dome to be positioned to ensure that they will be able to arrive at the well location within 7 days after a loss of well control.

BSEE proposes to revise § 250.471 by:

(i) Adding a new provision at the end of paragraph (a) stating that “However, the Regional Supervisor will approve delaying access to your SCCE until your operations have reached the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities provided that you submit adequate documentation (such as, but not limited to, risk modeling data, offset well data, analog data, seismic data), with your APD, demonstrating that you will not encounter any abnormally high-pressure zones or other geologic hazards. The Regional Supervisor will base the determination on any documentation you provide as well as any other available data and information.”

(ii) modifying the language in paragraph (a) describing the performance standard that the SCCE must meet by replacing “capable of stopping or capturing the flow of an out-of-control well” with “capable of controlling or containing the flow from an out-of-control well when drilling below or working below the surface casing;” and

(iii) removing the phrase “positioned to ensure that it will arrive at the well location within 7 days after a loss of well control” from subparagraphs (a)(2) and (3), which apply to the cap and flow system and containment dome, respectively.

The changes described in item (i) from the previous paragraph could allow the operator to adjust the point in time during operations when it must position its capping stack—from “when drilling or working below the surface casing” to “when drilling or working below the last casing point prior to the zone capable of flowing hydrocarbons in measurable quantities”—if the operator is able to demonstrate that it will not encounter any abnormally high-pressure zones or other geological hazards before that casing point. However, unless otherwise approved by BSEE, the operator must have access to their SCCE as described in paragraph (a)(1) and proposed paragraphs (a)(2) and (3), when drilling or working below the surface casing. While BSEE does not propose changes to the capping stack provision in paragraph (a)(1), changes to paragraph (a) would have a practical effect on the existing capping stack requirements. Changes to the capping stack requirements are discussed in the next subsection, entitled, *Revisions to the Capping Stack Requirements*.

BSEE’s proposed modifications to the language in paragraph (a), describing the performance standard that the operator’s SCCE must meet, is administrative in nature. BSEE proposes this change so that the language is consistent with the source “control” and “containment” description of this equipment, as well as the title of this section of the regulations (i.e., § 250.471 *What are the requirements for Arctic OCS source control and containment?*). It would not change the performance standard that the operator’s SCCE must meet.

BSEE’s proposed changes to remove the phrase “positioned to ensure that it will arrive at the well location within 7 days after a loss of well control” from paragraphs (a)(2) and (3) would still require the operator to ensure it has access to a cap and flow system or a containment dome. However, the operator would no longer be required to ensure the equipment is positioned to be able to arrive at the well location within 7 days after the loss of well control. The distinction between the positioning requirement and the requirement to have access to the equipment is that “having access” refers to ensuring the operator has identified the equipment that would meet the performance requirements in this section and in other existing BSEE

regulations—§ 250.462 (*What are the source control, containment, and collocated equipment requirements?*) and is able to deploy the equipment as directed by the Regional Supervisor. Details regarding BSEE’s proposed revisions to § 250.471(a)(2) and (3) are discussed in the subsection below, entitled, *Revisions to the Cap and Flow System, and Containment Dome Requirements*.

• *Revisions to the Capping Stack Requirements*

BSEE’s proposed revisions to paragraph (a) would provide an opportunity to the operator to adjust the point in time during operations when it must position its capping stack, so that it will be available to arrive at the well location within 24 hours after a loss of well control. If the operator is able to demonstrate to BSEE that the operations it plans to conduct below the surface casing would not encounter any abnormally high-pressure zones or other geologic hazards before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, then BSEE would allow the operator delay its positioning of the capping stack until that point. A capping stack, as defined under the existing regulations at § 250.105, is a mechanical device that can be installed on top of a subsea or surface well head or BOP to stop the uncontrolled flow of fluids into the environment. BSEE also proposes certain non-substantive language changes for clarity.

The existing capping stack requirements in paragraphs (a) and (a)(1) are intended to ensure that a capping stack is readily available to stop or capture the flow of hydrocarbons in case of a loss of well control when drilling below or working below the surface casing. While BSEE does not propose to eliminate the requirement in paragraph (a)(1) to ensure that the capping stack will be able to arrive at the well location within 24 hours after a loss of well control, the existing requirement in paragraph (a) to ensure the equipment is accessible when drilling below the surface casing does not fully take into consideration the known geology of an area. The formations below the surface casing, based on the known geology of the area, may have minimal or no potential to flow hydrocarbons in measurable quantities during drilling operations. This obviates the need for ensuring capping stack availability during operations in those zones. Prior to submitting an APD, operators assess the formations they will potentially encounter during drilling operations,

including the potential for hydrocarbon flow. Operators base this assessment on existing G&G data that they include in the APD.

In many cases, flowable hydrocarbons are not anticipated or encountered in measurable quantities until the target productive formation is reached. For example, a surface casing shoe setting depth for an Arctic OCS exploration well could be only 1,500 feet, but the hydrocarbon bearing formation may be thousands of feet below that point. The existing regulations require the operator to have access to an available capping stack when drilling or working below the surface casing, even though geologic and engineering risk analyses the operator must submit as part of their APD may show that there is little or no potential for hydrocarbons to escape the formation and flow into the well prior to reaching the targeted productive formation. In such circumstances, the operator could safely drill for thousands of feet below the surface casing, without any identifiable need for a capping stack. This proposed change would, when appropriate, eliminate an unnecessary burden for the operator to maintain a positioned capping stack while drilling into low risk, non-productive sections of the well below the surface casing.

An extensive amount of geophysical data already exists for certain areas of both the Beaufort and Chukchi Sea Planning Areas, and there has been extensive drilling in certain areas of the Beaufort Sea Planning Area. In the known geologic conditions of the U.S. Arctic, operators have a good understanding of the locations of reservoirs that they will encounter, which can be relatively shallow and normally pressured above certain geologic depths. Therefore, it may not be necessary to have access to a capping stack when drilling through zones below the surface casing that do not have abnormally high formation pressures or contain other geological hazards, and do not have the potential to flow hydrocarbons in measurable quantities, as they are penetrated.

However, because geologic conditions are not uniformly normally pressured throughout the Arctic OCS, BSEE is maintaining the existing requirement to have the capping stack positioned when drilling or working below the surface casing. At the same time, BSEE does not discount the possibility that future projects would not need to have SCCE (*i.e.*, the capping stack) positioned until reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons.

The criteria BSEE proposes to rely on—that the operator can demonstrate to BSEE that it will not encounter “abnormally high-pressured zones or other geologic hazards”—to determine whether to grant an exception accounts for those downhole risks that could lead to a blowout and may require the use of a capping stack. With respect to abnormally high-pressured zones, BSEE is concerned that there could be a case where a kick (an influx, or flow, of formation fluid from the high-pressured zone entering into the wellbore) is not controlled and could lead to a blowout. While there are means of mitigating the risk of a kick, (*i.e.*, overbalanced drilling), the capping stack needs to be readily available if heavier weight drilling muds, the BOP, and SSID, if applicable, fail to control the well.

There could be other geologic hazards, such as fractured or high permeability zones, that may also pose a risk, particularly if those zones contain hydrocarbons. It is possible that normally pressured zones may be highly permeable or contain fractures, in which lost circulation may occur. This could cause a dynamic effect where drilling mud flows into the permeable formation causing the circulating pressure to decrease below the zone’s pore pressure resulting in formation fluids flowing into the well bore. This may lead to a loss of well control. The capping stack needs to be readily available if heavier weight drilling muds, the BOP, and SSID, if applicable, fail to control the well.

However, if the operator is able to demonstrate that a highly permeable or fractured zone is predicted to only contain water, BSEE would consider allowing the operator to delay positioning of the capping stack. Under this scenario, the operator would be able to use the diverter system in conjunction with the BOP system to maintain safety and environmental protection because it would be unlikely for hydrocarbons to be released into the environment. The diverter system consists of a mechanical device similar to a BOP annular preventer. The diverter system is used to divert gases, fluids, and other materials flowing from the well, away from facilities and personnel. Also, an operator would pump fluid loss materials into the well to bridge the formation to reduce its permeability and allow drilling muds to isolate the formation from the well. To permanently address the incident, the operator could also install a liner or set a new casing point at the interval where that highly permeable or fractured zone is located. BSEE would like to know whether there are more appropriate

criteria, other than “abnormally high-pressured zones or other geologic hazards,” that the Bureau should use to determine whether to allow the operator to delay positioning of the capping stack.

BSEE’s proposed regulatory language describing the types of documentation it would consider adequate to demonstrate that abnormally high-pressured zones or other geological hazards would not be encountered before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities—“such as, but not limited to, risk modeling data, offset well data, analog data, seismic data”—is not meant to be an exhaustive list. BSEE would accept any other types of documentation the operator may provide that will help its demonstration. BSEE does not anticipate this submission requirement would lead to a significant information collection burden on the operator because it is normal practice for operators to gather these types of information to develop and design an offshore exploration drilling project on the OCS in the Arctic. BSEE is requesting comment on what other types of information could be used to demonstrate the absence of abnormally pressured zones or other geologic hazards, and how burden on the operator could change—increase or decrease—if BSEE were to require its submission.

At the APD stage, BSEE would evaluate the operator’s documentation along with other accompanying geologic and engineering information/analyses that must be submitted as part of its APD. BSEE would also consider any other available G&G information, such as information gathered from prior drilling operations in the area (*e.g.*, well log and pressure testing information), and any other applicable geophysical (*e.g.*, seismic data) information. BSEE makes clear in its proposed regulatory language that the Regional Supervisor will base the determination on whether to allow the operator to delay positioning of the capping stack on the documentation that the operator submits, as well as any other available data and information.

BSEE is also considering an alternative regulatory approach whereby the Bureau would instead revise existing paragraph (a) by replacing “surface casing” with “last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.” This regulatory option would uniformly adjust the point in time during operations when the operator must have access to its capping stack, by requiring the operator to have

its capping stack positioned before drilling below or working below the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.

Under this regulatory option, BSEE would evaluate the geologic and engineering information/analysis that the operator must submit as part of its APD, while also taking into consideration any other available G&G information the Bureau may have (e.g., off-set well data, such as well logs and pressure testing information, or geophysical information, such as seismic data). Based on these different sources of information, BSEE would determine whether there may be a need for the operator to position the capping stack at a point in time during operations earlier than last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.

There may be cases where the operator or BSEE may not have sufficient G&G or analogous well data during the permit review process on a proposed project to provide an adequate level of certainty regarding anticipated formations that may be encountered prior to reaching the targeted productive formation. Therefore, BSEE is also considering, as part of this regulatory option, a clarification that the Regional Supervisor may require the operator to have access to a capping stack in advance of drilling below or working below the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities if BSEE determines there is insufficient G&G or analogous well data.

For example, there may be insufficient G&G or analogous well data in cases where there have been a limited number of wells drilled within proximity to the planned well. In most cases, G&G and analogous well data are gathered from multiple sources. However, the same sets and amounts of data and information may not be available for each area, well, or project. There is no single set of criteria for determining the sufficiency of G&G or analogous well data. The more data that are available from sources near to the proposed drilling location, the greater confidence BSEE will have in the G&G interpretations. BSEE wants to ensure the operator has the most accurate data to make determinations about where the zones capable of flowing hydrocarbons in measurable quantities are located.

This alternative regulatory option would maintain the same level of safety and environmental protection in comparison to BSEE's proposed regulatory change. The decision on

whether it is appropriate to delay positioning of the capping stack at a point in time when operations are taking place below the surface casing resides with BSEE. BSEE, ultimately, may decide not to allow the operator to delay positioning of the capping stack if the Bureau reasonably assesses that potential risks below the surface casing exist that may require immediate deployment of this device. However, the distinction under this regulatory option is that the operator would not need to specifically demonstrate that abnormally high-pressured zones or other geologic hazards would be encountered above last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities. The presumption would be that all zones above the last casing point prior to penetrating a zone capable of flowing hydrocarbons are safe unless BSEE determines otherwise. In addition, under BSEE's proposed regulatory change, it would be clear that the Bureau may request additional information from the operator and would provide that BSEE may consider other available data and information.

BSEE is specifically soliciting comments about the benefits or disadvantages of this regulatory option. BSEE is also soliciting comments about the need for the operator to verify on a case-by-case basis those zones incapable of flowing hydrocarbons in measurable quantities. Operators verify these zones by analyzing G&G data to evaluate the formations that are expected to be encountered during drilling operations and confirm that there are no hydrocarbons present. Operators must use available offset well data in conjunction with the G&G data. BSEE requests comment on other methods operators use to verify the hydrocarbon zones, or abnormally high-pressured zones or other geologic hazards (such as fractured or high permeability zones), they anticipate encountering for a proposed drilling project and how frequently the data would be lacking at the point of preparing information to submit as part of an APD.

• *Revisions to the Cap and Flow System, and Containment Dome Requirements*

As described at the beginning of this section-by-section discussion, § 250.471, BSEE is also proposing to revise paragraphs (a)(2) and (3) of existing § 250.471, which refers to the timing of the arrival of a cap and flow system and containment dome, respectively, by removing the phrase "positioned to ensure that it will arrive at the well location within 7 days after a loss of well control" from each paragraph. This

proposed change would remove the requirement to have a cap and flow system or a containment dome positioned to ensure the equipment will be available to arrive at the well location within 7 days after the loss of well control, while preserving the existing requirement to deploy those pieces of equipment as directed by BSEE.

BSEE proposes to allow the operator to adjust the point in time during operations when it must position its capping stack under paragraph (a), from "when drilling or working below the surface casing" to "when drilling below or working below last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities" if the operator is able to demonstrate that it will not encounter any abnormally high-pressured zones or other geologic hazards before that casing point. Only the 7-day arrival timing related to the "flow" part of the cap and flow system would be altered as a result of BSEE's proposed modification to paragraph (a)(2) of § 250.471.⁴⁴

The changes proposed in paragraphs (a)(2) and (3) to remove the requirement for the cap and flow system and the containment dome to arrive at the well location within 7 days after a loss of well control would not change other existing requirements throughout § 250.471 for the operator to ensure:

- (i) Access to a containment dome and cap and flow system;
- (ii) that the cap and flow system is designed to capture at least the amount of hydrocarbons equivalent to the calculated WCD rate referenced in the operator's BOEM-approved EP;
- (iii) that the containment dome has the capacity to pump fluids without relying on buoyancy;
- (iv) that tests or exercises are conducted for the SCCE, as directed by the Regional Supervisor;
- (v) that records pertaining to the testing, inspection, maintenance, and use of the SCCE are maintained and made available to BSEE upon request;
- (vi) that all SCCE identified in § 250.471 are transported to the well upon a loss of well control; and
- (vii) that SCCE is deployed as directed by the Regional Supervisor.

BSEE proposes to remove the cap and flow system and containment dome 7-day arrival timing requirements based on the Bratslavsky and SolstenXP study. The Bratslavsky and SolstenXP study determined that the time periods when SCCE may be safely deployed throughout the Arctic OCS is limited based on typical Arctic conditions. In

⁴⁴ Existing § 250.105 defines Cap and flow system and Capping stack.

the Chukchi Sea, this means that safe SCCE deployment could only occur between August and October in the historically active exploration area. Moving north from the historically active exploration area of the Chukchi Sea, the ability to safely deploy SCCE diminishes significantly (*id.* at 100). The study mentions there are more opportunities for safe deployment of SCCE in other portions of the Chukchi Sea (June through December). However, it is only in the southwestern extent of the Chukchi Sea Planning Area; outside of the historically active exploration area.

In the Beaufort Sea, the study noted that sea ice concentrations tend to be greater year-round as compared to the Chukchi Sea (*id.* at 75). Accordingly, safe SCCE deployment could occur from ice capable vessels between early August and October in the historically active exploration area of the Beaufort Sea (*i.e.*, the southern portion of the Beaufort Sea Planning Area). However, moving north beyond the historically active exploration area, time windows for safe SCCE deployment decrease significantly (*id.* at 104).

In the case of open water operations in both the Chukchi and Beaufort Seas, the study points out that sea state is an important limiting factor for safe SCCE deployment. Rough sea states—high waves and longer wave periods—can affect the safety and operating limits of SCCE deployment. The vessel carrying the SCCE can become very unstable in rough sea states and the heave action on the deck can therefore increase significantly beyond the vessel's tolerance levels for conducting operations, which may negatively affect the ability to safely deploy the SCCE. Rough sea states are most likely to occur when there is less sea ice coverage and larger open water areas to generate large waves, which is more of an issue in the Chukchi Sea, where there are larger open water areas throughout the open water season (*id.* at 11).

When operating in open water conditions, sea states generally dictate that safe SCCE deployment could occur only between late September and October in the historically active exploration area of the Chukchi Sea, and that window diminishes significantly moving north of the historically active exploration area. In the Beaufort Sea, where there is less open water throughout the operating season, sea states would generally permit safe deployment of SCCE between late-August and early-to mid-October in the historically active exploration area. Beyond that, the probability for safe SCCE deployment decreases rapidly in

the historically active exploration area and in the other areas of the Beaufort Sea. (*id.* at 98,102)

Water depth is also an important factor to consider for the safe deployment of SCCE. Deployment is likely to be impaired in water depths shallower than 984 feet because the equipment would potentially be subject to a gas boil at the surface from a subsea blowing well (*id.* at 143). A gas boil is a forceful release of hazardous gases which can present human-health hazards to workers, fire hazards, and potential stability problems for support vessels and the vessel deploying the SCCE directly above the blowing well. Water depths in the majority of the Chukchi Sea and Beaufort Sea where exploration has historically occurred are relatively shallow—167 feet or less (Table 1–1 and Table 1–2, *id.* at 7 to 9). As recently as April of 2020,⁴⁵ there were active leases in the Arctic OCS where SCCE may be deployed. These leases were located in the Beaufort Sea in water depths less than approximately 170 feet deep. This water depth range limits the fleet of support vessels that can be used for the safe deployment of SCCE. A possible solution that could enable SCCE deployment in the presence of a gas boil is the use of offset-deployment technology to remotely position SCCE over the blowing well in shallow water (*id.* at A–35).

When BSEE proposed its original Arctic OCS SCCE requirements in 2015, the Bureau explained that there is limited ability in the Arctic region to summon additional source control and containment resources. Accordingly, the Bureau required operators to plan for response redundancies and planning complexities not required elsewhere (80 FR 9938). BSEE determined that the provisions finalized in 2016 provided for the necessary redundancy and sequencing of the responses, based on the time necessary to deploy, and therefore provided sufficient safety and environmental protection to allow for exploratory drilling on the Arctic OCS. At that time, BSEE believed that the technologies identified in its SCCE requirements represented the optimal approach to well control capabilities available for the Arctic OCS (81 FR 46520).

⁴⁵ In April of 2020, the only leases with potential projects that would be subject to the Arctic OCS's SCCE requirements were relinquished. However, there are other active leases in the Beaufort Sea located nearer to the shore in shallow waters where exploration and development projects are being pursued (primarily through man-made gravel islands).

Since publication of the 2016 rule, however, BSEE has sought to better understand the ability to safely deploy SCCE (and relief rigs) in Arctic OCS conditions, through a study it commissioned to Bratslavsky Consulting Engineers, Inc., and SolstenXP, Inc. According to the Bratslavsky and SolstenXP study, the time periods when SCCE may be safely deployed throughout the Arctic OCS is limited in comparison to relief-well drilling operations, based on typical Arctic conditions. BSEE did not have the benefit of having the Bratslavsky and SolstenXP study when finalizing the 2016 Arctic Exploratory Drilling Rule. BSEE's proposed changes to § 250.471(a)(2) and (3) for the containment dome and cap and flow system responds to the information it has gathered from the study.

In light of these findings, BSEE proposes the revisions under § 250.471 to the containment dome and cap and flow system deployment requirements in paragraphs (a)(2) and (3) because it is not reasonable to impose such universal, prescriptive requirements for equipment that may not be safely deployed (moved to the location, equipment put into place, and activated) and effectively used under certain Arctic OCS conditions. The deployment and arrival schedules of the cap and flow system and the containment dome will be directed by the BSEE Regional Supervisor on a case-by-case basis.

However, as previously described, BSEE proposes only to adjust, rather than eliminate, the reference to the point in time during operations when the operator must have access to a capping stack that is positioned to be able to arrive at the well location within 24 hours after a loss of well control. The Bratslavsky and SolstenXP study shows that the time periods when SCCE (capping stack, containment dome, and cap and flow system) may safely be deployed and effectively used are limited. Metocean conditions (*i.e.*, rough sea states and sea ice concentrations) prevalent in the Arctic OCS can exceed the operating limits of the vessels that transport and deploy the SCCE. In addition, SCCE deployment is likely impaired in water depths shallower than 984 feet, where gas boils could form above a blowing well. Water depths in the majority of the Chukchi Sea and Beaufort Sea where exploration has historically occurred are relatively shallow—167 feet or less. However, BSEE's independent observation outside of the study is that the chances for successfully deploying a capping stack under Arctic OCS conditions is greater in comparison to the containment dome

and cap and flow system. More specifically, in comparison to the containment dome, the capping stack has proven to be a more effective technology when successfully deployed and has a different function compared to a containment dome. The capping stack latches on to a connector or pipe stub located on or in the well to achieve a pressure tight seal to capture or stop all fluids flowing out of the well. A containment dome, which removes oil and gas from the water column, will likely capture only a portion of the hydrocarbon flow due to the non-sealing design. In addition, the use of a containment dome may be constrained by the drilling unit itself. Certain drilling rigs, such as jackups and submersible drilling vessels, are unlikely to provide adequate structural clearance for deployment of a containment dome without moving the rig off the drill site. (*id.* at 33). Furthermore, containment domes have limited field application to prove their capabilities while, in contrast, capping stacks have been field tested and successfully deployed in multiple practice drills (*id.* at 32 and 34).⁴⁶

With respect to the cap and flow system, the flow portion of the system would require additional vessel support activities on the surface (*e.g.*, support vessels for oil and gas processing, and hydrocarbon storage/transfer) to keep the system working in comparison to what would be needed to deploy a capping stack (*e.g.*, a single vessel that would load the capping stack and deploy to the well when needed). The support activities and the vessel on which the flow system is loaded would be subject to the same challenging metocean conditions previously described, thus limiting their ability to be safely deployed throughout the Arctic drilling season. The capping stack would generally have a better opportunity for deployment because once the capping stack is lowered under the water and attached to the wellhead, weather becomes less of a factor.

BSEE believes it is critical to ensure that operators have redundant protective measures in place, as there is no guarantee that a single measure could control or contain a worst-case discharge (*see* 81 FR 46487). Because the chances of successfully deploying a capping stack under Arctic OCS conditions may be greater in comparison to the containment dome and cap and flow system, BSEE is revising, and not eliminating, the

capping stack positioning requirement. BSEE invites comments on any technological upgrades or methods that exist for SCCE that would meet the objective of being a redundant system that could control or contain a WCD.

Although BSEE is proposing to remove the requirement in existing paragraphs (a)(2) and (3) to ensure that the cap and flow system and containment dome will be available to arrive at the well location within 7 days after a loss of well control, BSEE would maintain the provisions under the same paragraphs that require that the operator identify and have access to a containment dome and cap and flow system capable of deployment as directed by BSEE. BSEE would also maintain the requirement under existing paragraph (g) to initiate transit of all SCCE identified under § 250.471 upon a loss of well control. Collectively, the proposed revisions to paragraphs (a)(2), (a)(3), and existing paragraph (g) would mean that, in the event of a loss of well control, the containment dome and cap and flow system would be in transit while the capping stack is being deployed at the well location. In light of the distinct functions and capabilities of these various elements of SCCE under anticipated Arctic OCS exploratory drilling conditions, BSEE proposes to retain these requirements, as modified, to preserve the regulations' requirement for redundant protective measures, while acknowledging the capability of each SCCE component, as there is no guarantee that a single measure could control or contain a WCD.

Finally, BSEE proposes to revise existing paragraph (b) by eliminating the requirement for the operator to conduct a stump test of a pre-positioned capping stack, if the operator elects to use one, prior to installation on each well. This proposed change would provide consistency with BSEE's proposed revision to the definition of a capping stack in § 250.105 and the new SSID alternative BSEE is proposing under § 250.472. BSEE's proposed SSID alternative includes specific testing procedures, which is discussed in detail later in this preamble. BSEE's prior references to "pre-positioned capping stacks" were intended to address a comment on the 2015 Arctic Exploratory Drilling Proposed Rule suggesting that the definition of a capping stack be expanded to allow pre-positioned capping stacks to be used below subsea BOPs when deemed technically and operationally appropriate.

What are the additional well control equipment or relief rig requirements for the Arctic OCS? (§ 250.472)

Paragraph (b) of § 250.472 currently requires the operator to have access to a relief rig (different from the primary drilling rig), when drilling or working below the surface casing. In addition, when drilling or working below the surface casing, paragraph (b) requires the operator to stage the relief rig so that it could arrive on site, drill a relief well, kill and permanently plug the out-of-control well, and abandon the relief well prior to expected seasonal ice encroachment at the drill site, and in no event later than 45 days after the loss of well control.

BSEE proposes to revise the existing relief rig and SSRW requirements in § 250.472 by:

(i) Providing the operator with an option to either use an SSID or have access to a relief rig, if the operator will conduct exploratory drilling operations from a MODU;

(ii) Establishing the requirements that the operator must satisfy if the operator elects to use an SSID to comply with § 250.472;

(iii) Establishing the requirements that the operator must satisfy if the operator elects to have access to a relief rig to comply with § 250.472;

(iv) Adding a new provision that would apply if the operator elects to have access to a relief rig, which states, "However, the Regional Supervisor will approve delaying access to your relief rig until your operations have reached the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities provided that you submit adequate documentation (such as, but not limited to, risk modeling data, off-set well data, analog data, seismic data), with your APD, demonstrating that you will not encounter any abnormally high-pressured zones or other geological hazards. The Regional Supervisor will base the determination on any documentation you provide as well as any other available data and information."; and

(v) Eliminating the reference to expected seasonal ice encroachment at the drill site, which applies to relief rig operations.

With respect to the structure of § 250.472, proposed paragraph (a) would establish the requirements the operator must follow if the operator elects to use an SSID, and proposed paragraph (b) would establish the requirements the operator must follow if the operator elects to maintain access to a relief rig. BSEE would combine the

⁴⁶ For example, the capping stack technology was used to shut-in the *Macondo* well during the Deepwater Horizon incident.

requirements in existing paragraphs (a) and (b) into a single paragraph—proposed paragraph (b)—for organizational purposes, since existing paragraphs (a) and (b) cover relief rigs. Proposed paragraph (b) would also include the relief rig-related revision described in item (iv) of the previous paragraph, which could allow the operator to adjust the point in time during operations when it must stage its relief rig—from “when drilling or working below the surface casing” to “when drilling or working below the last casing point prior to the zone capable of flowing hydrocarbons in measurable quantities”—if the operator is able to demonstrate that it will not encounter any abnormally high-pressured zones or other geological hazards before that casing point. However, unless otherwise approved by BSEE, the operator must stage its relief rig in a location, such that the relief rig would be available to arrive on site, drill a relief well, kill and abandon the original well, and abandon the relief well no later than 45 days after the loss of well control, when drilling or working below the surface casing. Finally, proposed paragraph (b) would include the proposed relief rig-related revision to eliminate the reference to expected seasonal ice encroachment at the drill site, which could potentially extend the open-water drilling season for MODUs. The changes included in proposed paragraphs (a) and (b) are discussed in further detail below, respectively, under the two subheadings entitled, *Proposed Paragraph (a)—Complying with § 250.472 by Using an SSID* and *Proposed Paragraph (b)—Complying with § 250.472 by Having Access to a Relief Rig*.

In addition, the general alternative compliance language in existing paragraph (c) would be eliminated because the proposed rule would provide the operator with the alternatives of either using an SSID or having access to a relief rig, and because § 250.141, *May I ever use alternate procedures or equipment?*, already provides an option for an operator to seek approval to use alternate procedures or equipment, potentially including future technologies that have not yet been developed.

When it promulgated the 2016 Arctic Exploratory Drilling Rule, BSEE understood that, based on past loss of well control events (including the *Deepwater Horizon* incident), it was important for the operator to be prepared to drill a relief well to permanently plug a well, in the event of a loss of well control. Arctic OCS exploratory drilling operations

conducted from MODUs are complicated by the fact that these operations can take place only during a short period each year, when ice hazards can be physically managed and there is no continuous ice layer over the water. Outside of that window, ice encroachment complicates or prevents drilling, including drilling a relief well, and transit operations. Therefore, BSEE concluded in the proposed rule: Oil and Gas and Sulphur Operations on the OCS—Requirements for Exploratory Drilling on the Arctic OCS (February 24, 2015, 80 FR 9916) that, for Arctic OCS Conditions, it was necessary to establish a relief rig and SSRW requirements, whereby the rig would be positioned at a location that would enable it to transit to the well site, drill a relief well, kill and permanently plug the out-of-control well, plug the relief well, and demobilize from the site, prior to expected seasonal ice encroachment. (see 80 FR 9940).

Prior to finalizing the 2016 Arctic Exploratory Drilling Rule, BSEE did not identify any alternative technologies that provided a comparable level of results to drilling a relief well and permanently killing an out-of-control well. Drilling a relief well prior to seasonal ice encroachment eliminates the risk of a prolonged uncontrolled flow of hydrocarbons under the ice, throughout the winter season. The SCCE intervention options in BSEE's existing regulations (capping stack, cap and flow system, and containment dome) are intended only to temporarily control a well and not to be left in place over an entire ice season. However, BSEE did provide an option through the 2016 rule for the operator to request that BSEE approve “alternative compliance measures to the relief rig requirement,” as provided in the longstanding regulation at § 250.141, *May I ever use alternate procedures or equipment?*

Since the promulgation of the 2016 Arctic Exploratory Drilling Rule, BSEE has received and considered new information regarding the current relief rig and SSRW requirements in § 250.472. BSEE used the following information when developing the proposed requirements of this section:

- *Supplemental Assessment to the 2015 Report on Arctic Potential: Realizing the Promise of U.S. Arctic Oil and Gas Resources (NPC 2019 Report)*

In April 2018, the Secretary of Energy, in cooperation with DOI, requested that the NPC develop a supplemental assessment to the NPC 2015 Report. In April 2019, the NPC issued a report entitled, “*Supplemental Assessment to the 2015 Report on Arctic Potential: Realizing the Promise of U.S. Arctic Oil*

and Gas Resources.” The supplemental assessment evaluated recent experiences with Arctic exploration and advancements in technology, and it provided findings and recommendations directed toward enhancing the Nation's regulatory environment to improve reliability, safety, efficiency, and environmental stewardship for Arctic oil and gas development. One of the key areas the Secretary of Energy requested that the NPC address was regulatory burdens related to development on the Arctic OCS. (NPC 2019 Report at A–1)

The NPC 2015 Report described various technologies employed by industry as preventative measures, to reduce the risk of a well control incident or to mitigate the impacts of an incident through response and recovery measures. It recommended further examination of source control and containment technologies, including capping stacks and SSIDs, noting that such alternatives “. . . could prevent or significantly reduce the amount of spilled oil compared to a relief well, which could take a month or more to be effective.” (NPC 2015 Report at 4–16).

In July/August of 2007, BSEE's predecessor, MMS, published a paper entitled, “Absence of fatalities in blowouts encouraging in MMS study of OCS incidents 1992–2006.” You may download and view the paper at http://drillingcontractor.org/dcp/dc-julyaug07/DC_july07_MMSBlowouts.pdf. The paper summarizes BSEE's assessment of statistical information about loss of well control events that occurred during drilling operations on the OCS from 1992 through 2006. The paper noted that although relief wells were initiated in 2 of the 39 blowouts that occurred during the study period, both wells were controlled by other means prior to completion of the relief well. According to the NPC 2015 report, “[a] relief well under good weather conditions may take 30 to 90 days plus rig mobilization, whereas a capping stack could be installed significantly sooner, and a subsea shut-in device could be activated in minutes.” (NPC 2015 Report at 8–17)

The NPC 2019 Report noted that, when ExxonMobil drilled an exploratory well in the Russian waters of the Kara Sea, it used an SSID that was built and tested in Norway. According to the NPC 2019 Report, the SSID used in the Kara Sea used existing capping stack technology, including dual blind shear rams; an upgraded, redundant control system; and side inlets for intervention below the shear rams. (*id.* at C–10). At the same time, the NPC 2019 Report described the SSID as

similar to a second BOP that was designed to be left on the wellhead, instead of being removed with the drilling rig, if the rig moves off the well near the end of the drilling season. The SSID, which could be actuated remotely, and the casing design together were capable of safe full well shut-in, diminishing the risk related to a loss of well control event occurring in late season and continuing over the winter season. The NPC 2019 Report observed that this design approach could eliminate the need for an SSRW. (*id.* at C–28). Ultimately, the NPC recommended that the use of an SSID, in conjunction with capping stacks, be accepted in place of the existing requirement for SSRW capability. (*id.* at 2).

The NPC 2019 Report also included additional data regarding the geologic characteristics of the formations targeted during exploratory drilling operations in the Chukchi Sea and Beaufort Sea. The NPC 2019 Report provides an illustrative comparison of the geologic depths encountered in the Arctic OCS and the Gulf of Mexico OCS. (NPC 2019 Report at 11). The shallower targeted geologic formations in the Arctic OCS make drilling less complex and lower risk. This is different from current water depths encountered by operators in the Gulf of Mexico. In the Arctic OCS, exploratory drilling operations conducted from MODUs have taken place in waters less than 200 feet. In the Gulf of Mexico, drilling activities are continually taking place in waters deeper than 9,000 feet.

The Arctic OCS's distinct challenges are driven by the region's extreme environmental conditions, geographic remoteness, and a relative lack of fixed infrastructure and existing operations. In comparison to the Gulf of Mexico, the Arctic OCS lacks extensive operations and infrastructure from which resources could be drawn to respond to a well control incident. In addition, the open water season for drilling from a MODU is limited, allowing operators to perform drilling operations only during the summer and early fall. A late-season well-control event could challenge an operator's ability to perform well intervention operations prior to freeze up.

• *Suitability of Source Control and Containment Equipment versus SSRW in the Alaska Outer Continental Shelf Region (Bratslavsky and SolstenXP, 2018)*

In addition to the NPC 2019 Report, BSEE received information about SSIDs through the Bratslavsky and SolstenXP study, discussed in the previous section in connection with the proposed

changes to the current Arctic OCS source control and containment requirements in § 250.471. As previously mentioned, the Bratslavsky and SolstenXP study entailed a comprehensive review and gap analysis of U.S. and international regulations, standards, recommended practices (RP), specifications, technical reports, and common industry methods regarding the safe deployment of SCCE as compared to the effectiveness of drilling an SSRW in Arctic conditions. BSEE notes that the Bratslavsky and SolstenXP study refers to the SSID as a “subsea intervention device” and considers the device to be SCCE, which is used to mitigate the consequences of a well control event. However, consistent with the findings in the NPC 2019 Report that categorizes SSIDs as preventative measures (instead of a response and recovery measure), BSEE considers SSIDs to be a barrier intended to prevent or minimize the impacts of a well control event. (*id.* at 16).

The Bratslavsky and SolstenXP study noted that an SSID was installed and field tested on a submersible drilling vessel (*i.e.*, a steel drilling caisson) for a 2005/2006 drilling project in the Canadian Beaufort Sea. However, the system was not completed in time to meet the approval process timelines and shipping deadlines required for timely implementation of the unit. (Bratslavsky & SolstenXP at A–36). According to the study, the use of a preinstalled SSID could provide a faster and safer additional line of defense for a response to a blowout than an SSRW or deployment of a capping stack or containment dome, resulting in smaller discharges to the environment. The report also mentions that the ability to remotely function the SSID ensures that it can be used in instances where other types of SCCE cannot be deployed due to site hazards that make it unsafe or inaccessible. These instances may include: A blowout with pressurized fluids coming up solely through the wellbore (forming a gas boil on the surface), a rig catching fire or collapsing on top of the well, or an incident in an area where response operations are limited, such as in shallow waters (*id.* at 35). The report also stated that if the well is designed to accommodate a full shut-in of the last casing string interval, the SSID can temporarily cap and control a well and facilitate its plugging and abandonment. This finding is consistent with the information from the NPC 2019 Report discussed previously. In 2008, Chevron initiated a technology venture with its partners on an R&D project to develop an SSID that would

advance the best BOP technologies available at the time and would meet or exceed Canada's SSRW Arctic offshore regulations. The SSID was known as the Alternative Well Kill System (AWKS), which had two shear rams that were capable of simultaneously shearing and sealing heavier wall, larger diameter tubulars, and casings than was possible at that time. According to the NPC 2015 Report, Chevron successfully completed its testing of the AWKS in 2014 and is ready for deployment. (NPC 2015 Report at 4–18).

Although the Bratslavsky and SolstenXP study points out that SSIDs could provide a faster and safer response to a blowout than capping stacks or containment domes, BSEE does not conclude from this observation that SSIDs should also replace the SCCE requirements in existing and proposed § 250.471. In the Arctic, it is critical for the operator to have redundant protective measures in place, as there is no guarantee that a single measure could control or contain a WCD. (*see* 81 FR 46487). In addition to these redundant protective measures, the SSID, well design, and BOPs serve as controls and barriers that prevent or minimize the likelihood of loss of well control.

Other pertinent information from the Bratslavsky and SolstenXP study includes the statistical analysis of recent OCS drilling seasons in the Beaufort and Chukchi Seas. The analysis identified the metocean and operational conditions that would support the safe drilling of a relief well. The study noted that the hazards of sea ice to drilling vessels and associated support vessels are primarily determined by the concentration and thickness of the sea ice. A vessel's ice classification, which are determined by various marine classification societies, such as the American Bureau of Shipping (ABS) and Det Norske Veritas and Germanischer Lloyd (DNV GL), indicates the vessel's capabilities. As ice concentrations increase, a vessel's efficiency decreases. (Bratslavsky & SolstenXP at 23).

The study notes that the currently available open water operating season in the Chukchi Sea ranges from approximately 60 to 90 days in the historically active exploration area. (*id.* at 143). However, the results of the study showed that there is a high probability (90 percent) that drilling can be conducted safely in sea ice conditions in a majority of the historically active exploration area of the Chukchi Sea for 70 to 160 days if an ice class MODU and associated support vessels are used as part of the drilling

operation. (*id.* at 108 and 145). Moreover, the NPC 2019 Report notes that “vessels and equipment that are positioned in the theater ‘just in case’ they are needed to minimize environmental impact, can actually impede personnel safety and source control objectives, because they distract operations personnel, add congestion, and can impede surface access to the well location.” (NPC 2019 Report at 19).

In the Beaufort Sea, the available open water operating season is limited to approximately 50 to 60 days across the historically active exploration area. (*id.* at 143). The study’s analysis showed there is a high probability (90 percent) that drilling can be conducted safely for 70 days, from mid-August through October, in a majority of the historically active exploration area of the Beaufort Sea. (*id.* at 146).

In light of the information from the NPC reports and the Bratslavsky and SolstenXP study, and BSEE’s consideration of that information, BSEE proposes to revise § 250.472 in the following manner:

• *Proposed Paragraph (a)—
Complying with § 250.472 by Using an SSID*

The use of an SSID is not a new concept and was discussed in the 2016 Arctic Exploratory Drilling Rule.⁴⁷ Through the 2016 rulemaking comment process, stakeholders informed the Bureau that use of an SSID could help significantly reduce the risk of a release of hydrocarbons if the BOP system fails. At that time, BSEE focused more on permanent remediation to resolve a WCD event in the Arctic. Nonetheless, the Bureau agreed that an operator could request to use an SSID as an alternate procedure or equipment to the relief rig (80 FR 9940). Stopping short of requiring the use of an SSID, BSEE, instead, stated in the 2016 rule that it would consider the use of an SSID as an alternate procedure or equipment, under appropriate circumstances, if proposed for use with a jack-up (when surface BOPs are used). At that time, BSEE determined that, in the case where subsea BOPs are used in conjunction with floating drilling units, SSIDs would only be marginally effective or redundant (81 FR 46531). Since the

publication of the 2016 rule, BSEE has reevaluated the use of SSIDs and the overall improved technology for similar components (BOPs). In this proposed rule, BSEE would allow operators the option to use an SSID based on BSEE’s assessment of improved SSID design and operating requirements, including the ability to shut in a well over the winter ice season with a well cap. Additionally, BSEE would make this revision to potentially minimize environmental damage due to a prolonged ongoing well control event. An SSID is not a permanent solution for well remediation. However, it can provide a significantly quicker response time to address a well control event compared to drilling a relief well.

Consistent with the policy in E.O. 13783 to review existing regulations that potentially burden the development or use of domestically produced energy resources, BSEE re-considered the SSID more closely, in light of the SSID information from the NPC reports and the Bratslavsky and SolstenXP study, to determine whether the device could address the issues the Bureau identified when promulgating the 2016 rule.

Drilling a relief well is a complex, time-consuming process. After setting up the drill rig and drilling begins, the process to intercept the original wellbore may take several weeks or more because the operator needs to drill deep enough at great precision to ensure interception of the original well. This delay increases the length of the time oil and other fluids within the original well could be flowing uncontrollably into the marine environment. There is no delay for operational use of an SSID compared to the process of using the relief rig or capping stack.

In this proposed rule, BSEE developed its proposed SSID requirements based on existing BOP equipment/technology whose performance and reliability has been tested, proven in a manner that is repeatable and reproducible, and has improved since promulgation of the 2016 rule. BSEE also proposes to require an SSID used in the Arctic OCS to operate independently from the BOP. This would be accomplished by requiring the SSID to have a redundant control system, independent from the BOP control system, and independent, dedicated subsea accumulators to operate the SSID. By having two independent, redundant components (*i.e.*, the BOP and the SSID) as part of the well control system, the overall reliability and effectiveness of the entire system increases. The following paragraphs describe BSEE’s proposed requirements associated with the SSID,

including the SSID’s redundant control system (*i.e.*, under proposed § 250.472(a)(2)(ii)) and subsea accumulators (*i.e.*, under proposed § 250.472(a)(2)(iii)).

Although the NPC 2019 Report recommended that the use of an SSID and capping stacks replace the requirement for an SSRW capability, BSEE is not proposing to eliminate the relief rig and SSRW requirements. Rather, BSEE is proposing to maintain the relief rig and SSRW requirement as an option for the operator to meet the regulatory requirements of § 250.472. BSEE has determined that its regulations should provide options and flexibility to the operator (*i.e.*, an SSID or a relief rig) to fit its needs and plans to develop its Arctic OCS leases. There could be cases where the operator’s drilling schedule may not align with the availability of an SSID. In such a case, the operator should have the option to elect to proceed by complying with the relief rig and SSRW requirements. If an operator does not complete its exploratory drilling operations during that open water operating season, the operator could come back during a subsequent open water operating season and use an SSID, if one has become available in time.

There could also be cases where two or more operators may plan to perform exploratory drilling operations during the same open water season. In such a case, each operator’s drilling rig could serve as the other’s relief rig. Under the existing regulations, BSEE would consider this type of a scenario to be in compliance with the relief rig and SSRW requirements. BSEE would not change that interpretation as part of this rulemaking. In a scenario like this, none of the operators would need to install an SSID, so long as there is an agreement among the operators that their drilling rigs will serve as a relief rig, if necessary. While it is not possible to identify every conceivable scenario, BSEE recognizes there could be other scenarios that are reasonably possible. Thus, it is appropriate to provide regulatory flexibility in order to accommodate an operator’s drilling program. BSEE also retains its regulatory authority to approve alternate procedures or equipment if the proposed procedures or equipment either meet or exceed the level of safety and environmental protection required.

The term SSID is a broadly used industry term, and there is not a single, all-encompassing definition that establishes the scope and function of an SSID. In some cases, different terms are used to describe the device. For example, as stated earlier, the

⁴⁷ See, e.g., 80 FR 9940 (“[BSEE] requests comments on alternative compliance approaches and specifically requests data on the performance of SIDs, including operational issues (such as timeframes needed to activate such alternatives). In particular, BSEE requests comments on appropriate staging requirements for a relief rig assuming that an SID has been installed at the exploration well. Comments are also requested on the need for an operator to have an in-season relief well drilling capability if an SID is used at a location that is not subject to ice scouring.”)

Bratslavsky and SolstenXP study refers to the device as a “subsea intervention device,” while some in the industry also refer to the SSID as a “mudline closure device.” Irrespective of these synonymous titles, BSEE uses the term SSID to refer to a fit-for-purpose device that may be used for different types of situations, including for well intervention applications, and can be used in different locations, including outside of the Arctic. However, for the purposes of Arctic OCS exploratory drilling from a MODU, BSEE is proposing to define the minimum acceptable capabilities and functions of an SSID. BSEE notes that, outside of the Arctic OCS, operators are contemplating using SSIDs for future projects, and SSIDs have already been approved for use in other parts of the OCS. The NPC 2019 Report notes that the requirement to drill an SSRW to mitigate the risk of a late season well control event continuing over the winter season is “outdated.” The 2019 report concludes that SSIDs and capping stacks are superior solutions that could stop the flow of oil and allow intervention through the original borehole before a relief well could be completed. (NPC 2109 Report at 19). The SSID requirements BSEE is proposing to establish in this proposed rule would not apply to projects outside of the Arctic OCS. The design requirements for those SSIDs would be based on the needs of a particular project and may or may not be similar to what BSEE is proposing in this proposed rule. BSEE requests comments on these SSID requirements as outlined in the proposed rule.

Under proposed paragraph (a) of § 250.472, if the operator elects to satisfy the requirements of this section by using an SSID, BSEE would require the operator to ensure that the SSID and well design (including the casing and cementing program) are designed to achieve a full shut-in, without causing an underground blowout or having reservoir fluids breach to the seafloor.

Currently, BSEE’s regulations for SCCE under § 250.462 do not require all wells to be designed to achieve a full shut-in (e.g., partial shut-in is acceptable) as there are methods to control the residual fluid flow into a surface production and storage system when a well is designed for partial shut-in. However, because BSEE is proposing that the SSID be designed to achieve full wellbore shut-in until kill operations are completed, it is important that the well design assures that the well will be able to withstand the associated loads for the entire time the SSID is closed (e.g., prevents gas migration in the shut-in

wellbore). If the wellbore is compromised during or after a full shut-in, an underground blowout or breach to the seafloor may occur. BSEE reviewed available incident data on loss of well control events,⁴⁸ and determined that, on average, five loss of well control events occurred each year on the OCS between 2007 and 2017.

The well design language in proposed paragraph (a) would also require the operator to account for the stresses and loads placed on the well from the equipment that may be required to regain control after a loss of well control event. This includes the SSID, BOP stack, and capping stack. It is imperative that all well components are designed to withstand all potential loads and stresses placed on the well, including those that may be required during well control situations and deployment of SCCE (i.e., the well must be able to support a capping stack in addition to the other equipment required for normal operations).

The need for the operator to account for all potential loads placed on the well also includes consideration of conditions where a well would be shut-in over the ice season. For example, in typical well control operations, a BOP is used to stop the uncontrolled flow and shut-in the well. It remains shut-in for a relatively short period of time while well kill operations are implemented and, if needed, materials and personnel are mobilized to the rig.

For wells that may be shut-in for extended periods, the operator must consider the potential effects of gas expansion within the well. For example, in reservoirs containing gas, which is less dense than the liquids in the wellbore (e.g., drilling mud, completion fluid, brine), the gas will migrate upward in the wellbore until it reaches the closed BOP. This gas exerts a lower hydrostatic pressure than the column of oil or drilling fluids in the wellbore, and more of the reservoir pressure is transmitted to the top of the wellbore as a result. As the hydrostatic pressure acting on the bubbles decreases, the bubbles expand.

As these bubbles continue to migrate and expand over time, the wellbore pressure profile increases. What was once a low pressure at the top of the well, with a hydrostatic pressure gradient below it, will eventually increase to reservoir pressure, increasing the downhole pressure. As the pressures in the wellbore increase, some of the liquid may bleed into the open formation(s). Eventually, the

pressure may exceed the strength of the formation (fracture pressure) in the wellbore, potentially resulting in a fracture of the formation and an underground blowout. Because proposed paragraph (a) of § 250.472 contemplates allowing the operator to leave a well shut-in from one open-water season to the next (i.e., in the case of a late season well control event), wells need to be designed to withstand this potential loading condition.

In a new paragraph (a)(1), BSEE proposes to establish performance-based design requirements for the SSID. BSEE would require the operator to ensure that the SSID is designed to:

- (1) Close and seal the wellbore, independent of the BOP;
- (2) Perform under the maximum environmental and operational conditions anticipated to occur at the well;
- (3) Be left on the wellhead in the event the drilling rig is moved off location (e.g., due to storms, ice incursions, or emergency situations);
- (4) Preserve isolation through the winter season without relying on the elastomer elements of the rams (e.g., by using a well cap) and allow re-entry during the following open-water season; and
- (5) In the event of a loss of well control, preserve isolation until other methods of well intervention may be completed, including the need to drill a relief well.

BSEE’s analysis of loss of well control events data indicates that the most common methods employed to regain control of a well include pumping mud or cement into the uncontrolled well or activating mechanical well control equipment (e.g., blowout preventer).

These SSID design requirements would help ensure the device is capable of shutting in and containing all fluids within the wellbore for an entire ice season (in the case of a loss of well control event too late in the open-water season to provide enough time for the operator to perform well kill or plug and abandonment operations). BSEE is basing the proposed design requirement for the SSID to be capable of preserving isolation through the winter season without relying on the elastomer elements of the rams (e.g., by using a well cap) on information it gained from the Kara Sea project. BSEE understands that the SSID used in the Kara Sea project was capable of preserving isolation over an entire ice season because it was designed to have a metal-to-metal cap installed on top of the SSID, after the BOP is detached and all equipment is moved off of the drill site. BSEE understands that isolation could

⁴⁸ See, BSEE’s website at <https://www.bsee.gov/stats-facts/offshore-incident-statistics>.

not be achieved over the ice season if the shut-in relied solely on the elastomer elements of the rams. The design requirements would also ensure the SSID will allow for re-entry to perform well recovery operations during the following open water season.

In a new paragraph (a)(2), BSEE proposes to require that the operator's SSID include the following equipment:

(1) Dual shear rams, including ram locks; one ram must be a blind shear ram;

(2) A redundant control system, independent from the BOP control system, that includes ROV (remotely operated vehicle) capabilities and a control station on the rig;

(3) Independent, dedicated subsea accumulators with the capacity to function all components of the SSID; and,

(4) Two side inlets for intervention, one of which must be located below the lowest ram on the SSID.

The dual shear ram requirement in proposed paragraph (a)(2)(i) would ensure that the SSID is capable of shearing through drill pipe, sealing the wellbore, and containing the fluids before they can escape during a loss of well control event. BSEE notes that the NPC 2019 Report describes the SSID as having shearing/sealing rams. In fact, when describing the SSID used in the Kara Sea Project, the report explains that the device utilized dual blind shear rams. While proposed paragraph (a)(2)(i) would require only one of the rams to be a blind shear ram, BSEE is seeking comment on the advisability of requiring dual blind shear rams on the SSID. As described in the bow-tie diagram of the NPC 2019 Report, the SSID is the last line of prevention to minimize the impacts of an event. (NPC 2019 Report at 14).

The redundant control system requirements in proposed paragraph (a)(2)(ii) would ensure there is reliability in the system and that the SSID will function when needed in an emergency situation. This proposed requirement is intended to align with the existing requirement in existing § 250.734(a)(2), which requires subsea BOPs to have a redundant control system to ensure proper and independent operation of the BOP system. With respect to the requirement that an SSID have a separate control station on the rig that is independent from the BOP control system located on the rig, it is important for the SSID functions to be controlled by personnel directly involved in the drilling process to allow for an appropriate response from a "situationally aware" individual. Therefore, while BSEE is proposing to

require the SSID control system to remain independent of the BOP control system, it would not require those systems to be located in separate locations.

BSEE is seeking comment on whether the proposed requirement in paragraph (a)(2)(ii) is appropriate for the SSID or whether there are additional ways to enhance the system's reliability. For example, BSEE is contemplating whether it may be more appropriate to require the SSID's redundant control system capabilities to be separate from the ROV's capabilities. BSEE is also considering, as part of the final rule, requiring the SSID control systems to be consistent with the fully redundant control system requirements described in American Petroleum Institute (API) Specification (Spec.) 16D (e.g., yellow pod and blue pod). More specifically, BSEE is further considering whether there should be an additional manual method (separate from the redundant control system) to close the SSID's rams with the ROV and whether it may be appropriate to require a standby or tending vessel with an ROV. These measures could address cases where the SSID's control system on the drilling rig is not available (e.g., due to failure or an evacuation of the rig).

The requirement in proposed paragraph (a)(2)(iii) for SSIDs to have independent, dedicated subsea accumulators with capacity to function all components of the SSID would help ensure that, if the BOP system fails, the SSID will have the capabilities to function as needed, independent of the BOP's accumulator system. The requirement in proposed paragraph (a)(2)(iv) for SSIDs to have two side inlets, with one of the inlets located below the lowest ram on the SSID, would allow for re-entry through the SSID to perform well intervention operations. Side inlets allow the operator to pump fluids into the well to kill the well, before opening the blind shear ram to perform additional well intervention operations.

In proposed paragraph (a)(3), BSEE would require the SSID to include ROV intervention equipment and capabilities to function the SSID. BSEE regulations currently include requirements for ROV intervention capabilities in relation to a BOP's functionality. BSEE is proposing similar requirements for the SSID because the SSID functions similarly to a BOP. Under proposed paragraph (a)(3), the ROV equipment and capabilities must:

(1) Be able to close each shear ram under the Maximum Anticipated Surface Pressures (MASP), as defined for the operation;

(2) Include an ROV panel that is compliant with API RP 17H (as incorporated by reference in § 250.198);

(3) Meet the ROV requirements in existing § 250.734(a)(5); and,

(4) Have the ability to function the SSID in any environment (e.g., when in a mudline cellar).

The requirement in proposed paragraph (a)(3)(i) for the ROV to be able to close each shear ram under the operation's defined MASP would ensure that the operator is able to remotely close (through the ROV) each shear ram on the SSID and seal the well, which are the most critical functions during a well control event. The requirement in proposed paragraph § 250.472 (a)(3)(ii) for the ROV to have panels that are compliant with API RP 17H would ensure that the operator's ROV capabilities for the SSID follow BSEE's existing ROV panel requirements for BOP systems. API RP 17H provides recommendations and overall guidance for the design and operation of ROV tooling used on offshore subsea systems (e.g., provision for high flow Type D hot stabs). This guidance is critical to ensuring safe and reliable ROV operations. In conjunction with the proposal in paragraph (a)(3)(ii) to require the operator's ROV panels to be compliant with API RP 17H, BSEE proposes to add the citation for proposed § 250.472(a)(3) to § 250.198(e)(73). Section 250.198(e)(73) documents the locations in the regulations where API RP 17H is incorporated by reference as a regulatory requirement, which would include § 250.472(a)(3) under this proposed rule. Adding the citation for § 250.472(a)(3) to § 250.198(e)(73) would clarify that API RP 17H is a regulatory requirement when complying with § 250.472 and is subject to BSEE oversight and enforcement in the same manner as other regulatory requirements.

The requirement in proposed paragraph (a)(3)(iii) for the operator to meet the requirements in existing § 250.734(a)(5) would ensure that the operator has a trained ROV crew on each rig unit. The crew must ensure that the ROV is maintained and capable of carrying out the necessary tasks during emergency operations and be trained in operating the ROV, including stabbing into the ROV intervention panel on the SSID. The crew must also have the capability to communicate with designated rig personnel, who are knowledgeable about the SSID's capabilities.

The requirement in proposed paragraph (a)(3)(iv) for the ROV to be capable of functioning the SSID in any

environment is meant to address those cases where it may be necessary to place the SSID in an enclosed or restricted environment. For example, if the SSID is used in an area with ice scouring or with deep ice keels, the SSID would be placed in a mudline cellar. If the ROV panels are attached to the SSID, the ROV may not be able to access the panels if there is not enough space in the cellar. The operator must ensure that the ROV has the capabilities to address these types of scenarios. BSEE is aware of current projects that are evaluating positioning the ROV panels away from the SSID. The ROV would function the SSID from the remote panel, which would be hardwired to the SSID. In addition, it is possible for a mudline cellar to be constructed via a dragline. In such a case, the mudline cellar could be constructed wide enough to provide adequate space for the ROV to access the panel if the panel was attached to the SSID. BSEE proposes to make the requirement in proposed paragraph (a)(3)(iv) flexible, recognizing that there are multiple ways an operator could address this type of concern.

In general, however, BSEE is seeking comment on the feasibility of installing an SSID below a subsea BOP in cases where the SSID would also be installed in a mudline cellar. BSEE's current regulations at §§ 250.734(a)(13) and 250.738(h) require placement of subsea BOP systems in mudline cellars when drilling occurs in areas subject to ice-scouring. In addition, proposed § 250.720(c)(2) requires placement of the wellhead in a mudline cellar in areas subject to ice-scouring. BSEE is requesting more information about whether there are any other operational or installation challenges that the operator may encounter when attempting to effectively operate the SSID in this environment. If so, what are those challenges, and how could they be addressed?

BSEE understands that the SSID used in the Kara Sea could be manually activated using acoustic technologies. While such technologies are available to function the SSID from a remote location, BSEE is proposing to require use of an ROV, as described in proposed paragraph (a)(3). BSEE understands that ROVs are more reliable for this type of application. However, BSEE requests that commenters provide any information that demonstrates the reliability of acoustic (or other) technologies to actuate an SSID from a remote location.

Furthermore, although BSEE is not proposing to require the SSID to have a self-actuating function, the Bureau is contemplating whether one may be

necessary for certain emergency situations. BSEE is aware that in the Arctic OCS, it is possible for a drilling vessel to sink and allide with (*i.e.*, strike against) the top of a wellhead during a loss of well control event (Bratslavsky and SolstenXP at 17). As discussed in the previous section, all exploratory drilling in the Beaufort Sea and the Chukchi Sea has taken place in waters less than 167 feet deep, and as recent as April 2020,⁴⁹ there were active leases in the Beaufort Sea where an SSID could have been deployed. These leases were located in water depths less than approximately 170 feet deep. In these water depths, during an emergency, a vessel could sink before the BOP or SSID can be activated. A self-actuating system incorporated into the SSID could potentially address this problem.

One option BSEE is considering is whether it may be appropriate to establish an autoshear and deadman system requirement for the SSID. The intent would be to address those emergency situations, such as when a sunken MODU allides with the wellhead, where the SSID could no longer be functioned via the ROV (due to lack of access) or a control station on the drill ship. BSEE's regulations already address autoshear and deadman systems for subsea BOPs. Existing § 250.734(a)(6)(i) requires subsea BOPs to have an autoshear system that is designed to automatically shut-in the wellbore in the event of a disconnect of the lower marine riser package (LMRP). Also, existing § 250.734(a)(6)(ii) requires a deadman system, that is designed to automatically shut-in the wellbore in the event of a simultaneous absence of hydraulic supply and signal transmission capacity in the subsea control pods, respectively. However, BSEE did not propose this requirement for SSIDs in this rulemaking. The SSID is meant to be a backup to the BOP, and it is not necessary for the SSID to have the same automatic emergency functions as the BOP.

There could potentially be negative consequences if both systems were to automatically function. For example, there could be a situation where the BOP's autoshear or deadman systems function, but they are not able to shut-in the well because a non-shearable drill string is positioned across the rams. If the subsea BOP rams are experiencing

this issue, then the SSID may also encounter the same problem, depending on the part of the drill string that is across the rams at that time. In this scenario, it would be more appropriate to assess the situation to determine whether other well intervention operations could be performed to address the position of the drill string, before activating the SSID.

Regardless of these challenges, BSEE is seeking comment on what fail-safe mechanism(s) may be appropriate to address cases where the BOP fails and the SSID is inaccessible by an ROV or a control station. If an autoshear system or a deadman system are appropriate fail-safe mechanisms to add to the SSID, BSEE is seeking input on what criteria should be used to function these systems, to ensure the system does not function at the wrong time or interferes with or impacts the BOP's autoshear and deadman systems.

BSEE is also seeking comment on how to ensure that the SSID will be able to preserve isolation over the winter season in the event of a late-season emergency incident, such as a sunken drillship. As previously mentioned, BSEE understands that prior SSIDs have planned for long-term isolation through installation of a metal-to-metal cap (*i.e.*, a well cap) on the SSID before leaving the device on the seafloor over the winter season. In the case of a late-season emergency situation that prevents access to the SSID to install a metal-to-metal cap, how would isolation be preserved through the winter season?

In addition, BSEE is soliciting comment on whether the regulations should require use of an autoshear or deadman system in cases where these systems are not built into the BOP's system. As previously mentioned, BSEE's autoshear and deadman system requirements currently apply to subsea BOPs. There is no current requirement to use an autoshear or deadman system when surface BOPs are used. BSEE would expect that if an operator uses a surface BOP, the operator would still install the SSID on the seafloor. BSEE seeks comment on whether it would be appropriate in such a case to require use of an autoshear or deadman system on the SSID. If so, what criteria should BSEE apply to the functioning of the autoshear or deadman systems in an environment where a surface BOP is used? Furthermore, BSEE welcomes any other comments, unrelated to autoshear or deadman systems, regarding use of a surface BOP.

With respect to installation of the SSID, BSEE proposes in paragraph (a)(4) to require operators to install the SSID:

(1) Below the BOP;

⁴⁹In April 2020, the only leases with potential projects that would be subject to the Arctic OCS's SSID or SSRW requirements were relinquished. However, there are other active leases in the Beaufort Sea located nearer to the shore in shallower waters where exploration and development projects are actively being pursued (primarily through man-made gravel islands).

(2) At or before the time they install their BOP; and

(3) In a way that will provide protection from deep ice keels in the event it must remain in place over the winter season (e.g., installed in a mudline cellar).

Installing the SSID below the BOP would allow for quick detachment of the BOP and other equipment above the SSID, which would be critical when moving off of a location for emergency purposes. With respect to timing of the SSID's installation, the operator would be required to install the SSID at or before the time they install the BOP. The proposed requirement for the SSID to be installed in a way that will provide protection from deep ice keels would help ensure that the device is not damaged by ice in areas of ice scour. As previously discussed, this could be accomplished by placing the SSID in a mudline cellar. In complying with this proposed requirement, the operator must also consider situations where the drill site is not located in an ice scour area, but could experience ice floes with keels deep enough to clip and compromise the SSID if left on the seafloor over the winter season.

In a new paragraph (a)(5), BSEE proposes to require the operator to test the SSID according to the BOP testing requirements in § 250.737, *What are the BOP system testing requirements?* The SSID's testing requirements should align with the BOP testing requirements since, as previously mentioned, the SSID functions similarly, and in addition, to a BOP. This testing would aid in predicting future performance of the SSID to ensure that the device will function when needed during an emergency situation. While BSEE proposes to align the SSID testing requirements with the Bureau's existing BOP testing requirements, BSEE welcomes input on whether there are more appropriate and reliable testing methods. For example, what testing procedures have been used in the past to test an SSID when it was deployed? For future operations, what testing procedures are being developed specifically for an SSID? What testing procedures should be applied to SSIDs, and why?

Overall, BSEE intends for the SSID to provide time for the operator to marshal the equipment and materials necessary to permanently address a well control event, without the constraints of seasonal ice coverage, and to prevent the potential environmental impacts that could occur if an out of control well was allowed to flow over the season when the operator would not have access to the site due to ice. The SSID,

along with the proper well design, would allow the well to be shut in over the ice season without requiring additional vessels and the situation addressed permanently in the following open water season. It would also allow the operator the time necessary to complete the intervention, without the well flowing, if unforeseen problems are encountered.

Collectively, the SSID's design requirements; equipment specifications; ROV intervention capabilities; installation requirements; and testing requirements; together with the additional well design requirements, would help ensure that the device will function when needed during an emergency situation and will be capable of controlling the well over the ice season, if necessary, until the operator returns to perform well intervention operations during the following open-water season. In connection with that well intervention operation, BSEE may still exercise its existing authority to also require the operator to drill a relief well to permanently plug and abandon the out-of-control well, if needed. BSEE reviewed recent incident data from 2013 to 2017, which may be accessed on BSEE's website at <https://www.bsee.gov/stats-facts/offshore-incident-statistics>, to try to identify any past incidents involving the use of a BSEE directed relief well to remedy the loss of well control. Aside from the Macondo well incident in 2010, one incident in 2013 required the drilling of a relief well (see <https://www.bsee.gov/newsroom/latest-news/statements-and-releases/press-releases/drilling-of-relief-well-begins-at-south>). Other loss of well control events during that timeframe were successfully remedied with conventional well control methods. These incidents occurred in the Gulf of Mexico and were controlled by either circulating heavier weighted muds into the well or closing the BOP (or both), to control pressures within the well. BSEE would evaluate the individual circumstances associated with each case to make this determination. For these reasons, BSEE's proposed changes to § 250.472 would maintain safety and environmental protection, though BSEE invites comment on the technical feasibility of such requirements.

BSEE is seeking comment on whether the use of an SSID, particularly in a case where a subsea BOP is deployed, could present operational or installation challenges. For example, if the well is not located in an ice scour area and the BOP system, including the LMRP, and the SSID are placed on the seafloor, then these pieces of equipment could get as tall as 88 feet when installed (BOP

approximately 70 feet + SSID approximately 18 feet). In addition, the bottom of a ship's hull, in the case where a drillship is used, may extend as much as 40 feet into the water from the sea surface. Historically, drilling in the Beaufort Sea and the Chukchi Sea has occurred in waters less than 167 feet deep. With as much as 128 feet of water column taken up by the BOP system, SSID, and ship's hull, very little space remains for operations between the bottom of the ship and the top of the well control system. BSEE seeks comment on what sorts of challenges operators have faced or would anticipate facing in the scenario just described. BSEE would also like to know how operators addressed those challenges in the past or could address them for future operations, taking into account the unique characteristics and extreme conditions of the Arctic OCS.

BSEE is also generally seeking comment on its proposed changes to § 250.472. For example, BSEE is seeking comments on how well design could be better addressed in this rulemaking to enhance overall safety of operations on the Arctic OCS. Is the well design requirement proposed in paragraph (a) adequate to address the situations that may be encountered if a well is shut-in with an SSID over a winter season? As previously described, there could be cases where the wellbore pressure profile may increase to reservoir pressures at the top of the well over the course of a winter season. What other scenarios should BSEE consider that could occur in the well over the ice season that could be addressed in proposed paragraph (a)?

• *Proposed Paragraph (b)—Complying with § 250.472 by Having Access to a Relief Rig*

As discussed earlier, BSEE proposes to combine existing paragraphs (a) and (b) into a single, new paragraph (b), *Relief Rig*, for organizational purposes because both existing paragraphs cover relief rigs. Combining existing paragraph (a) into proposed paragraph (b) would not be a substantive modification to BSEE's regulations because the specific requirements from existing paragraph (a) would remain unchanged. More specifically, the provision in existing paragraph (a) that requires the operator's relief rig to comply with all other requirements of 30 CFR part 250 that pertain to drill rig characteristics and capabilities, and requires the relief rig to be able to drill a relief well under anticipated Arctic OCS conditions, would be relocated to proposed paragraph (b)(1). The provision in existing paragraph (a) that provides that the Regional Supervisor

may direct the operator to drill a relief well in the event of a loss of well control would be relocated to proposed paragraph (b)(2).

○ *Last Casing Point Prior to Penetrating a Zone Capable of Flowing Hydrocarbons in Measurable Quantities*

Substantively, BSEE proposes to revise the requirements in existing paragraph (b) that prescribe the availability of the relief rig. BSEE would maintain the requirement for the operator to have access to a relief rig, different from its primary drilling rig, when drilling or working below the surface casing. However, BSEE proposes to add a new provision to the newly rearranged proposed paragraph (b) stating “However, the Regional Supervisor will approve delaying access to your relief rig until your operations have reached the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, provided that you submit adequate documentation (such as, but not limited to, risk modeling data, off-set well data, analog data, seismic data), with your APD, demonstrating that you will not encounter any abnormally high-pressured zones or other geological hazards. The Regional Supervisor will base the determination on any documentation you provide as well as any other available data and information.”

BSEE would also add new language at the beginning of existing paragraph (b) that says “*Relief Rig*. If you choose to satisfy this requirement by having access to a relief rig, you must have access to your relief rig at all times when you are drilling below or working below the surface casing during Arctic OCS exploratory drilling operations.” This language would simply clarify that if the operator chooses to use a relief rig to comply with proposed § 250.472, it must have access to its relief rig at all times when drilling below or working below the surface casing. The changes described in this paragraph would be shown as a general requirement in proposed paragraph (b).

BSEE’s proposed revisions to paragraph (b) would potentially provide an opportunity for the operator to adjust the point in time during its operations when it must stage its relief rig. If the operator is able to demonstrate to BSEE that the operations it plans to conduct below the surface casing would not encounter any abnormally high-pressured or other geologic hazards before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, then BSEE would allow the

operator to delay staging of its relief rig until reaching that point.

The changes BSEE is proposing would make proposed paragraph (b) of § 250.472 and proposed paragraph (a) of § 250.471 consistent, with respect to providing a potential opportunity to the operator to delay access to its SCCE (as described in § 250.471(a)(1) and proposed § 250.471(a)(2) and (3)) until its operations have reached the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, so long as the operator submits adequate documentation, with its APD, demonstrating that it will not encounter any abnormally high-pressured zones or other geologic hazards before that casing point.

The existing requirement in § 250.472(b) pertaining to the availability of a relief rig does not take into consideration that the operator may demonstrate, based on geologic and engineering analyses, that there could be zones below the surface casing that are not hydrocarbon-bearing or that have minimal or no potential to flow hydrocarbons in measurable quantities during drilling operations. In many cases, operators do not anticipate or encounter flowable hydrocarbons in measurable quantities until the target productive formation is reached. For example, a surface casing shoe setting depth for an Arctic OCS exploration well could be only 1,500 feet deep, but the hydrocarbon bearing formation may be thousands of feet deeper below that point. The existing regulations require the operator to stage its relief rig when drilling or working below the surface casing, even though geologic and engineering risk analyses the operator must submit as part of their APD may indicate that there is little or no potential for hydrocarbons to escape the formation and flow into the well prior to reaching the targeted productive formation. In such circumstances, the operator could safely drill for thousands of feet below the surface casing without any identifiable need for a relief rig.

This proposed change would, when appropriate, eliminate the need for the operator to stage its relief rig while drilling through low risk, non-productive sections of the well below the surface casing. Arctic regional pore pressure modeling conducted by BOEM for an area in the Beaufort Sea identifies a general uniformity following an average pressure gradient (*i.e.*, normally pressured) up to approximately 7,500 feet to 8,500 feet, subsea. The typical reservoirs targeted for exploration in the Arctic are usually located at less than 8,000 feet. In the GOM, there are many

different geological features that can affect the pressure profiles and potentially create abnormal pressures (*e.g.*, salt domes, and shallow water flow areas).

An extensive amount of geophysical data already exists for certain areas of both the Beaufort and Chukchi Sea Planning Areas, and there has been extensive drilling in certain areas of the Beaufort Sea Planning Area. In the known geologic conditions of the U.S. Arctic, operators have a good understanding of the locations of reservoirs that they will encounter, which can be relatively shallow and normally pressured to certain depths. Therefore, it may not be necessary to have a relief rig immediately available when drilling through zones below the surface casing that do not have abnormally high formation pressures or contain other geological hazards, and do not have the potential to flow hydrocarbons in measurable quantities as they are penetrated.

However, because geologic conditions are not uniformly normally pressured throughout the Arctic OCS, BSEE is maintaining the existing requirement to have the relief rig staged when drilling or working below the surface casing. At the same time, BSEE does not want to discount the possibility that future projects would not need to have the relief rig staged until reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons.

The criteria BSEE proposes to rely on—that the operator can demonstrate to BSEE that it will not encounter “abnormally high-pressured zones or other geologic hazards”—to determine whether to grant an exception accounts for those downhole risks that could lead to a blowout and may require the use of a relief rig. With respect to abnormally high-pressured zones, BSEE is concerned that there could be a case where a kick (an influx, or flow, of formation fluid from the high-pressured zone entering into the wellbore) is not controlled and could lead to a blowout. While there are means of mitigating the risk of a kick, (*i.e.*, overbalanced drilling), the relief rig needs to be readily available if heavier weight drilling muds, the BOP and SSID, if applicable, fail to control the well.

There could be other geologic hazards, such as fractured or high permeability zones, that may also pose a risk, particularly if those zones contain hydrocarbons. It is possible that normally pressured zones may be highly permeable or contain fractures, in which lost circulation can occur. This could cause a dynamic effect where drilling mud flows into the permeable formation

and causing the circulating pressure to decrease below the zone's pore pressure resulting in formation fluids flowing into the well bore. This may lead to a loss of well control. The relief rig needs to be readily available if heavier weight drilling muds, the BOP, and the capping stack, fail to control the well.

However, if the operator is able to demonstrate that a highly permeable or fractured zone is predicted to only contain water, BSEE would consider allowing the operator to delay the staging of its relief rig. Under this scenario, the operator would be able to use the diverter system in conjunction with the BOP system to maintain safety and environmental protection because it would be unlikely for hydrocarbons to be released into the environment. The diverter system consists of a mechanical device similar to a BOP annular preventer. The diverter system is used to divert gases, fluids, and other materials flowing from the well, away from facilities and personnel. Also, an operator would pump fluid loss materials into the well to bridge the formation to reduce its permeability and allow drilling muds to isolate the formation from the well. To permanently address the incident, the operator could also install a liner or set a new casing point at the interval where that highly permeable or fractured zone is located. As requested in the section-by-section discussion of § 250.471, BSEE would like to know whether there are more appropriate criteria, other than "abnormally high-pressured zones or other geologic hazards," the Bureau should use to determine whether to allow the operator to delay its staging of the relief rig.

BSEE's proposed regulatory language describing the types of documentation it would consider adequate to demonstrate that abnormally high-pressured zones or other geologic hazards would not be encountered before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities—"such as, but not limited to, risk modeling data, off-set well data, analog data, seismic data"—is not meant to be an exhaustive list. BSEE would accept any other types of documentation the operator may provide that will help its demonstration. BSEE does not anticipate this submission requirement would lead to a significant information collection burden on the operator because it is normal practice for operators to gather these types of information in order to develop and design an offshore exploration drilling project in the Arctic OCS. BSEE is requesting comment on what other types of information could

be used to demonstrate the absence of abnormally pressured zones or other geologic hazards, and how burden on the operator could change—increase or decrease—if BSEE were to require its submission.

At the APD stage, BSEE would evaluate the operator's documentation along with other accompanying geologic and engineering information/analyses that must be submitted as part of their APD. BSEE would also take into consideration any other available G&G information, such as information gathered from prior drilling operations in the area (e.g., well log and pressure testing information), and any other applicable geophysical information (e.g., seismic data). BSEE makes clear in its proposed regulatory language that the Regional Supervisor will base the determination for whether to allow the operator to delay staging of its relief rig on the documentation the operator submits as well as any other available data and information.

BSEE is also considering an alternative regulatory approach whereby the Bureau would instead revise existing paragraph (b) by replacing "surface casing" with "last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities." This option would adjust the point in time during operations when the operator must stage its relief rig. This alternative regulatory change would, instead, require the operator to stage its relief rig before drilling below or working below the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.

Under this regulatory option, BSEE would evaluate the geologic and engineering information/analysis the operator must submit as part of its APD, while also taking into consideration any other available G&G information the Bureau may have (e.g., off-set well data, such as well logs and pressure testing information, or geophysical information, such as seismic data). Based on these different sources of information, BSEE would determine whether there may be a need for the operator to position the capping stack at an interval earlier than last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.

There may be cases where the operator or BSEE may not have sufficient G&G or analogous well data during the permit review process on a proposed project to provide an adequate level of certainty regarding anticipated formations that may be encountered prior to reaching the targeted productive formation. Therefore, BSEE is also

contemplating, as part of this regulatory option, a clarification that the Regional Supervisor may require the operator to stage its relief rig prior to drilling below or working below the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities if BSEE determines there is insufficient G&G or analogous well data.

For example, there may be insufficient G&G or analogous well data in cases where there have been a limited number of wells drilled within proximity to the planned well. In most cases, G&G and analogous well data are gathered from multiple sources. However, the same sets and amounts of data and information may not be available for each area, well, or project. There is no single set of criteria for determining the sufficiency of G&G or analogous well data. The more data that are available from sources near to the proposed drilling location, the greater confidence BSEE will have in the G&G interpretations. BSEE wants to ensure the operator has the most accurate data to make determinations about where the zones capable of flowing hydrocarbons in measurable quantities are located.

This alternative regulatory option would maintain the same level of safety and environmental protection in comparison to BSEE's proposed regulatory change. The decision on whether it is appropriate to delay positioning of the capping stack below the surface casing resides with BSEE. BSEE, ultimately, may not allow the operator to delay staging of the relief rig if there are potential risks below the surface casing that may require immediate relief rig deployment. However, the distinction under this regulatory option is that the operator would not need to specifically demonstrate that abnormally high-pressured zones or other geologic hazards would be encountered above last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities. BSEE would be responsible for making that determination.

BSEE is specifically soliciting comments about its views of the benefits or disadvantages of this regulatory option and the need for the operator to verify on a case-by-case basis which zones are incapable of flowing hydrocarbons in measurable quantities.

○ *Expected Seasonal Ice Encroachment at the Drill Site*

In the 2015 proposed Arctic Exploratory Drilling Rule, BSEE determined that, because Arctic OCS exploratory drilling operations from a MODU take place only during the open water season (i.e., that period of time in

the summer and early fall when ice hazards can be physically managed and there is no continuous ice layer over the water), it was critical to ensure that drilling (including relief well drilling) and other operations affected by sea ice are concluded before ice encroachment. Ice encroachment may complicate or prevent drilling, transit, and oil spill response operations. However, the analysis from the Bratslavsky and SolstenXP study shows that the sea ice capabilities of an ice class MODU and its support vessels can extend the currently available open-water operating seasons in the Chukchi and Beaufort Seas, depending on the drilling location within each planning area (*id.* at 143). Therefore, BSEE proposes to eliminate the reference to “expected seasonal ice encroachment” at the drill site in existing paragraph (b). BSEE, however, would retain the requirement clarifying that the relief rig must be different than the operator’s primary drilling rig and that the relief rig must be staged in a location such that it can arrive on site, drill a relief well, kill and abandon the original well, and abandon the relief well no later than 45 days after the loss of well control. This proposed regulatory change would effectively extend the drilling season in those cases where the operator’s MODU and associated support vessels are capable of safely operating beyond the period when seasonal sea ice begins to encroach at a drill site. The operator would no longer need to plan for their well operations to end in time to complete a relief well prior to the date when sea ice is expected to encroach on the drill site. The operator would, instead, have to plan to end its operations with sufficient time to complete its relief well prior to the anticipated date when sea ice conditions at the drill site are approaching the ice classification capability and rating limits of the operator’s vessels.

BSEE and BOEM would evaluate the ice classification capabilities and limitations of the operator’s MODU and associated support vessels using existing permitting and review processes. For example, through BOEM’s EP review process, the operator is required under existing § 550.220(c)(6) to specify when it anticipates completing onsite operations and when it anticipates terminating drilling operations. In addition, § 550.220(c)(1) requires the operator to describe how it will design and conduct its exploratory drilling activities in a manner that accounts for Arctic OCS conditions. Furthermore, in the EP

regulations at proposed § 550.220(c)(1), BOEM would require the operator to submit a description of how all vessels and equipment will be designed, built, and/or modified to account for Arctic OCS conditions and how such activities will be managed and overseen as an integrated endeavor. This preamble discusses this proposed regulatory change in more detail later. Collectively, this information provided in an EP would allow BOEM (in conjunction with BSEE) to evaluate the capability of the operator’s equipment, including its vessels and procedures to manage and mitigate risks associated with Arctic OCS conditions.

At the APD stage, BSEE would also review the capabilities of the operator’s MODU and associated supporting vessels. Existing paragraph (a)(2) of § 250.470, *What additional information must I submit with my APD for Arctic OCS exploratory drilling operations?* requires the operator to describe how it plans to prepare its equipment, materials, and drilling unit for service in the environmental, meteorological, and oceanic conditions it expects to encounter at the well site and how its drilling unit will be in compliance with the requirements of existing § 250.713, *What must I provide if I plan to use a Mobile Offshore Drilling Unit (MODU) for well operations.* Paragraph (d) of § 250.713 requires the operator, when using a MODU for well operations, to provide the current Certificate of Inspection (for U.S.-flag vessels) or Certificate of Compliance (for foreign-flag vessels) from the USCG, as well as a Certificate of Classification. The operator must also provide current documentation of any operational limitations imposed by an appropriate classification society. As discussed earlier in this section, the Bratslavsky and SolstenXP study notes that a vessel’s capabilities are identified by the ice classification for the vessel, which is provided by marine classification societies such as ABS and DNV GL. BSEE would evaluate the information required under existing §§ 250.470(a)(2) and 250.713(d), together with BOEM’s approval of the operator’s end-of-season date(s) in the EP, to verify whether the vessels’ capabilities and limitations can support extending operations beyond when seasonal ice is expected to arrive at the drill site. However, in no case will BSEE approve a permit that proposes to use a vessel that does not meet the existing requirements of § 250.713, including providing a current certificate of inspection or compliance from the USCG.

Finally, while BSEE is proposing these revisions to § 250.472, BSEE is

seeking comment on whether there are other appropriate approaches to well control operations in the Arctic, including alternative equipment/technology or performance standards. For example, although the NPC 2019 Report recommends accepting the use of an SSID in place of the requirement for SSRW capability, it also recommends replacing the relief rig and SSRW requirements with requirements that specify the desired outcome (*i.e.*, to stop the flow of a well and allow the operator to propose equivalent technology and demonstrate its capabilities). (NPC 2019 Report at 30). BSEE assumes that the NPC recommends specifying a desired performance-based outcome in the regulations that would allow the operator to propose and demonstrate technologies capable of meeting that standard at the permitting stage, rather than prescribing a particular technology, such as a relief rig.

Subpart G—Well Operations and Equipment

When and how must I secure a well? (§ 250.720)

BSEE proposes to delete the last sentence in existing paragraph (c)(2) that states “BSEE may approve an equivalent means that will meet or exceed the level of safety and environmental protection provided by a mudline cellar if the operator can show that utilizing a mudline cellar would compromise the stability of the rig, impede access to the well head during a well control event, or otherwise create operational risks.” In its place, BSEE proposes to insert a new sentence that states “You may request, and the Regional Supervisor may approve, an alternate procedure or equipment in accordance with §§ 250.141 and 250.408.” BSEE, however, would preserve the basic requirement in paragraph (c)(2) for the operator to use a mudline cellar or an equivalent means if there is indication of ice scour. The regulatory change BSEE is proposing in this section would make clear that BSEE could approve the equivalent means of doing so in accordance with §§ 250.141, *May I ever use alternate procedures or equipment?* and 250.408, *May I use alternate procedures or equipment during drilling operations?*

The new language that BSEE proposes to insert reiterates longstanding regulatory provisions contained in §§ 250.141 and 250.408 that describe what procedures the operator must follow and standards it must meet to receive BSEE’s approval of a request to use alternate procedures or equipment to those required by regulation. Section

250.141 allows the BSEE District Manager or Regional Supervisor to approve the use of any alternate procedures or equipment that the operator may propose if the proposal provides a level of safety and environmental protection that equals or surpasses BSEE's current requirements. It also describes the types of information the operator must submit or present to BSEE when requesting to use alternate procedures or equipment. Section 250.408 requires the operator to identify and discuss their proposed alternate procedures or equipment in their APD.

Since the issuance of the 2016 Arctic Exploratory Drilling Rule, BSEE learned that there is an industry misconception that the last sentence in existing paragraph (c)(2) means that the operator would be required to use a mudline cellar in all cases, except when the operator can prove that the mudline cellar would present an operational risk—effectively narrowing the scope of §§ 250.141 and 250.408 in this context. However, BSEE did not intend that language to constrain the contexts in which operators could seek approval of alternatives to the mudline cellar requirement. Rather, in response to commenters expressing concern that use of a mudline cellar may create operational risks in certain contexts, BSEE introduced that language to make clear that alternate approaches were available in those contexts, while at the same time highlighting the general flexibility available under § 250.141, *May I ever use alternate procedures or equipment?* (see 81 FR 46507 and 46510). The last sentence in existing paragraph (c)(2) was not intended to, and did not, restrict or preclude use of the longstanding options for seeking approval of alternate procedures or equipment under §§ 250.141 and 250.408, which do not necessarily require a demonstration of operational risk. Thus, this proposed change would clarify that the operator has more flexibility to propose alternate solutions to the mudline cellar requirement under a broader range of circumstances than those described in the last sentence of existing § 250.720(c)(2). An operator could still base such a request on the same grounds that BSEE described in the language that we propose to delete (*i.e.*, that installation of a mudline cellar in a specific case would cause operational risks).

B. Key Revisions Proposed by BOEM

Title 30, Chapter V, Subchapter B, Part 550, Subpart B—Plans and Information Definitions. (§ 550.200)

BOEM is proposing to eliminate the definition of the term “Integrated Operations Plan,” consistent with the proposal to eliminate the requirement for the operator to submit an IOP for the reasons listed immediately below.

Removal of the IOP Requirement (§ 550.204)

The 2016 Arctic Exploratory Drilling Rule discussed how commenters generally criticized the IOP provision as being duplicative or redundant of existing requirements (see 81 FR at 46492–46493). In 2016, when the rule was adopted, BOEM disagreed with these commenters and published responses to the commenters in the preamble. In its responses, BOEM discussed how the IOP was distinct from existing regulations, the importance of contractor management as it related to the IOP provisions, and the BOEM Regional Director's ability to waive submission of required information in the EP that was already provided in the IOP. Circumstances have changed since the IOP requirement was originally adopted. The various Federal agencies have improved their coordination to such an extent that BOEM believes there is no need for operators to create and submit a separate IOP for that purpose. Much of the required content of the two documents overlaps, and in the 2016 rulemaking itself BOEM added requirements that the EP include additional information that made this overlap even greater. BOEM is now proposing to keep two important provisions from the IOP and incorporate them into the requirements for EPs. The first provision would reinforce BOEM's commitment to operational safety, while the second provision would require the operator to provide details of how its operations would conform to the unique circumstances of the Arctic OCS. Taken together, the enhancements to BOEM's regulations made in connection with the 2016 Arctic Exploratory Drilling Rule and the retention of these key provisions from the IOP make the IOP unnecessary and redundant.

For these reasons, BOEM proposes to eliminate the requirement for preparing and submitting the IOP. In doing so, BOEM would delete all of § 550.204, and remove corresponding references to the IOP from §§ 550.200 and 550.206. Currently, BOEM requires the operator to submit an IOP at least 90 days before filing an EP with BOEM. The IOP is not

subject to agency approval. BOEM developed the IOP requirement based on the Report to the Secretary of the Interior, Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program, prepared by DOI (60-Day Report), March 2013,⁵⁰ which included⁵¹ the following recommendation:

All phases of an offshore Arctic program—including preparations, drilling, maritime and emergency response operations—must be integrated and subject to strong operator management and government oversight. (60-day report, p. 3).

The information provided in the IOP was intended to facilitate the prompt sharing of information among the relevant Federal agencies (*e.g.*, BOEM, BSEE, USFWS, USCG, NMFS, U.S. Army Corps of Engineers, and EPA). Standing BOEM practice (LP-SOP-06 Standard Operating Procedure for Exploration Plans) in the Anchorage, Alaska OCS Office is to inform other agencies about an operator's EP, well in advance of the completeness review (*i.e.*, the deemed submitted determination) for the EP. BOEM successfully did so prior to the 2016 implementation of the IOP requirement.

The IOP requirement does not supersede or supplant the operator's obligation to comply with all other applicable Federal agency requirements. As described in the 2016 Arctic Exploratory Drilling Rule, the IOP process does not provide a mechanism for agencies to approve or disapprove the operator's proposed activities. BOEM has no authority under the IOP provision other than to make unenforceable suggestions to the operator. If BOEM or another agency determined that an operator was failing to engage in the needed integrated planning in advance of EP submission, BOEM could only compel an operator to do so through the EP review process.

The 2016 Arctic Exploratory Drilling Rule added informational requirements for EPs to address key concerns that motivated the IOP, as shown in Table 1, “Crosswalk between the IOP provisions proposed for removal and existing EP regulations and review practices.” Because this information is required in the EP, operators should be aware that they must plan for how they will manage contractors to reduce

⁵⁰ Available at: <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf>.

⁵¹ Report to the Secretary of the Interior, Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program, prepared by DOI (60-Day Report), March 2013, available at: <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf>.

operational risks and address the challenges associated with operations on the Arctic OCS. The EP regulations are clear that the operator must plan to coordinate the work of a number of contractors to ensure that time pressure, or other contractor complications, do not undermine safe and environmentally responsible operations. In particular, proposed § 550.220(c)(1) would require the operator to describe in the EP how it will design and conduct its exploratory drilling activities, and how it will manage and oversee these activities as an integrated endeavor. BOEM does not need, and nothing in OCSLA requires, an operator to inform Federal agencies about its planning on these issues in advance of an EP. The EP, however, will make evident whether the operator has done so, and if the EP does not address the operators' planning on all the required elements, BOEM will return the EP to the operator to include the requisite information in accordance with existing § 550.231(b).

As part of the 2016 Arctic Exploratory Drilling Rule, BOEM expanded the regulatory criteria for EPs to include information important for planning Arctic exploratory drilling. Specifically, BOEM expanded requirements for: Emergency plans at existing § 550.220(a), the EP's suitability for Arctic OCS conditions at proposed § 550.220(c)(1), ice and weather management at existing § 550.220(c)(2), SCCE capabilities at existing § 550.220(c)(3), deployment for a relief rig at proposed § 550.220(c)(4), resource-sharing at existing § 550.220(c)(5), and anticipated end of seasonal operation dates at existing § 550.220(c)(6).

BOEM's EP and environmental impact analysis (EIA) requirements at existing § 550.202, *What criteria must the Exploration Plan (EP), Development and Production Plan (DPP), or Development Operations Coordination Document (DOCD) meet?*, existing paragraphs (a) and (c) of § 550.211, *What must the EP include?*, existing paragraph (c) of § 550.216, *What biological, physical,*

and socioeconomic information must accompany the EP?, existing paragraphs (a) and (b) of § 550.219, *What oil and hazardous substance spills information must accompany the EP?*, existing paragraphs (b), (c)(2) and (5) of § 550.220, *If I propose activities in the Alaska OCS Region, what planning information must accompany the EP?*, proposed paragraph (c)(1) of § 550.220, existing paragraph (a) of § 550.224, *What information on support vessels, offshore vehicles, and aircraft you will use must accompany the EP?*, and existing paragraph (b)(7) of § 550.227, *What environmental impact analysis (EIA) information must accompany the EP?* require the operator to address issues that the operator also needs to consider in preparing the IOP. The following table provides a detailed analysis of how the key operational provisions of the IOP are addressed in BOEM's existing regulations, and why the key safety provisions of the IOP will continue to be fully addressed by other provisions within BOEM's regulations:

TABLE 1—CROSSWALK BETWEEN THE IOP PROVISIONS PROPOSED FOR REMOVAL AND EXISTING EP REGULATIONS AND REVIEW PRACTICES

IOP provision	Coverage in BOEM's continuing regulations, operator EPs, and review practices
§ 550.204(a)—The operator describes how vessels and equipment were designed for Arctic OCS conditions;	§ 550.220 (c)(1)—The operator describes how drilling activities account for Arctic OCS conditions.
§ 550.204(b)—The operator includes a schedule of the exploratory program;	§ 550.211(a)—The operator includes a schedule and discussion of objectives for its exploration program.
§ 550.204(c)—The operator describes how its plans account for Arctic OCS conditions;	§ 550.220 (c)(1)—The operator describes how drilling activities account for Arctic OCS conditions. § 550.220(c)(2)—The operator describes weather and ice forecasting and management plans. § 550.224(a)—The operator describes vessels and aircraft it would use during exploration, including storage capacity of fuels. § 550.202—BOEM must review plans to ensure they are safe and do not cause undue or serious harm or damage to the human, marine, or coastal environment.
§ 550.204(d)—The operator describes general abandonment plans for wells;	§ 550.211(a)—The operator includes a schedule and discussion of objectives for its exploration program. § 550.220 (c)(1)—The operator describes how drilling activities account for Arctic OCS conditions. § 550.220(c)(2)—The operator describes weather and ice forecasting and management plans. § 550.220(c)(6)(ii) (proposed)—The operator would describe the termination of drilling operations consistent with the well control planning requirements under § 250.472 of this title.
§ 550.204(e)—The operator describes its plans for responding and managing ice hazards and weather events;	§ 550.220(c)(2)—The operator describes weather and ice forecasting and management plans. § 550.220(b)—The operator would describe critical operations and curtailment procedures.
§ 550.204(f)—The operator describes work to be performed by contractors;	§ 550.220 (c)(1)—The operator describes how drilling activities account for Arctic OCS conditions. § 550.220(c)(2)—The operator describes weather and ice forecasting and management plans. § 550.202—BOEM must review plans to ensure they are safe and do not cause undue or serious harm or damage to the human, marine, or coastal environment.
§ 550.204(g)—The operator describes how it will ensure operational safety;	§ 550.211(c)—The operator would describe the drilling unit, associated equipment, safety features, and storage of fuels and oils. § 550.220 (c)(1)—The operator describes how drilling activities account for Arctic OCS conditions.

TABLE 1—CROSSWALK BETWEEN THE IOP PROVISIONS PROPOSED FOR REMOVAL AND EXISTING EP REGULATIONS AND REVIEW PRACTICES—Continued

IOP provision	Coverage in BOEM's continuing regulations, operator EPs, and review practices
§ 550.204(h)—The operator describes oil spill response plans;	§ 550.219 (a) and § 550.219 (b)—The operator would describe its oil spill response plan and associated spill modeling report.
§ 550.204(i)—The operator describes efforts to minimize impacts to local community infrastructure;	§ 550.216 (c)—the operator must analyze socioeconomic resources associated with its exploratory program.
§ 550.204(j)—The operator describes how it could rely on local communities for parts of its exploratory drilling program.	§ 550.227 (b)(7)—The operator must describe socioeconomic resources including employment and subsistence resources and harvest practices. § 550.220 (c)(5)—The operator describes agreements it has with third parties in the event of an oil spill or emergency. § 550.219 (a) and § 550.219 (b)—The operator would describe its oil spill response plan and associated spill modeling report. § 550.227 (b)(7)—The operator must describe socioeconomic resources including employment and subsistence resources and harvest practices.

The following information that was previously required as part of the IOP submission, but not included in the EP

requirements, is proposed to be added to the relevant sections of the EP:

Existing regulation text	New provision
§ 550.204(a)—The operator describes how vessels and equipment were designed for Arctic OCS conditions;	§ 550.220(c)(1)—The operator describes how the exploratory drilling (including vessels and equipment) would account for Arctic OCS conditions, including any allowances or limitations its vessels have from a classification society and/or the USCG.
§ 550.204(g)—The operator describes how it will ensure operational safety;	§ 550.211(b)—the operator describes how it will ensure operational safety.

To the extent that there is not an exact correlation between the information required in the IOP and that required in the EP, BOEM and BSEE believe that the additional information required in the IOP that is not in the EP is not necessary and certainly not necessary in advance of the EP.

Furthermore, the BOEM Anchorage, Alaska OCS Office meets with members of the Interagency Working Group on Alaska Energy Permitting and other relevant agencies, before an EP is submitted or deemed submitted.

Although BOEM previously argued that the IOP would not delay, but in fact, speed development by encouraging earlier review and coordination between regulatory agencies, BOEM no longer believes that is the case. While it is true that the IOP might speed up BOEM's review and approval of an EP, by encouraging earlier review and coordination among agencies, such acceleration would not shorten the overall planning process undertaken by the operator to prepare and submit an EP. The operator should conduct the same degree of planning with or without an IOP, because such planning is necessitated by the EP requirements. The IOP merely shifts some of the agency review to earlier in the process. With or without a prescriptive requirement for an IOP, the operator's thorough advance planning and

coordination between BOEM, the operator, and other agencies prior to submission, will result in fewer unexpected issues overall. In practice, the entire planning process from initial concept to actual drilling should be the same, with or without an IOP. What is more important in terms of timeline, is the detailed work the operator would conduct in preparing and submitting a well-crafted EP.

How do I submit the EP, DPP, or DOCD? (§ 550.206)

BOEM proposes to delete all references to the IOP in this section. The substantive provisions of this section that relate to EPs, DPPs, and DOCDs would remain unchanged.

What must the EP include? (§ 550.211)

BOEM proposes to move existing § 550.204(g) to § 550.211 as a new paragraph (b). All other provisions of § 550.211 would remain unchanged. The addition of the provision from § 550.204 into § 550.211 is designed to describe operational safety procedures that the operator has developed specific to conditions relevant on the Arctic OCS. These requirements were previously included in the IOP and not specifically enumerated as part of the requirements for an EP, although similar, more general requirements are already part of paragraphs (a),

Description, objectives, and schedule, and (c), Drilling unit of this section. Paragraph (c) requires the operator to describe the drilling unit, associated equipment, safety features, and storage of fuels and oils.

Without the current IOP provisions, the applicant would already need to have the information required by this paragraph in order to comply with BSEE's regulations that currently require operators to develop, implement, and maintain a safety and environmental management system (SEMS) program (Subpart S, §§ 250.1900 to 250.1933), and as a result, moving this requirement from §§ 550.204 to 550.211 does not add any burden.

Retaining this important provision as part of the requirements for exploratory drilling on the Arctic OCS ensures consistency with the goals of this rulemaking and to better align BOEM's rules with those of BSEE. The following is a description of the provision that is being retained. The section describes how an operator will ensure operational safety while working in Arctic OCS conditions, including but not limited to:

(1) The safety principles that it intends to apply to itself and its contractors;

(2) The accountability structure within its organization for implementing such principles;

(3) How it will communicate such principles to its employees and contractors; and

(4) How it will determine successful implementation of such principles.

The text of this transferred regulation provision is identical to what it was in § 550.204(g). As such, this addition to § 550.211 will not impose any new burden on lessees or operators. BOEM believes that retaining this important safety and environmental protection is a necessary part of ensuring that energy exploration and development activity is safe and environmentally responsible.

If I propose activities in the Arctic OCS Region, what planning information must accompany the EP? (§ 550.220)

BOEM proposes to revise paragraphs (c)(1) and (4), and (c)(6)(ii) of § 550.220 to conform to BSEE's proposed changes to § 250.472, *What are the additional well control equipment or relief rig requirements for the Arctic OCS?*

Existing paragraph (c)(1) of § 550.220 would be revised to add text to account for the text in existing § 550.204(a), which would be removed. With the elimination of § 550.204, BOEM proposes to combine the requirements of these two sections into a revised § 550.220(c)(1) that would require the operator to describe how its exploratory drilling (including vessels and equipment) would account for Arctic OCS conditions, including any allowances or limitations its vessels have from a classification society and/or the USCG.

BOEM is proposing to add a new informational requirement for modified vessels. BOEM is seeking to confirm that the operator meets the requirements of other entities with authority over vessels, not to impose requirements on those vessels. Although this revised paragraph would appear to add new requirements, in fact this revision would simply clarify and formalize the existing arrangements between BOEM and these other entities. This provision is proposed in order to avoid any potential confusion that might otherwise arise regarding the incorporation of the existing IOP requirements into the EP and how they may relate to the regulations and jurisdiction of the United States Coast Guard, or the flag state of the vessel. According to this proposed revision, for vessel modifications, the operator would describe any approvals from the flag state and vessel classification society and include in that description any allowances or limitations placed upon the vessel by the classification society and/or USCG. Vessel modifications may include the

suitability of vessels for Arctic conditions. These vessels may have or acquire classification from a "recognized organization" under the USCG's Alternative Compliance Program (ACP).⁵² This specification provides the operator with guidance on what information the EP should contain to show that its vessels would be able to operate safely in the Arctic OCS. The specification would also show that BOEM is not duplicating regulations from USCG by acknowledging that the flag state, USCG, and/or the classification society have authority for approvals, allowances, and limitations placed upon modified vessels. For these reasons, this change would impose no material additional burden on lessee or operators beyond that which already exists and which has already been accounted for in the information collection burden for this section.

To ensure consistency with BSEE's proposed regulatory changes, BOEM is proposing to revise paragraphs (c)(4) and (c)(6)(ii) by requiring the operator to provide a general description of how they will comply with § 250.472, including a description of the termination of their operations. BSEE is proposing to revise § 250.472 to provide the operator with the option to either use an SSID or have access to a relief rig, as an additional means to secure the well in the event of a loss of well control, if the operator will be conducting exploratory drilling operations from a MODU.

III. Additional Comments Solicited

To assist BSEE and BOEM in these revisions, we are requesting public comments on specific issues discussed in the preamble. We will consider these comments while developing final regulations. To provide necessary context, we included the requests for public comments in appropriate locations throughout the preamble. For ease of commenting, we consolidated the requests for comments in this section of the preamble. While BSEE and BOEM are soliciting comment on specific topics associated with the proposed rule, the bureaus welcome the public to submit information or comment on any other topics relevant to this rulemaking that may not necessarily pertain to the bureaus' specific solicitation. At this stage, the bureaus are open to considering any option that would improve the regulatory changes proposed, including maintaining the original requirement as part of the final rule. In all cases, please provide

supporting reasons and data for your responses.

(i) *Well Design When Using an SSID (§ 250.472(a))*—BSEE is seeking comments on how well design could be better addressed in this rulemaking to enhance the overall safety of operations on the Arctic OCS. More specifically, BSEE would like to know whether the well design requirement in proposed § 250.472(a) is adequate to address situations the operator may encounter if a well is shut-in with an SSID over an entire winter season (e.g., six to nine months). These situations could include cases where the wellbore pressure profile may increase to reservoir pressures at the top of the well over the course of the winter season. BSEE would also like to know whether there are other scenarios that may occur in a shut-in well over the ice season.

(ii) *SSID Efficacy Relative to the Relief Rig and SSRW*—BSEE is proposing to revise the relief rig and SSRW requirement with the intent to minimize environmental damage due to a prolonged ongoing well control event. When drilling a relief well, there is a delay in stopping the uncontrolled flow of oil and other fluid into the marine environment while relief well drilling operations are taking place. When properly functioning as designed, there is usually no delay for operational use of an SSID compared to the process of utilizing the relief rig or capping stack. If the SSID does not initially function, the SSID may still be activated through the ROV intervention equipment and capabilities that BSEE is proposing as a SSID design requirement. The SSID would operate independently from the BOP. By having two independent, redundant components, as part of the well control system, the overall reliability and effectiveness of the entire system increases. BSEE would like to know of any cases or data, in addition to what we have already discussed in the preamble, regarding the performance and reliability of the SSID and its effectiveness compared to drilling a relief well.

(iii) *NPC Report and Bratslavsky and SolstenXP Study*—The NPC 2019 Report and the Bratslavsky and SolstenXP study have been valuable tools that were not available when promulgating the 2016 Arctic Exploratory Drilling Rule. BSEE requests the public to provide additional information or clarification related to those portions of these reports that the Bureau relied upon in this rulemaking.

(iv) *SSID Capability to Preserve Isolation Over the Winter Season (§ 250.472(a)(1)(iv))*—BSEE proposes to require that the SSID must be capable of

⁵² 33 U.S.C. 3316 and 46 CFR part 8 implement the USCG's ACP.

preserving isolation through the winter season without solely relying on the elastomer elements of the rams (e.g., by using a well cap) and allow re-entry during the following open-water season. BSEE understands that the operator is able to achieve long-term isolation by installing a well cap (i.e., a metal-to-metal cap) on the SSID before leaving the device on the seafloor over the winter season. BSEE would like to know if there are means by which isolation would be preserved through the winter season in cases where a late-season emergency situation may not provide adequate time or ability to access the SSID to install a well cap.

(v) *SSID Dual Shear Requirement in Proposed § 250.472(a)(2)(i)*—The NPC 2019 Report describes the SSID used in the Kara Sea Project as having dual blind shear rams. BSEE does not propose requiring the SSID to be equipped with dual blind shear rams. However, BSEE is seeking comment on the advantages or disadvantages between dual blind shear rams and using dual shear rams, with ram locks, with one ram being a blind shear ram.

(vi) *SSID Redundant Control System Capabilities (§ 250.472(a)(2)(ii))*—BSEE proposes to require the SSID to use a redundant control system that includes ROV capabilities and a control station on the rig that is independent from the BOP control system. BSEE is contemplating whether it may be more appropriate to require the SSID's redundant control system capabilities to be separate from its ROV's capabilities, and to be consistent with the fully redundant control system requirements described in API Spec. 16D, *Specification for Control Systems for Drilling Well Control Equipment and Control Systems for Diverter Equipment*, Second Edition, July 2004, reaffirmed August 2013; incorporated by reference at § 250.198(e)(90); (e.g., yellow pod and blue pod). In addition to meeting the ROV requirements in existing § 250.734(a)(5), BSEE is also considering whether there should be an additional manual method (separate from the redundant control system) to close the SSID's rams with the ROV and whether it may be appropriate to require a standby or tending vessel with an ROV. There could be cases where the SSID's control system on the drilling rig is not available (e.g., due to failure or an evacuation of the rig).

(vii) *SSID Testing Requirements (§ 250.472(a)(5))*—BSEE is seeking comment on whether it is appropriate to align the SSID's proposed testing requirements with BSEE's existing BOP testing requirements in § 250.737, *What are the BOP system testing*

requirements?, or whether there are more appropriate and reliable testing methods for SSIDs. BSEE would like to receive information on what testing procedures have been used in the past to test an SSID when it was deployed, or what testing procedures are being developed for future projects.

(viii) *Relief Rig Staging and Capping Stack Positioning Requirements*—BSEE proposes to revise the staging and positioning requirement for the relief rig and capping stack, respectively, by providing an opportunity to the operator to adjust the point in time during its operations when it must stage or position these pieces of equipment, from “when drilling below or working below the surface casing” to “when drilling below or working below the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.” If the operator is able to demonstrate to BSEE that the operations it plans to conduct below the surface casing would not encounter any abnormally high-pressured or other geologic hazards before reaching the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, then BSEE would allow the operator to delay staging of its relief rig or positioning of its SCCE until reaching that point. BSEE would like to know whether there are more appropriate criteria, other than “abnormally high-pressured zones or other geologic hazards,” that should be used to determine whether to allow the operator to delay positioning of the capping stack and relief rig. BSEE is also requesting comment on what types of information, other than what is listed in proposed § 250.471(a) and § 250.472(b)—risk modeling data, off-set well data, analog data, and seismic data, could be used to demonstrate the absence of abnormally pressured zones or other geologic hazards, and how burden on the operator could change—increase or decrease—if BSEE were to require submission of that information in its APD.

(ix) *Alternative Regulatory Approach to the Relief Rig and Capping Stack Positioning Requirements*—BSEE is considering an alternative regulatory approach in which BSEE would revise the staging and positioning requirement for the relief rig and capping stack, respectively, by adjusting the point in time during its operations when it must stage or position these pieces of equipment, from “when drilling below or working below the surface casing” to “when drilling below or working below the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities.” However,

there could be cases where the operator or BSEE may not have sufficient G&G or analogous well data on a proposed project to confidently identify the location of the first formation that the operator may encounter that is capable of flowing hydrocarbons in measurable quantities. BSEE is soliciting the public's comments about this regulatory approach. BSEE is also soliciting comment about the need for the operator to verify, on a case-by-case basis, zones not capable of flowing hydrocarbons in measurable quantities.

(x) *Installing and Operating an SSID in a Mudline Cellar*—BSEE is requesting more information about whether there are any operational or installation challenges the operator may encounter in attempting to operate the SSID when it is installed in a mudline cellar. In areas of ice scour, BSEE's current regulations at §§ 250.734(a)(13) and 250.738(h) require placement of subsea BOP systems in mudline cellars. In addition, proposed § 250.720(c)(2) requires placement of the wellhead in a mudline cellar in areas of ice scour. Proposed § 250.472(a)(4)(i) would require installation of the SSID below the BOP.

(xi) *Operating an SSID with a Subsea BOP Installed on the Seafloor*—Historically, drilling in the Beaufort Sea and the Chukchi Sea has occurred in waters less than 167 feet deep, and as recent as April 2020,⁵³ there were active leases in the Beaufort Sea where an SSID could have been deployed. If the operator installs all well control systems on the seafloor (subsea BOP systems and SSIDs), there could be as much as 128 feet of water column taken up by these systems and a ship's hull (if a drillship is used). BSEE would like to know what challenges operators could face in cases where there is little room to operate. BSEE would also like to know how operators addressed those challenges in the past, or how such challenges could be addressed in future operations.

(xii) *Fail-Safe Mechanisms Used on an SSID*—BSEE is seeking comment on what fail-safe mechanisms exist that could be applied to an SSID in cases where a subsea BOP system is used. BSEE is contemplating whether it may be necessary to require mechanisms, such as autoshear or deadman for the SSID, to address emergency situations, such as a sunken MODU, where the

⁵³ In April of 2020, the only leases with potential projects that would be subject to the Arctic OCS's SSID requirements were relinquished. However, there are other active leases in the Beaufort Sea located nearer to shore in shallower waters where exploration and development projects are actively being pursued (primarily through man-made gravel islands).

subsea BOP system may have failed and the SSID could no longer be functioned via the rig or ROV (due to lack of access). BSEE currently has fail-safe requirements for subsea BOP systems (autoshear and deadman systems), which could be applied to SSIDs.

However, there could be unintended consequences from applying these fail-safe systems on an SSID when a subsea BOP system is used. BSEE is seeking comment on what fail-safe mechanisms could be deployed to address cases where the BOP fails and the SSID is inaccessible by an ROV or a MODU control station. If an autoshear system or a deadman system are appropriate fail-safe mechanisms, BSEE is seeking input on what criteria should be used to function these systems, to ensure they do not function at the wrong time or interfere with or impact the subsea BOP's autoshear and deadman systems.

(xiii) *Autoshear and Deadman System Requirements for Surface BOPs*—BSEE is contemplating establishing autoshear and deadman system requirements in cases where operators use a surface BOP. BSEE does not currently require the use of an autoshear or deadman system with surface BOPs. BSEE is seeking comment on what criteria should be established to function the autoshear or deadman systems in connection with a surface BOP. BSEE welcomes any other comments, unrelated to autoshear or deadman systems, which require additional consideration in those cases where a surface BOP is used.

(xiv) *Outcome-based Well Control System Requirements*—BSEE is seeking comment on other appropriate approaches to well-control operations in the Arctic. The NPC 2019 Report recommends accepting the use of an SSID in place of the requirement for SSRW capability. However, it also recommends replacing the relief rig and SSRW requirements with requirements that specify desired outcomes (*i.e.*, to stop the flow of a well and allow the operator to propose equivalent technology and demonstrate its capabilities). BSEE assumes that the NPC recommendation would entail a performance-based approach to the regulations, in which the operator could propose and demonstrate new technologies to meet a stated objective, rather than being required to use certain technologies, such as a relief rig.

(xv) *Suspension of Operations*—BSEE is considering the option of limiting the period during which a suspension would remain in effect to the period between one drilling season and the next when the operator is prevented from continuing its drilling or other

leaseholding activities due to seasonal conditions. BSEE is seeking comment on this regulatory option for the new SOO provision it is proposing in a new paragraph (d) of § 250.175, or any other option that could avoid or minimize the additional burdens associated with making requests on an annual basis (if the duration of the suspension needs to be longer), but still assure diligent lease exploration and development.

(xvi) *Other Solicited Comments*—BSEE is also requesting comments on the specific costs and operational implications of each of the regulatory changes included in this proposed rule.

IV. Procedural Matters

A. Regulatory Planning and Review (Executive Orders (E.O.) 12866, 13563, and 13771)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) within OMB will review all significant rules. This proposed action is an economically significant regulatory action that was submitted to OMB for review, as it would have an annual effect on the economy of \$100 million or more. BSEE and BOEM developed an economic analysis to assess the anticipated costs and potential benefits of the proposed rule. Due to uncertainty surrounding the outcome of ongoing litigation regarding the availability of Arctic OCS planning areas for future leasing and energy development, BSEE and BOEM developed two baseline activity level forecasts: (1) Activity levels expected if the full Beaufort and Chukchi Sea planning areas are reopened (*i.e.*, the Full Arctic baseline), and (2) reduced activity levels if these areas remain withdrawn from leasing (*i.e.*, the Restricted Beaufort baseline). Under either scenario, the proposed action would be economically significant as a result of the estimated cost savings of this proposed rule. BSEE and BOEM estimate the amendments proposed in this rulemaking would provide annualized net benefits of \$142 million under the Full Arctic baseline, or \$121 million under the Restricted Beaufort baseline, discounted at 7 percent.

Details on the estimated cost savings of this proposed rule can be found in the rule's Initial Regulatory Impact Analysis (IRIA). The net quantified benefits for this proposed rule are based on cost savings less forgone benefits. The cost savings to both government and industry result from removing regulatory redundancies, reduction in paperwork burdens, provision for alternative methods of compliance, and adoption of improved industry

technology. Forgone benefits result from slight increases in the risks to subsistence hunters and fishermen and wildlife stemming from an increased probability of small or catastrophic oil spills. The cost savings exceed the forgone benefits, leading to the net benefits summarized in the following paragraphs.

This proposed rule would revise regulatory provisions in 30 CFR part 250, subparts A, C, D, and G, and 30 CFR part 550, subpart B. BSEE and BOEM have reassessed a number of the provisions promulgated through the 2016 Arctic Exploratory Drilling Rule and are proposing to revise some provisions to reflect performance-based standards rather than prescriptive requirements. Other revisions remove redundant regulatory oversight provisions and provide regional flexibility in the administration of suspensions and associated lease term extensions, without significantly impacting the current levels of safety and environmental protection. The bureaus sought the best available data and information to analyze the economic impact of these changes. The IRIA for this rulemaking can be found in the <https://www.regulations.gov/docket> (Docket ID: BSEE–2019–0008).

BSEE and BOEM are proposing to revise certain regulations promulgated through the 2016 Arctic Exploratory Drilling Rule based on new information generated since the 2016 rule was finalized, and to support the goals of the Administration's regulatory reform initiatives, while ensuring safety and environmental protection. This proposed rule would revise certain existing regulations—§§ 250.105; 250.175; 250.198; 250.300(b); 250.470(b), (f), and (h); 250.471(a) and (b); 250.472(a), (b), and (c); 250.720(c); 550.200; 550.204; 550.206; 550.211; and 550.220(c). The bulk of the net benefits are derived from cost savings driven by a proposed revision to existing § 250.472(b) and (c), which is discussed below. The analysis suggests forgone benefits are small compared to the cost savings, and the primary forgone benefits are from possible impacts on the environment and subsistence hunting and whaling communities, that could be caused by an oil spill of greater duration and higher discharge volumes in the event the BOP, SSID, and capping stack were to fail in sequence, and a containment dome and flow system would be needed to capture oil flowing from the well while relief-well drilling operations are underway. These, and the other provisions, are discussed in greater detail within the IRIA.

The largest contributor to net benefits attributable to the proposed rule is the proposed revision to existing § 250.472 paragraphs (a), (b), and (c). As promulgated under the 2016 Arctic Exploratory Drilling Rule, this provision currently requires the use of a ‘relief rig’ and adoption of a 45-day shoulder season. The relief rig is a secondary drilling vessel that is available and capable of drilling an SSRW in the event of a loss of well control. The 45-day “shoulder season” was the maximum time permitted by the regulations to mobilize the relief rig to an incident, drill a relief well, kill and abandon the original well, and abandon the relief well prior to expected seasonal ice encroachment at the drill site. This shoulder season necessarily compresses the already short Arctic drilling timeframe and also limits the ability of operators to drill and complete a well in one season. The proposed revisions to § 250.472 would provide the operator with the option to either use an SSID or have access to a relief rig, as an additional means to secure the well in the event of a loss of well control, if the operator will be conducting exploratory drilling operations from a MODU. The two features of this flexibility driving the cost savings are the removal of the shoulder season and removal of the requirement for the secondary drilling vessel, if the operator elects to install an SSID to comply with § 250.472. Because of the relative cost effectiveness of procuring, and potential well control advantages of installing an SSID versus mobilizing a relief rig and the necessary support vessels and personnel, BSEE

assumes operators will prefer this option when using MODUs. This proposed change would produce an annualized cost savings of \$142 million under the Full Arctic baseline, or \$121 million under the Restricted Beaufort baseline, discounted at 7%.

This proposed rule would reduce the burden imposed on industry, while maintaining safety and environmental protection. The forgone benefits of adopting the proposed rule include possible impacts on the environment, subsistence hunting and whaling communities, and an oil spill of greater duration with higher discharge volumes in the event a BOP and SSID were to fail. As discussed earlier in the preamble, BSEE proposes to require operators to operate an SSID independently from the BOP. By having two independent, redundant components (*i.e.*, the BOP and the SSID) as part of the well control system, the overall reliability and effectiveness of the entire system increases. In the event both devices were to fail, the capping stack would still be used as required in the permitted timeframe. When a capping stack is used to contain a well, the relief well can be drilled without an ongoing active spill event. If the capping stack were to fail, the containment dome and flow system would be used to capture the oil flowing from the well while relief-well drilling operations are underway.

Given that the proposed rule would remove the arrival timing requirement for these pieces of equipment, there may be a delay in their arrival, in comparison to the existing regulations. The amount of oil flowing from the well

during that delayed period, would be the contributing factor to the proposed rule’s forgone benefits. However, as discussed in the IRIA, the probability of a catastrophic spill event (as a result of the BOP and SSID systems experiencing total failures) is low. Coupled with a scenario in which a BOP, SSID, and capping stack were all to fail, the probability of realizing these forgone benefits may be even lower.

Nonetheless, the possibility exists and if the BOP were to fail and the SSID were to function as designed, there would be no forgone benefits in comparison to the existing regulations (and there might be a gained benefit since the SSID would activate immediately).

As part of the final rule, BSEE and BOEM are contemplating the preparation of a sensitivity analysis for the Final RIA and are soliciting comments on ways to make the analysis as accurate as possible. The information we receive through public input on this proposed rule regarding the SSID’s performance, reliability, and effectiveness may inform the preparation of a sensitivity analysis.

The timeframe of the present analysis is 24 years, composed of an initial 4 years with no activity followed by 20 years of activities beginning in 2024. The two tables below summarize BSEE’s and BOEM’s estimates of the total and annual net benefits derived from all proposed revisions and additions. Additional information on the time horizon, compliance costs, savings, benefits, and forgone benefits may be found in the IRIA published in the rule docket.

20-YEAR ESTIMATED ANNUALIZED NET BENEFITS ASSOCIATED WITH PROPOSED AMENDMENTS TO 30 CFR PART 250 SUBPARTS A, C, D, AND G, AND 30 CFR PART 550, SUBPART B UNDER FULL-ARCTIC BASELINE ASSUMPTIONS

Year (2024–2043)	Discounted to 2019 at 3%	Discounted to 2019 at 7%
Annualized (millions)	\$149.8	\$142.2

20-YEAR ESTIMATED ANNUALIZED NET BENEFITS ASSOCIATED WITH PROPOSED AMENDMENTS TO 30 CFR PART 250 SUBPARTS A, C, D, AND G, AND 30 CFR PART 550, SUBPART B UNDER RESTRICTED BEAUFORT BASELINE ASSUMPTIONS

Year (2024–2043)	Discounted to 2019 at 3%	Discounted to 2019 at 7%
Annualized (millions)	\$126.0	\$120.9

This proposed rule would revise multiple provisions in the current regulations to implement performance-based provisions based upon reasonably obtainable information on safety, technical, economic, and other issues. Redundant or unnecessary reporting requirements are also being eliminated.

BSEE and BOEM are providing industry flexibility, when practical, to meet the safety or equipment standards, rather than specifying the compliance method. Based on a consideration of the qualitative and quantitative safety and environmental factors related to the rule, BSEE and BOEM determined that

the proposed revisions would be consistent with the policies of the applicable E.O.s and the OCSLA.

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 E.O. 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 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. Furthermore, it promotes retrospective review of existing regulations that may be outmoded, ineffective, insufficient, or excessively burdensome. BSEE and BOEM have reviewed the existing regulations as amended by the 2016 Rule and have developed this proposed rule in a manner consistent with E.O. 13563.

Executive Order 13771 requires Federal agencies to take proactive measures to reduce the costs associated with complying with Federal regulations. This proposed rule is an E.O. 13771 deregulatory action.

B. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires agencies to analyze the economic impact of regulations when there is likely to be a significant economic impact on a substantial number of small entities and to consider regulatory alternatives that will achieve the agency's goals while minimizing the burden on small entities. The proposed rule would affect operators and Federal oil and gas lessees that could conduct exploratory drilling on the Arctic OCS. The RFA defines small entities as small businesses, small nonprofits, and small governmental jurisdictions. No small nonprofits or small governmental jurisdictions have been identified that would be impacted by this rule.

Businesses subject to this proposed rule fall under North American Industry Classification System (NAICS) codes 211111 (Crude Petroleum and Natural Gas Extraction) and 213111 (Drilling Oil and Gas Wells). For these classifications, a small business is defined as one with fewer than 1,250 employees (NAICS code 211111) and fewer than 1,000 employees (NAICS code 213111), respectively. A small entity is one that is “independently owned and operated and which is not dominant in its field of operation.”

According to BOEM's list of Arctic OCS leaseholders, four businesses currently hold lease interests on the

Arctic OCS. This proposed rule would directly affect all four Arctic lessees. Based on the small entity criterion, none of the four businesses are considered a small entity. No small companies hold leases on the Arctic OCS. Previously, a single small company with only one lease held acreage on the Arctic OCS. This company relinquished its lease in March 2016.

BSEE and BOEM prepared an Initial Regulatory Flexibility Analysis (IRFA), which can be found in Section VII of the IRIA. Given the challenging environment and associated costs of drilling in the Arctic OCS planning areas, no small entities are expected to operate in these areas for the foreseeable future. Therefore, BSEE and BOEM preliminarily conclude that no small entities would be affected by these proposed amendments, however the agency has prepared an IRFA and is seeking public comment on any small business impacts from the proposed amendments.

This proposed rule would meet the E.O. 12866 criteria for an economically significant rule because it would likely have an annual effect on the economy of \$100 million or more in at least one year of the 20-year period analyzed, and BSEE/BOEM comply with the RFA and the Small Business Regulatory Enforcement Fairness Act by providing a regulatory flexibility analysis. The requirements would apply to all entities operating on the Arctic OCS regardless of company designation as a small business. For more information on the small business impacts, see the IRFA section in the IRIA. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman, and to the Regional Small Business Regulatory Fairness Board. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of BSEE or BOEM, call 1–888–REG–FAIR (1–888–734–3247).

C. Unfunded Mandates Reform Act of 1995 (UMRA)

This proposed rule would not impose an unfunded Federal mandate on State, local, or tribal governments and would not have a significant or unique effect on State, local, or tribal governments. The requirements in this proposed rule would apply to Arctic OCS oil and gas lessees and operators, not to State, local, and tribal governments. Thus, the proposed rule would not have

disproportionate budgetary effects on these governments. BSEE and BOEM have determined the proposed changes in this rulemaking would result in cost savings annually to regulated entities. Therefore, a written statement under the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

D. Takings Implication Assessment

Under the criteria in E.O. 12630, this proposed rule would not have significant takings implications. The proposed rule is not a governmental action capable of interference with constitutionally protected property rights. A Takings Implication Assessment is not required.

E. Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this proposed rule would not have federalism implications. This proposed rule would not substantially and directly affect the relationship between the Federal and State Governments. To the extent that State and local governments have a role in OCS activities, this proposed rule would not affect that role. A Federalism Assessment is not required.

F. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule:

1. Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
2. Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

G. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, Consultation and Coordination with Indian Tribal Governments (dated November 6, 2000), DOI's Policy on Consultation with Indian Tribes and Alaska Native Corporations (512 Departmental Manual 4, dated November 9, 2015), and DOI's Procedures for Consultation with Indian Tribes (512 Departmental Manual 5, dated November 9, 2015), we evaluated the subject matter of this rulemaking and determined that it would have tribal implications for Alaska Natives. As described earlier, future Arctic OCS exploratory drilling activities conducted pursuant to this proposed rule could affect Alaska Natives, particularly their ability to engage in subsistence and cultural activities. However, as discussed earlier in *Section I*.

Background, Subsection E. Partner Engagement in Preparation for This Proposed Rule, Item 2. Summary of Comments Received. BOEM's environmental studies program has provided nearly \$500 million over the last 46 years to scientific research on the Alaska OCS, which includes the Arctic OCS. Since July 2016, BOEM has completed 35 environmental studies and has 23 ongoing studies that cover the Arctic, totaling nearly \$72 million. While this proposed rule would change how operators could explore for OCS resources in the Arctic, there are ample opportunities to permit these activities consistent with ESA, MMPA, NEPA, and consultation with Alaska Native communities. BOEM's environmental studies program provides the information that is used to evaluate the potential environmental effects of leasing OCS lands for exploration and development and helps ensure BOEM and BSEE have the best science available for the public, industry, and federal permitting decisions.

In addition, Alaska Natives may also be beneficiaries of the proposed rule, to the extent they are partners in any exploratory activities. There are additional unquantified benefits in situations where a SSID is available to immediately shut-in a flowing well rather than waiting for a relief well to be drilled.

BSEE and BOEM are committed to regular and meaningful consultation and collaboration with Alaska Native Tribes and ANCSA Corporations on policy decisions that have tribal implications, including, as an initial step, through complete and consistent implementation of E.O. 13175, together with related orders, directives, and guidance. Therefore, BSEE and BOEM engaged in Government-to-Government tribal consultations, Government-to-ANCSA Corporations consultations, and meetings with municipal leaders (*i.e.*, mayors or their respective representatives), to discuss the subject matter of the proposed rule and solicit input in the development of the proposed rule.

On September 20, 2018, BSEE and BOEM began reaching out to leaders from Alaska Native Tribes, ANCSA Corporations, and municipalities to determine which partners were interested in having conversations with BSEE and BOEM about the rulemaking. Consultations entailed meetings in Alaska, at locations and times convenient to the Alaska Native communities and corporations, to ensure they can have proper representation during the meetings. Accordingly, the timing of these meetings was critical. BSEE and BOEM scheduled the meetings around important traditional subsistence and cultural activities, such as whaling, that take place during specific times of the year, particularly in the early fall. Between November 29, 2018 and January 30, 2019, BSEE and BOEM met with a majority of the tribal entities (23 of 25) originally invited to consult. The following table lists all 25 invited tribal entities, and the dates and locations of the meetings with the 23 entities.

Tribal entity name	Type of entity	Meeting date	Location
Native Village of Utqiagvik	Tribal Government	November 29, 2018 ...	Anchorage.
Native Village of Wainwright	Tribal Government.		
Olgoonik Native Corporation	Native Corporation.		
Doyon Limited	Native Corporation.		
Arctic Slope Regional Corporation	Native Corporation	December 7, 2018.	
Native Village of Kotzebue	Tribal Government	December 10, 2018 ...	Kotzebue.
Northwest Arctic Borough Mayor	Municipal Government.		
Native Village of Point Hope	Tribal Government	December 11, 2018 ...	Point Hope.
Tikigaq Native Corporation	Native Corporation.		
Point Hope Mayor	Municipal Government.		
Alaska Eskimo Whaling Commission	Non-tribe that consults on tribe's behalf	December 13, 2018 ...	Anchorage.
Cully Corporation	Native Corporation	December 14, 2018.	
North Slope Borough Mayor	Municipal Government	December 17, 2018 ...	Utqiagvik.
City of Utqiagvik Mayor	Municipal Government.		
Native Village of Nuiqsut	Tribal Government	December 18, 2018 ...	Nuiqsut.
Kuukpiik Corporation	Native Corporation.		
Nuiqsut Mayor	Municipal Government.		
Inupiat Community of the Arctic Slope	Non-tribe that consults on tribe's behalf.		
Native Village of Kaktovik	Tribal Government	December 19, 2018 ...	Kaktovik.
Kaktovik Inupiat Corporation	Native Corporation.		
Kaktovik Mayor	Municipal Government.		
Tanana Chiefs Conference	Tribal Government	December 20, 2018 ...	Fairbanks.
Native Village of Point Lay	Tribal Government	January 30, 2019	Conference Call.
Kikiktatruk Corporation	Native Corporation	BSEE and BOEM made multiple attempts to contact these corporations. However, the bureaus did not receive a response from either organization.	
NANA Regional Corporation	Native Corporation.		

All Alaska Native input provided during the meetings was subsequently provided to DOI in writing and has been included in the administrative record for this proposed rule.

As previously discussed in part E of the background section in this preamble, BSEE and BOEM heard a variety of perspectives during their meetings with Alaska Natives. The most

common comment received was a concern over food security. Subsistence resources, including bowhead and beluga whales, other marine mammals, fish, and birds, are a key food source for many people's diets in the native villages. Another common comment recommended inclusion of a requirement for an oil and gas operator to establish an agreement with those

whaling communities potentially affected by a planned drilling project. Certain tribal representatives and most ANCSA corporations were supportive of this proposed rulemaking because it could help attract more economic opportunities to their villages. Other comments provided during the consultation meetings included a recommendation to provide broader

outreach by presenting this rulemaking to the tribal assemblies and to citizens within the communities. One of the ANCSA corporations also recommended that this rulemaking take into account the NPC 2019 Report. Please refer to the discussions above in Part E (*Partner Engagement in Preparation for This Proposed Rule*) of the background section of this preamble for a description of how BSEE and BOEM are addressing this input during the rulemaking process. BSEE and BOEM intend to continue consultation with affected tribes and ANCSA Corporations following publication of this proposed rule.

H. Effects on Environmental Justice for Minority and Low-Income Populations (E.O. 12898)

E.O. 12898 requires Federal agencies to make achieving environmental justice part of their mission by identifying and addressing disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. DOI has determined that this proposed rule would not have a disproportionately high or adverse

human health or environmental effect on native, minority, or low-income communities because its provisions are designed to maintain environmental protection and minimize any impact of exploration drilling on subsistence activities and Alaska Native community resources and infrastructure.

I. Paperwork Reduction Act (PRA)

This proposed rule contains existing and new information collection (IC) requirements for both BSEE and BOEM regulations, and a submission to OMB for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is required. Therefore, each bureau will submit an IC request to OMB for review and approval. 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. OMB has previously reviewed and approved the existing information collection requirements associated with Outer Continental Shelf drilling permits, plans, and related information collection, which would be altered by this proposed rule. OMB has assigned

the following OMB control numbers to the current ICs:

- 1014–0025 (BSEE), 30 CFR part 250, Applications for Permit to Drill (APD and revised APD) (expires 06/30/2023), and in accordance with 5 CFR 1320.10, an agency may continue to conduct or sponsor this collection of information while the renewal submission is pending at OMB.

- 1010–0151 (BOEM), 30 CFR part 550, subpart B Plans and Information (exp. 06/30/2021), and in accordance with 5 CFR 1320.10, an agency may continue to conduct or sponsor this collection of information while the renewal submission is pending at OMB.

The IC aspects affecting each bureau are discussed separately. Additionally, BOEM is seeking to renew these information collections for three years with this rulemaking. Instructions on how to comment follow those discussions.

The following table details proposed changes to the annual estimated hour burdens and non-hour costs; as well as associated wage cost changes for both BSEE and BOEM information submission activities described below:

BSEE

Requirement	Existing regulations		Proposed rule		Total changes		
	Number of responses	Number of burden hours	Number of responses	Number of burden hours	Change of responses	Change of burden hours	Changes in wage cost
Submit signed SSID and Well Design certification § 250.470(h)	0	0	2	6	+2	+6	+\$848
Submit request to delay access to your SCCE—§ 250.471(a) and § 250.472(b)	0	0	2	2	+2	+2	+\$286

There are no changes to non-hour costs for BSEE requirements.

BOEM

Requirement	Existing regulations		Proposed rule		Total changes		
	Number of responses	Number of burden hours	Number of responses	Number of burden hours	Change of responses	Change of burden hours	Changes in wage cost
Submit IOP, including all required information § 550.204	1	2,880	0	0	(1)	(2,880)	(\$316,800)
Submit required Arctic-specific information with EP § 550.220	1	350	1	400	.....	+50	+5,500

There are no changes to non-hour costs for BOEM requirements.

BSEE Information Collection—30 CFR Part 250

The proposed regulations would establish new and/or revise current requirements and the submission of information for safe and

environmentally responsible Arctic OCS oil and gas exploration in an APD. BSEE would use the information in our efforts to protect life and the environment, conserve natural resources, and prevent waste.

The following provides a breakdown of the paperwork and non-hour cost burdens for this proposed rule. For the

current requirements retained in the proposed rule, we used OMB's approved estimated hour and non-hour cost burdens.

As discussed in the Preamble Section-by-Section above, and in the supporting statement available at *RegInfo.gov*, this proposed rule would modify language in §§ 250.175(d), 250.300(b),

250.470(f)(3), and 250.720(c)(2); however, there would be no change in hour burden or non-hour costs associated with these revisions.

In § 250.470(h), we would add a requirement to submit with an APD a certification signed by a registered professional engineer that your SSID and well design (including casing and cementing program) meet the design requirements in § 250.472 (+ 2 responses and 6 hours for PE Certification).

In §§ 250.471(a) and 250.472(b), we would add a requirement for operators to submit, with an APD, documentation demonstrating that having access to SCCE and the relief rig can be safely delayed until the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities. BSEE will grant this approval if the operator adequately demonstrates to the Bureau that it will not encounter any abnormally high-pressured zones or

other geological hazards before that casing point (+ 2 responses and 2 hours per request).

Because not all APDs submitted to BSEE would involve Arctic OCS exploration drilling, we are separating the Arctic-specific requirements and burdens from the national APD requirements. The burden table below outlines the revised requirements and burdens associated with this proposed rulemaking.

Title of Collection: Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf—Application for Permit to Drill (APD, Revised APD).

OMB Control Number: 1014–0025.

Form Number: BSEE–0123 (APD) and BSEE–0123S (Supplemental APD).

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Potential respondents comprise Federal OCS oil, gas, and sulfur lessees/

operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 60 Oil and Gas Drilling and Production Operators in the OCS. Not all the potential respondents would submit information at any given time, and some may submit multiple times.

Total Estimated Number of Annual Responses: 11,331.

Estimated Completion Time per Response: Varies from 1 hour to 2,800 hours depending on activity.

Total Estimated Number of Annual Burden Hours: 77,945.

Respondent's Obligation: Most responses are mandatory, while others are required to obtain or retain benefits.

Frequency of Collection: Generally, on occasion and as required in the regulations.

Total Estimated Annual Nonhour Burden Cost: \$4,400,470.

BURDEN TABLE

[Changes due to the proposed rule shown in **bold**]

Citation 30 CFR 250; application for permit to drill (APD)	Reporting or recordkeeping requirement *	Hour burden	Average number of responses	Annual burden hours (rounded)
		Non-hour cost burden		
Subparts A, C, D, E, G, H, P	Apply for permit to drill, sidetrack, bypass, or deepen a well submitted via Forms BSEE–0123 (APD) and BSEE–0123S (Supplemental APD). (This burden represents only the filling out of the forms, the requirements are listed separately below.).	1	190 applications	190
			\$2,113 fee × 190 = \$401,470	
Subparts D, E, G	Obtain approval to revise your drilling plan or change major drilling equipment by submitting a Revised APD and Supplemental APD [no cost recovery fee for Revised APDs]. (This burden represents only the filling out of the forms, the requirements are listed separately below.).	1	730 submittals	730
Subtotal			920 responses	920
			\$401,470 non-hour cost burdens	
Subpart A				
125	Submit evidence of your fee for services receipt	Exempt under 5 CFR 1320.3(h)(1)		0
197	Written confidentiality agreement	Exempt under 5 CFR 1320.5(d)(2)		0
Subpart C				
300(b)(1), (2)	Obtain approval to add petroleum-based substance to drilling mud system or approval for method of disposal of drill cuttings, sand, & other well solids, including those containing Naturally Occurring Radioactive Material (NORM).	150	1 request	150
Subpart C subtotal			1 response	150

BURDEN TABLE—Continued
[Changes due to the proposed rule shown in **bold**]

Citation 30 CFR 250; application for permit to drill (APD)	Reporting or recordkeeping requirement *	Hour burden	Average number of responses	Annual burden hours (rounded)
Subpart D				
408; 414(h)	Request approval of alternate procedures or equipment during drilling operations.	Burden covered under subpart A, 1014–0022		0
409	Request departure approval from the drilling requirements specified in this subpart; identify and discuss.	1	370 approvals	370
410(b); 417(b); 713	Reference well and site-specific information in case it is not approved in your Exploration Plan, Development and Production Plan, Development Operations Coordination Document. Burdens pertaining to EPs, DPPs, DOCDs are covered under BOEM 1010–0151.	8	1 submittal	8
410(d)	Submit to the District Manager: An original and two complete copies of APD and Supplemental APD; separate public information copy of forms per §250.186.	0.5 R–0.5	380 submittals 380 submittals	190 190
411; 412	Submit plat showing location of the proposed well and all the plat requirements associated with this section.	2	380 submittals	760
411; 413; 414; 415; 420	Submit design criteria used and all description requirements; drilling prognosis with description of the procedures you will follow; and casing and cementing program requirements.	15	707 submittals	10,605
411; 416; 731	Submit diverter and BOP systems descriptions and all the regulatory requirements associated with this section.	11	380 submittals	4,180
411; 713	Provide information for using a MODU and all the regulatory requirements associated with this section.	10	682 submittals	6,820
411; 418	Additional information required when providing an APD include, but not limited to, rated capacities of drilling rig and equipment if not already on file; drilling fluids program, including weight materials; directional plot; H2S contingency plan; welding plan; and information we may require per requirements, etc.	20	380 submittals	7,600
414(c)	Request preapproval to use alternative equivalent downhole mud weight prior to submitting APD.	1	15 requests	15
420(a)(7)	Include signed registered professional engineer certification and related information.	3	1,034 certifications	3,102
423(c)	Submit for approval casing pressure test procedures and criteria. On casing seal assembly ensure proper installation of casing or liner (subsea BOP's only).	3	527 procedures & criteria.	1,581
428(b)	Submit to District Manager for approval revised casing setting depths or hole interval drilling depth; include certification by PE.	125	1 submittal	125
428(k)	Submit a description of the plan to use a valve(s) on the drive pipe during cementing operations for the conductor casing, surface casing, or liner.	125	1 submittal	125

BURDEN TABLE—Continued
[Changes due to the proposed rule shown in **bold**]

Citation 30 CFR 250; application for permit to drill (APD)	Reporting or recordkeeping requirement *	Hour burden	Average number of responses	Annual burden hours (rounded)
432	Request departure from diverter requirements; with discussion and receive approval.	8	53 requests	424
460(a)	Include your projected plans if well testing along with the required information.	17	2 plans	34
462(c)	Submit a description of your source control and containment capabilities to the Regional Su- pervisor and receive approval; all required in- formation.	125	1 submittal	125
470(h)	Submit certification signed by PE that SSID and well design meet requirements of § 250.472. (Alaska only).	3	2 certs.	6
471(a); 472(b)	Submit, to Regional Supervisor, a request to delay access to your SCCE and relief rig, if applicable, including adequate documenta- tion (such as, but not limited to, risk mod- eling data, off-set well data, analog data, seismic data). Demonstrate you will not en- counter any abnormally high-pressured zones or other geologic hazards. (Alaska only).	1	2 requests	2
490(c)	Request to classify an area for the presence of H2S.	3	91 requests	273
	Support request with available information such as G&G data, well logs, formation tests, cores and analysis of formation fluids.	3	73 submittals	219
	Submit a request for reclassification of a zone when a different classification is needed.	1	4 requests	4
Alaska Region: 410; 412 thru 418; 420; 442; 444; 449; 456; 470; 471; 472.	Due to the difficulties of drilling in Alaska, along with the shortened time window allowed for drilling, Alaska hours are done here as stand- alone requirements. Also, note that these spe- cific hours are based on the first APD in Alas- ka in more than 10 years.	2,800	1 request	2,800
Subpart D subtotal			5,467 responses	39,558
Subpart E				
513	Obtain written approval to begin well completion operations. If completion is planned and the data are available you may submit on forms.	3 R-3	288 requests	864
	Submit description of well-completion, sche- matics, logs, any H2S..	18.5 R-26	295 submittals	5,458
Subpart E subtotal			585 responses	6,351
Subpart G				
701; 720	Identify and discuss your proposed alternate pro- cedures or equipment.	Burden covered under subpart A, 1014- 0022		0
702	Identify and discuss departure requests.	Burden covered under subpart A, 1014- 0022		0
713(b)	Submit plat of the rig's anchor pattern for a moored rig approved in your EP, DPP, or DOCD.	125	1 submittal	125

BURDEN TABLE—Continued
[Changes due to the proposed rule shown in **bold**]

Citation 30 CFR 250; application for permit to drill (APD)	Reporting or recordkeeping requirement *	Hour burden	Average number of responses	Annual burden hours (rounded)
713(e)	Provide contingency plan for using dynamically positioned MODU and all the regulatory requirements associated with this section.	10	682 submittals	6,820
713(g)	Describe specific current speeds when implementing rig shutdown and/or move-off procedures for water depths > 400 meters; discussion of specific measures you will take to curtail rig operations/move-off location.	45	1 submittal	45
720(b)	Request approval to displace kill-weight fluid; include reasons why along with step-by-step procedures.	5	518 approval requests ..	2,590
721(g)(4)	Submit test procedures and criteria for a successful negative pressure test for approval. If any change, submit changes for approval.	2.5 R-4	355 submittals, 1 change.	8,884
731	Submit complete description of BOP system and components; schematic drawings; certification by ITP (additional I3P if BOP is subsea, in HPHT, or surface on floating facility); autoshear, deadman, EDS systems.	114	129 submittals	14,706
		\$31,000 × 129 submittal = \$3,999,000		
733(b)	Describe annulus monitoring plan; and how the well will be secured if leak is detected.	67	1 submittal	67
734(b)	Submit verification report from ITP documenting repairs and that BOP is fit for service.	R-64	1 report	64
734(c)	Submit revision, including all verifications required, before drilling out surface casing.	R-66	1 submittal	66
737(a)	Request approval from District Manager to omit BOP pressure test. Indicate which casing strings and liners meet the criteria for this request.	1	358 casing/liner info	358
737(b)(2)	Request approval of test pressures (RAM BOPs)	2	353 requests	706
737(b)(3)	Request approval of pressure test (annular BOPs).	2	380 requests	760
737(d)(2)	Submit test procedures for approval for surface BOP.	2.5	507 submittals	1,268
737(d)(3); (d)(4)	Submit test procedures, including how you will test each ROV intervention function, for approval (subsea BOPs only).	2	507 submittals	1,014
737(d)(12)	Submit test procedures (autoshear and deadman systems) for approval. Include documentation of the controls/circuitry system used for each test; describe how the ROV will be utilized during this operation.	2.5	507 submittals	1,268
738(b)	Submit a revised permit with a written statement from an independent third party documenting the repairs, replacement, or reconfiguration and certifying that the previous certification in § 250.731(c) remains valid.	.5	50 submittals	25
738(m)	Request approval to use additional well control equipment, including BAVO report; as well as other information required by District Manager.	66	1 request	66

BURDEN TABLE—Continued

[Changes due to the proposed rule shown in **bold**]

Citation 30 CFR 250; application for permit to drill (APD)	Reporting or recordkeeping requirement *	Hour burden	Average number of responses	Annual burden hours (rounded)
738(n)	Submit which pipe/variable bore rams have no current utility or well control purposes.	64	1 submittal	64
Subpart G subtotal			4,177 response	16,396
Subpart H				
807(a)	Submit detailed information that demonstrates the SSSVs and related equipment are capable of performing in HPHT.	13	1 submittal	13
Subpart H subtotal			1 response	13
Subpart P				
Note that for Sulfur Operations, while there may be 49 burden hours listed, we have not had any sulfur leases for numerous years, therefore, we have submitted minimal burden.				
1605(b)(3)	Submit information on the fitness of the drilling unit.	6	1 submittal	6
1617	Submit fully completed application (Form BSEE–0123) include rated capacities of the proposed drilling unit and of major drilling equipment; as well as all required information listed in this section.	40	1 submittal	40
1622(b)	Submit description of well-completion or workover procedures, schematic, and if H2S is present.	3	1 submittal	3
Subpart P subtotal			3 responses	49
Total Burden for APD			11,331 Responses	77,945
			\$4,400,470 Non Hour Cost Burden	

* In the future, BSEE may require electronic filing of some submissions.

In addition, the PRA requires agencies to estimate the total annual reporting and recordkeeping non-hour cost burden resulting from the collection of information, and we solicit your comments on this item. For reporting and recordkeeping only, your response should split the cost estimate into two components: (1) Total capital and startup cost component and (2) annual operation, maintenance, and purchase of service component. Your estimates should consider the cost to generate, maintain, and disclose or provide the information. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Generally, your estimates should not include equipment or services purchased: (1) Before October 1, 1995; (2) to comply with requirements not associated with the information collection; (3) for reasons

other than to provide information or keep records for the Government; or (4) as part of customary and usual business or private practices.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

- (1) Whether the collection of information is necessary, including whether the information will have practical utility;
- (2) The accuracy of our estimate of the burden for this collection of information;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on respondents.

Send your comments and suggestions on this information collection by the date indicated in the **DATES** section to the Desk Officer for the Department of

the Interior at OMB–OIRA at (202) 395–5806 (fax) or via the *RegInfo.gov* portal (online). You may view the information collection request(s) at <http://www.reginfo.gov/public/do/PRAMain>. Please provide a copy of your comments to the BSEE Information Collection Clearance Officer (see the **ADDRESSES** section). You may contact Kye Mason, BSEE Information Collection Clearance Officer at (703) 787–1607 with any questions. Please reference Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf (OMB Control No. 1014–0025), in your comments.

BOEM Information Collection—30 CFR Part 550

This proposed rule would add and remove requirements related to submitting exploration plans and other information before conducting oil and gas exploration drilling activities on the Arctic OCS. If final regulations become effective, the information collection burdens for this rulemaking would be

consolidated into the existing collection for Subpart B, Control Number 1010–0151, and will be adjusted as necessary. BOEM is requesting OMB approve the modified collections of information for OMB Control Number 1010–0151 with the final rule publication.

Pertaining to this proposed rulemaking, BOEM would collect the information to ensure that planned operations will be safe; will not adversely affect the marine, coastal, or human environments; will respond to the special conditions on the Arctic OCS; and will conserve the resources of the Arctic OCS. BOEM would use the information to ensure, through advanced planning, that operators are capable of safely operating in the unique environmental conditions of the Arctic and to make informed decisions on whether to approve EPs as submitted or whether modifications are necessary.

BOEM proposes to remove the Integrated Operations Plan (IOP) regulations by deleting § 550.204 and removing the corresponding references to the IOP from §§ 550.200 and 550.206. BOEM's existing requirement to submit the IOP at least 90 days before the lessee or operator files an EP would be eliminated. The data and information requested in the IOP is largely unnecessary in light of the information already collected in the EP. The current approval for OMB Control Number 1010–0151 counts the similar burdens associated with IOPs and EPs in both. Therefore, BOEM would remove the burdens attributed to the IOPs, and keep the burdens attributed to EPs. Removing the IOP provision would decrease the annual burden hours by 1 response and 2,880 hours (- 1 response and 2,880 annual burden hours).

The proposed rule would add a requirement to § 550.211(b) to describe operational safety procedures that the operator has developed specific to

conditions relevant on the Arctic OCS in the EP. These requirements were previously included in the IOP requirements that are removed from this rulemaking. Retaining this provision would lessen the 2,880-burden hour decrease by 50 annual burden hours (*i.e.*, by retaining 50 annual burden hours).

BOEM proposes to revise § 550.220(c)(1) to require a description of how exploratory drilling will be designed and conducted, including how all vessels and equipment will be designed, built, and/or modified, to account for Arctic OCS conditions and how such activities will be managed and overseen as an integrated endeavor, and in the description of vessel modifications, a description of any approvals from the flag state and the vessel classification society, including any allowances or limitations placed upon the vessel by the classification society and/or the USCG. Vessel modifications may include the suitability of vessels for Arctic conditions. These vessels may have or acquire classification from a “recognized organization” under the USCG's Alternative Compliance Program (ACP).⁵⁴ BOEM is seeking to confirm that the operator meets the requirements of other entities with authority over vessels, not to impose requirements on those vessels. BOEM believes that this change would not impose any material additional burdens on the lessees or operators. BOEM is also proposing to revise § 550.220(c)(4) and (6) by requiring the operator to provide a general description of how they will comply with § 250.472, including a description of the termination of their operations.

BOEM estimates that the proposed revisions would remove 2,880 annual burden hours that correlate to the removal of the existing IOP requirement.

These changes would result in a net decrease of 2,830 annual burden hours.

Because not all EPs submitted to BOEM would involve Arctic OCS exploration drilling, we are separating the burden associated with the Arctic-specific requirements and burdens from the national EP requirements. The burden table that follows this paragraph outlines the revised requirements and burdens associated with this rulemaking. BOEM has not identified any non-hour cost burdens associated with these proposed requirements.

Title of Collection: Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf—30 CFR part 550, subpart B, Plans and Information.

OMB Control Number: 1010–0151.

Form Number:

- BOEM–0137, OCS Plan Information Form
- BOEM–0138, EP Air Quality Screening Checklist
- BOEM–0139, DOCD/DPP Air Quality Screening Checklist.
- BOEM–0141, ROV Survey Report.
- BOEM–0142, Environmental Impact Analysis Worksheet.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Respondents are Federal oil and gas or sulfur lessees or operators.

Total Estimated Number of Annual Response: 4,265 respondents.

Total Estimated Number of Annual Burden Hours: 433,608 hours.

Respondent's Obligation: Some responses to the information collection are required to obtain or retain a benefit, and some are mandatory.

Frequency of Collection: The frequency of the response varies, but primarily responses are required only on occasion.

Total Estimated Annual Nonhour Burden Cost: \$3,939,435.

BURDEN BREAKDOWN

[Current requirements in regular font; proposed *expanded requirements shown in italic font*]

Citation 30 CFR 550 subpart B and NTLs	Reporting & recordkeeping requirement	Hour burden	Average number of annual responses	Burden hours
Non-hour costs				
200 thru 206	General requirements for plans and information; fees/refunds, etc.	Burden included with specific requirements below.		0
201 thru 206; 211 thru 228; 241 thru 262.	BOEM posts EPs/DPPs/DOCDs on FDMS and receives public comments in preparation of EAs.	Not considered IC as defined in 5 CFR 1320.3(h)(4).		0
Subtotal		0		0

⁵⁴ 33 U.S.C. 3316 and 46 CFR part 8 implement the USCG's ACP.

BURDEN BREAKDOWN—Continued

[Current requirements in regular font; proposed *expanded requirements* shown in *italic font*]

Citation 30 CFR 550 subpart B and NTLs	Reporting & recordkeeping requirement	Hour burden	Average number of annual responses	Burden hours
		Non-hour costs		
Ancillary Activities				
208; NTL 2009–G34 *	Notify BOEM in writing, and if required by the Regional Supervisor notify other users of the OCS before conducting ancillary activities.	11	61 notices	671
208; 210(a)	Submit report summarizing & analyzing data/information obtained or derived from ancillary activities.	2	61 reports	122
208; 210(b)	Retain ancillary activities data/information; upon request, submit to BOEM.	2	61 records	122
Subtotal			183 responses	91
Contents of Exploration Plans (EP)				
209; 231(b); 232(d); 234; 235; 281; 283; 284; 285; NTL 2015–N01.	Submit new, amended, modified, revised, or supplemental EP, or resubmit disapproved EP, including required information; withdraw an EP.	150	345 changed plans3	51,750
209; 211 thru 228; NTL 2015–N01.	Submit EP and all required information (including, but not limited to, submissions required by BOEM Forms 0137, 0138, 0142; lease stipulations; reports, including shallow hazards surveys, H2S, G&G, archaeological surveys & reports (§ 550.194) ***, in specified formats. Provide notifications.	600	163	97,800
		\$3,673 × 163 EP surface locations = \$598,699		
210; 220(a)–(c); 291; 292	For existing Arctic OCS exploration activities: revise and resubmit Arctic-specific information, as required.	700	1	700
202; 211; 216; 219, 220(a)–(c); 224, 227;.	For new Arctic OCS exploration activities: submit required Arctic-specific information with EP.	400	1	400
Subtotal			510 responses	150,650
			\$598,699 Non-hour costs	
Review and Decision Process for the EP				
235(b); 272(b); 281(d)(3)(ii)	Appeal State’s objection	Burden exempt as defined in 5 CFR 1320.4(a)(2), (c).		0
Contents of Development and Production Plans (DPP) and Development Operations Coordination Documents (DOCD)				
209; 266(b); 267(d); 272(a); 273; 281; 283; 284; 285; NTL 2015–N01.	Submit amended, modified, revised, or supplemental DPP or DOCD, including required information, or resubmit disapproved DPP or DOCD.	235	353 changed plans	82,955
241 thru 262; 209; NTL 2015–N01.	Submit DPP/DOCD and required/supporting information (including, but not limited to, submissions required by BOEM Forms 0137, 0139, 0142; lease stipulations; reports, including shallow hazards surveys, archaeological surveys & reports (§ 550.194)), in specified formats. Provide notification.	700	268	187,600
		\$4,238 × 268 DPP/DOCD wells = \$1,135,784.		
Subtotal			621 responses	270,555
			\$1,135,784 Non-hour costs	

BURDEN BREAKDOWN—Continued

[Current requirements in regular font; proposed *expanded requirements shown in italic font*]

Citation 30 CFR 550 subpart B and NTLs	Reporting & recordkeeping requirement	Hour burden	Average number of annual responses	Burden hours
		Non-hour costs		
Review and Decision Process for the DPP or DOCD				
267(a)	Once BOEM deemed DPP/DOCD submitted; Governor of each affected State, local government official; etc., submit comments/recommendations.	Not considered IC as defined in 5 CFR 1320.3(h)(4).		0
267(b)	General public comments/recommendations submitted to BOEM regarding DPPs or DOCDs.	Not considered IC as defined in 5 CFR 1320.3(h)(4).		0
269(b)	For leases or units in vicinity of proposed development and production activities RD may require those lessees and operators to submit information on preliminary plans for their leases and units.	3	1 response	3
Subtotal		1 response		3
Post-Approval Requirements for the EP, DPP, and DOCD				
280(b)	In an emergency, request departure from your approved EP, DPP, or DOCD.	Burden included under 1010–0114.		0
281(a)	Submit various BSEE applications for approval and submit permits.	Burdens included under appropriate subpart or form (1014–0003; 1014–0011; 1014–0016; 1014–0018).		0
282	Retain monitoring data/information; upon request, make available to BOEM.	4	150 records	600
	Prepare and submit monitoring plan for approval	2	6 plans	12
282(b)	Prepare and submit monitoring reports and data (including BOEM Form 0141 used in GOMR).	3	12 reports	36
284(a)	Submit updated info on activities conducted under approved EP/DPP/DOCD.	4	56 updates	224
Subtotal		224 responses		872
Submit CIDs				
296(a); 297	Submit CID and required/supporting information; submit CID for supplemental DOCD or DPP.	375	14 documents	5,250
		\$27,348 × 14 = \$382,872		
296(b); 297	Submit a revised CID for approval	100	13 revisions	1,300
Subtotal		27 responses		6,550
		\$382,872 Non-hour costs		
Seismic Survey Mitigation Measures and Protected Species Observer Program NTL				
NTL 2016–G02; 211 thru 228; 241 thru 262.	Submit to BOEM observer training requirement materials and information.	1.5 hours	2 sets of material	3
	Training certification and recordkeeping	1 hour	1 new trainee	1
	During seismic acquisition operations, submit daily observer reports semi-monthly.	1.5 hours	344 reports	516
	If used, submit to BOEM information on any passive acoustic monitoring system prior to placing it in service.	2 hours	6 submittals	12

BURDEN BREAKDOWN—Continued

[Current requirements in regular font; proposed *expanded requirements* shown in *italic font*]

Citation 30 CFR 550 subpart B and NTLs	Reporting & recordkeeping requirement	Hour burden	Average number of annual responses	Burden hours
		Non-hour costs		
	During seismic acquisition operations, submit to BOEM marine mammal observation report(s) semi-monthly or within 24 hours if air gun operations were shut down.	1.5 hours	1,976 reports	2,964
	During seismic acquisition operations, when air guns are being discharged, submit daily observer reports semi-monthly.	1.5 hours	344 reports	516
	Observation Duty (3 observers fulfilling an 8-hour shift each for 365 calendar days × 4 vessels = 35,040 man-hours). This requirement is contracted out; hence the non-hour cost burden.	3 observers × 8 hrs × 365 days = 8,760 hours × 4 vessels observing = 35,040 man-hours × \$52/hr = \$1,822,080.		
Subtotal			2,673 responses	4,012
			\$1,822,080 Non-hour costs	
Vessel Strike Avoidance and Injured/Protected Species Reporting NTL				
NTL 2016–G01; 211 thru 228; 241 thru 262.	Notify BOEM within 24 hours of strike, when your vessel injures/kills a protected species (marine mammal/sea turtle).	1 hour	1 notice	1
Subtotal			1 response	1
General Departure				
200 thru 299	General departure and alternative compliance requests not specifically covered elsewhere in Subpart B regulations.	2	25 requests	50
Subtotal			25 responses	50
Total Burden			4,265 responses	433,608
			\$3,939,435 Non-hour costs	

* The identification number of NTLs may change when NTLs are reissued periodically to update information.

In addition, the PRA requires agencies to estimate the total annual reporting and recordkeeping non-hour cost burden resulting from the collection of information, and we solicit your comments on this item. For reporting and recordkeeping only, your response should split the cost estimate into two components: (1) Total capital and startup cost component and (2) annual operation, maintenance, and purchase of service component. Your estimates should consider the cost to generate, maintain, and disclose or provide the information. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Generally, your estimates should not include equipment or services purchased: (1) Before October 1, 1995; (2) to comply with

requirements not associated with the information collection; (3) for reasons other than to provide information or keep records for the Government; or (4) as part of customary and usual business or private practices.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether the collection of information is necessary, including whether the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on respondents.

Send your comments and suggestions on this information collection by the date indicated in the **DATES** section to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or via the portal at <http://www.reginfo.gov> (online). You may view the information collection request(s) at <http://www.reginfo.gov/public/do/PRAMain>. Please provide a copy of your comments to the BOEM Information Collection Clearance Officer (see the **ADDRESSES** section). You may contact Anna Atkinson, BOEM Information Collection Clearance Officer at (703) 787–1025 with any questions. Please reference Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf (OMB Control No. 1014–0151), in your comments.

J. National Environmental Policy Act of 1969 (NEPA)

BSEE and BOEM developed a draft Environmental Assessment (EA) to

determine whether this proposed rule would have a significant impact on the quality of the human environment under the NEPA. The draft EA is available for review in conjunction with this proposed rule at www.regulations.gov (in the Search box, enter BSEE–2019–0008).

K. Data Quality Act

In developing this proposed rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (44 U.S.C. 3516 note).

L. Effects on the Nation's Energy Supply (E.O. 13211)

Although this proposed rule is a significant regulatory action under E.O. 12866, it is not a significant energy action under the definition of that term in E.O. 13211 because:

1. It is not likely to have a significant adverse effect on the supply, distribution or use of energy; and
2. It has not been designated as a significant energy action by the Administrator of OIRA.

Thus, a Statement of Energy Effects is not required.

While offshore Arctic OCS oil and gas studies indicate the potential of vast resources, there is currently little exploration activity and very little production of oil and gas on the Arctic OCS, largely due to the inherent practical difficulties of exploration and production in the area. The only existing oil production from the Arctic OCS is through the Northstar Island facility.

M. Clarity of Regulations

We are required by E.O. 12866, E.O. 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 believe we have not met these requirements, send us comments by one of the methods listed in the ADDRESSES section. 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 you find unclear, which sections or sentences are too long, or the sections where you believe lists or tables would be useful.

List of Subjects

30 CFR Part 250

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Incorporation by reference, Investigations, Oil and gas exploration, Penalties, Pipelines, Public lands—mineral resources, Public lands—rights of-way, Reporting and recordkeeping requirements, Sulphur.

30 CFR Part 550

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Mineral resources, Oil and gas exploration, Pipelines, Reporting and recordkeeping requirements, Sulfur.

Katharine MacGregor,
Deputy Secretary, U.S. Department of the Interior.

For the reasons stated in the preamble, BSEE and BOEM amend 30 CFR parts 250 and 550 as follows:

Title 30—Mineral Resources

CHAPTER II—BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, DEPARTMENT OF THE INTERIOR

SUBCHAPTER B—OFFSHORE

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

- 1. The authority citation for 30 CFR part 250 continues to read as follows:

Authority: 30 U.S.C. 1751, 31 U.S.C. 9701, 33 U.S.C. 1321(j)(1)(C), 43 U.S.C. 1334.

- 2. Amend § 250.105 by revising the definition of “Capping stack” to read as follows:

§ 250.105 Definitions.

* * * * *

Capping stack means a mechanical device that can be installed on top of a subsea or surface wellhead or blowout preventer to stop the uncontrolled flow of fluids into the environment.

* * * * *

- 3. Amend § 250.175 by adding paragraph (d) to read as follows:

§ 250.175 When may the Regional Supervisor grant an SOO?

* * * * *

(d) For leases or units on the Arctic OCS, you may request, and the Regional Supervisor may grant, an SOO when you have conducted leaseholding operations during the drilling season immediately preceding the period for which you are seeking a suspension,

and you satisfy one of the following conditions:

(1) You are conducting drilling operations from a Mobile Offshore Drilling Unit (MODU), but you are not able to safely continue leaseholding operations due to the presence of seasonal ice;

(2) You are conducting drilling operations from an artificial gravel island or a gravity-based structure, but you are not able to safely continue leaseholding operations due to temporary seasonal restrictions in your approved oil spill response plan; or

(3) You are conducting drilling operations from an artificial ice island, but you are not able to safely continue leaseholding operations due to seasonal temperature changes.

- 4. Amend § 250.198 by revising paragraph (e)(73) to read as follows:

§ 250.198 Documents incorporated by reference.

* * * * *

(e) * * *
(73) API RP 17H, Remotely Operated Tools and Interfaces on Subsea Production Systems, Second Edition, June 2013; Errata, January 2014; incorporated by reference at §§ 250.472(a) and 250.734(a);

* * * * *

- 5. Amend § 250.300 by revising paragraphs (b)(1) and (2) to read as follows:

§ 250.300 Pollution prevention.

* * * * *

(b)(1) The District Manager may restrict the rate of drilling fluid discharges or prescribe alternative discharge methods. The District Manager may also restrict the use of components that could cause unreasonable degradation to the marine environment. No petroleum-based substances, including diesel fuel, may be added to the drilling mud system without prior approval of the District Manager. For Arctic OCS exploratory drilling, you must capture all petroleum-based mud to prevent its discharge into the marine environment.

(2) You must obtain approval from the District Manager of the method you plan to use to dispose of drill cuttings, sand, and other well solids. For Arctic OCS exploratory drilling, you must capture all cuttings from operations that use petroleum-based mud to prevent their discharge into the marine environment.

* * * * *

- 6. Amend § 250.470 by:

- a. Revising paragraphs (b)(11) and (12);
- b. Adding paragraph (b)(13);
- c. Revising paragraph (f)(3); and

■ d. Adding paragraph (h).

The revisions and additions read as follows:

§ 250.470 What additional information must I submit with my APD for Arctic OCS exploratory drilling operations?

* * * * *

(b) * * *

(11) Pick up the oil spill prevention booms and equipment;

(12) Offload the drilling crew; and

(13) Recover the subsea isolation device (SSID), where applicable.

* * * * *

(f) * * *

(3) Where applicable, proof of contracts or membership agreements with cooperatives, service providers, or other contractors who will provide you with the necessary SCCE or related supplies and services if you do not possess them. The contract or membership agreement must include provisions for ensuring the availability of the personnel and/or equipment on a 24-hour per day basis while you are drilling below or working below the surface casing, or before the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, as approved by the Regional Supervisor.

* * * * *

(h) If you plan to install a subsea isolation device (SSID) on your well in accordance with § 250.472(a), a certification signed by a registered professional engineer that your SSID and well design (including casing and cementing program) meet the design requirements in § 250.472 and the design is appropriate for the purpose for

which it is intended under expected wellbore conditions.

■ 7. Amend § 250.471 by revising paragraph (a) introductory text, and paragraphs (a)(2) and (3) and (b) to read as follows:

§ 250.471 What are the requirements for Arctic OCS source control and containment?

* * * * *

(a) If you use a MODU, you must have access to the SCCE as described in paragraphs (a)(1) through (3) of this section capable of controlling and containing the flow from an out-of-control well when drilling below or working below the surface casing. However, the Regional Supervisor will approve delaying access to your SCCE until your operations have reached the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, provided that you submit adequate documentation (such as, but not limited to, risk modeling data, off-set well data, analog data, seismic data), with your APD, demonstrating that you will not encounter any abnormally high-pressure zones or other geologic hazards. The Regional Supervisor will base the determination on any documentation you provide as well as any other available data and information.

* * * * *

(2) A cap and flow system that can be deployed as directed by the Regional Supervisor pursuant to paragraph (h) of this section. The cap and flow system must be designed to capture at least the amount of hydrocarbons equivalent to

the calculated worst case discharge rate referenced in your BOEM-approved EP; and

(3) A containment dome that can be deployed as directed by the Regional Supervisor pursuant to paragraph (h) of this section. The containment dome must have the capacity to pump fluids without relying on buoyancy.

(b) You must conduct a monthly stump test of dry-stored capping stacks.

* * * * *

■ 8. Revise § 250.472 to read as follows:

§ 250.472 What are the additional well control equipment or relief rig requirements for the Arctic OCS?

If you will be conducting exploratory drilling operations from a Mobile Offshore Drilling Unit (MODU), you must either use a Subsea Isolation Device (SSID) or have access to a relief rig as an additional means to secure the well in the event of a loss of well control. If you satisfy this requirement through use of an SSID, you must meet the requirements in paragraph (a) in this section. If you satisfy this requirement through maintaining access to a relief rig, you must meet the requirements in paragraph (b) in this section.

(a) *Subsea Isolation Device (SSID)*. If you use an SSID to satisfy this requirement, your SSID and well (including the casing and cementing program) must be designed to achieve a full shut-in, without causing an underground blowout or having reservoir fluids broach to the seafloor. Your SSID must also meet the following requirements:

TABLE 1 TO PARAGRAPH (a)

Your SSID must	
(1) Be designed to:	<p>(i) Close and seal the wellbore, independent of the BOP;</p> <p>(ii) Perform under the maximum environmental and operational conditions anticipated to occur at the well;</p> <p>(iii) Be left on the wellhead in the event the drilling rig is moved off location (e.g., due to storms, ice incursions, or emergency situations);</p> <p>(iv) Preserve isolation through the winter season without relying on the elastomer elements of the rams (e.g., by using a well cap) and allow re-entry during the following open-water season; and</p> <p>(v) In the event of a loss of well control, preserve isolation until other methods of well intervention may be completed, including the need to drill a relief well.</p>
(2) Include the following equipment:	<p>(i) Dual shear rams, including ram locks; one ram must be a blind shear ram;</p> <p>(ii) A redundant control system, independent from the BOP control system, that includes ROV capabilities and a control station on the rig;</p> <p>(iii) Independent, dedicated subsea accumulators with the capacity to function all components of the SSID; and</p> <p>(iv) Two side inlets for intervention; one inlet must be located below the lowest ram on the SSID.</p>
(3) Include ROV intervention equipment and capabilities. Your ROV equipment and capabilities must:	<p>(i) Be able to close each shear ram under MASP conditions, as defined for the operation;</p> <p>(ii) Include an ROV panel that is compliant with API RP 17H (as incorporated by reference in § 250.198);</p> <p>(iii) Meet the ROV requirements in § 250.734(a)(5); and</p> <p>(iv) Have the ability to function the SSID in any environment (e.g., when in a mudline cellar).</p>

TABLE 1 TO PARAGRAPH (a)—Continued

Your SSID must	
(4) Be installed:	(i) Below the BOP; (ii) At or before the time that you first install your BOP; and (iii) To provide protection from deep ice keels, in the event it must remain in place over the winter season (e.g., installed in a mudline cellar).
(5) Be tested:	According to the BOP testing requirements in § 250.737.

(b) *Relief Rig*. If you choose to satisfy this requirement by having access to a relief rig, you must have access to your relief rig at all times when you are drilling below or working below the surface casing during Arctic OCS exploratory drilling operations. However, the Regional Supervisor will approve delaying access to your relief rig until your operations have reached the last casing point prior to penetrating a zone capable of flowing hydrocarbons in measurable quantities, provided that you submit adequate documentation (such as, but not limited to, risk modeling data, off-set well data, analog data, seismic data), with your APD, demonstrating that you will not encounter any abnormally high-pressured zones or other geologic hazards. The Regional Supervisor will base the determination on any documentation you provide as well as any other available data and information. Your relief rig must be different from your primary drilling rig, staged in a location, such that it would be available to arrive on site, drill a relief well, kill and abandon the original well, and abandon the relief well no later than 45 days after the loss of well control.

(1) Your relief rig must comply with all other requirements of this part pertaining to drill rig characteristics and capabilities, and it must be able to drill a relief well under anticipated Arctic OCS conditions.

(2) In the event of a loss of well control, the Regional Supervisor may direct you to drill a relief well using a relief rig that is able to kill and permanently plug an out-of-control well as described in your APD.

■ 9. Amend § 250.720 by revising paragraph (c)(2) to read as follows:

§ 250.720 When and how must I secure a well?

* * * * *

(c) * * *

(2) In areas of ice scour, you must use a well mudline cellar or an equivalent means of minimizing the risk of damage to the well head and wellbore. You may request, and the Regional Supervisor may approve, an alternate procedure or

equipment in accordance with §§ 250.141 and 250.408.

* * * * *

CHAPTER V—BUREAU OF OCEAN ENERGY MANAGEMENT, DEPARTMENT OF THE INTERIOR

SUBCHAPTER B—OFFSHORE

PART 550—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 10. The authority citation for 30 CFR part 550 continues to read as follows:

Authority: 30 U.S.C. 1751; 31 U.S.C. 9701; 43 U.S.C. 1334.

§ 550.220 [Amended]

■ 11. Amend § 550.200 by removing the words “IOP means Integrated Operations Plan.” in paragraph (a).

■ 12. Remove and reserve § 550.204.

§ 550.204 [Reserved]

■ 13. Amend § 550.206 by revising the section heading, paragraph (a) introductory text, and paragraphs (a)(3), (b), and (c) to read as follows:

§ 550.206 How do I submit the EP, DPP, or DOCD?

(a) *Number of copies*. When you submit an EP, DPP, or DOCD to BOEM, you must provide:

* * * * *

(3) Any additional copies that may be necessary to facilitate review of the EP, DPP, or DOCD by certain affected States and other reviewing entities.

(b) *Electronic submission*. You may submit part or all of your EP, DPP, or DOCD and its accompanying information electronically. If you prefer to submit your EP, DPP, or DOCD electronically, ask the Regional Supervisor for further guidance.

(c) *Withdrawal after submission*. You may withdraw your proposed EP, DPP, or DOCD at any time for any reason. Notify the appropriate BOEM Regional Office if you do.

■ 14. Amend § 550.211 by redesignating paragraphs (b) through (d) as paragraphs (c) through (e), respectively, and adding new paragraph (b) to read as follows:

§ 550.211 What must the EP include?

* * * * *

(b) A description of how you will ensure operational safety while working in Arctic OCS conditions, including but not limited to:

(1) The safety principles that you intend to apply to yourself and your contractors;

(2) The accountability structure within your organization for implementing such principles;

(3) How you will communicate such principles to your employees and contractors; and

(4) How you will determine successful implementation of such principles.

* * * * *

■ 15. Amend § 550.220 by revising the section heading, paragraphs (c)(1) and (4), and (c)(6)(ii) to read as follows:

§ 550.220 If I propose activities in the Arctic OCS Region, what planning information must accompany the EP?

* * * * *

(c) * * *

(1) A description of how your exploratory drilling will be designed and conducted, (including how all vessels and equipment will be designed, built, and/or modified) to account for Arctic OCS conditions and how such activities will be managed and overseen as an integrated endeavor. In your description of vessel modifications, describe any approvals from the flag state and the vessel classification society, including any allowances or limitations placed upon the vessel by the classification society and/or the United States Coast Guard.

* * * * *

(4) Additional well control equipment requirements for the Arctic OCS. A general description of how you will comply with § 250.472 of this title.

(6) * * *

(ii) The termination of drilling operations consistent with the well control planning requirements under § 250.472 of this title.

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Part III

Department of Labor

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

Implementing Legal Requirements Regarding the Equal Opportunity
Clause's Religious Exemption; Final Rule

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Part 60–1**

RIN 1250–AA09

Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption**AGENCY:** Office of Federal Contract Compliance Programs, Labor.**ACTION:** Final rule.

SUMMARY: The U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) publishes this final rule to clarify the scope and application of the religious exemption. These clarifications to the religious exemption will help organizations with federal government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their obligations.

DATES: *Effective Date:* These regulations are effective January 8, 2021.

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0104 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:**I. Executive Summary**

On August 15, 2019, OFCCP issued a notice of proposed rulemaking (NPRM) to clarify the scope and application of Executive Order 11246's (E.O. 11246) religious exemption consistent with recent legal developments. 84 FR 41677. During the 30-day public comment period, OFCCP received 109,726 comments on the proposed rule.¹ This total included over 90,000 comments generated by organized comment-writing efforts. Comments came from individuals and from a wide variety of organizations, including religious organizations, universities, civil rights and advocacy organizations, contractor associations, legal organizations, labor organizations, and members of Congress. Comments addressed all aspects of the NPRM. OFCCP appreciates the public's robust

participation in this rulemaking, and the agency has revised certain aspects of this regulation in response to commenters' concerns.

As stated in the NPRM, on July 2, 1964, President Lyndon B. Johnson signed the landmark Civil Rights Act of 1964. *See* Public Law 88–352, 78 Stat. 241. This legislation prohibited discrimination on various grounds in many of the most important aspects of civic life. Its Title VII extended these protections to employment opportunity, prohibiting discrimination on the basis of race, color, religion, sex, or national origin. In Title VII, Congress also provided a critical accommodation for religious employers. Congress permitted religious employers to take religion into account for employees performing religious activities: “This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities” Public Law 88–352, 702(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. 2000e–1(a)). Congress provided a similar exemption for religious educational institutions. *See id.* § 703(e)(2), 78 Stat. at 256 (codified at 42 U.S.C. 2000e–2(e)(2)).

Title VII's protections for religious organizations were expanded by Congress in 1972 into their current form. Congress added a broad definition of “religion”: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.” Equal Employment Opportunity Act of 1972, Public Law 92–261, 2(7), 86 Stat. 103 (codified at 42 U.S.C. 2000e(j)). Congress also added educational institutions to the list of those eligible for section 702's exemption. In addition, Congress broadened the scope of the section 702 exemption to cover not just religious activities, but all activities of a religious organization: “This title [VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” *Id.* § 3, 86 Stat. at 104 (codified at 42 U.S.C. § 2000e–1(a)). The Supreme

Court unanimously upheld this expansion of the religious exemption to all activities of religious organizations against an Establishment Clause challenge. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987).²

One year after President Johnson signed the Civil Rights Act, he signed E.O. 11246, requiring equal employment opportunity in federal government contracting. The order mandated that all government contracts include a provision stating that “[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.” Exec. Order No. 11246, § 202, 30 FR 12319, 12320 (Sept. 28, 1965). Two years later, President Johnson expressly acknowledged Title VII of the Civil Rights Act when expanding E.O. 11246 to prohibit, as does Title VII, discrimination on the bases of sex and religion. *See* Exec. Order No. 11375, § 3, 32 FR 14303–04 (Oct. 17, 1967). In 1978, the responsibilities for enforcing E.O. 11246 were consolidated in DOL. *See* Exec. Order No. 12086, 43 FR 46501 (Oct. 5, 1978). In its implementing regulations, DOL imported Title VII's exemption for religious educational institutions. *See* 43 FR 49240, 49243 (Oct. 20, 1978) (now codified at 41 CFR 60–1.5(a)(6)); *cf.* 42 U.S.C. 2000e–2(e)(2). In 2002, President George W. Bush amended E.O. 11246 by expressly importing Title VII's exemption for religious organizations, which likewise has since been implemented by DOL's regulations. *See* Exec. Order No. 13279, § 4, 67 FR 77143 (Dec. 16, 2002) (adding E.O. 11246 § 202(c)); 68 FR 56392 (Sept. 30, 2003) (codified at 41 CFR 60–1.5(a)(5)); *cf.* 42 U.S.C. 2000e–1(a).

Because the exemption administered by OFCCP springs directly from the Title VII exemption, it should be given a parallel interpretation, consistent with the Supreme Court's repeated counsel that the decision to borrow statutory text in a new statute is a “strong indication that the two statutes should be interpreted *pari passu*.” *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (*per curiam*). OFCCP thus generally interprets the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII. Because OFCCP regulates federal contractors rather than private employers generally, OFCCP must apply Title VII principles in a manner that

¹ Of the 109,726 comments, 35 comments were inadvertently posted on *Regulations.gov* before redactions were made. The posted comments were withdrawn, redacted, and then reposted. When the comments were reposted, the number of comments on *Regulations.gov* increased to 109,761.

² Justice White wrote the majority opinion for five justices. Justices O'Connor, Blackmun, and Brennan (with Justice Marshall joining) wrote opinions concurring in the judgment.

best fit its unique field of regulation, including when applying the religious exemption.

With that said, there has been some variation among federal courts of appeals in interpreting the scope and application of the Title VII religious exemption, and many of the relevant Title VII court opinions predate Supreme Court decisions and executive orders that shed light on the proper interpretation. The purpose of this final rule is to clarify the contours of the E.O. 11246 religious exemption and the related obligations of federal contractors and subcontractors to ensure that OFCCP respects religious employers' free exercise rights, protects workers from prohibited discrimination, and defends the values of a pluralistic society. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) ("[T]he promise of the free exercise of religion . . . lies at the heart of our pluralistic society."). This rule is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors.

Recent Supreme Court decisions have addressed the freedoms and antidiscrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (holding the government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause of the First Amendment when it decides to exclude an entity from a generally available public benefit because of its religious character, unless that decision withstands the strictest scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (holding the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (holding the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a minister against the religious school

for which she worked). Recent executive orders have done the same. See Exec. Order No. 13831, 83 FR 20 715 (May 8, 2018); Exec. Order No. 13798, 82 FR 21 675 (May 9, 2017). Additional decisions from the Supreme Court, issued after the NPRM, have likewise extended Title VII's protections while affirming the importance of religious freedom. See *Bostock*, 140 S. Ct. at 1754 (holding Title VII's prohibition on discrimination because of sex prohibits "fir[ing] an individual merely for being gay or transgender"); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379–84 (2020) (holding the Departments of Labor, Health and Human Services, and the Treasury had authority to promulgate religious and conscience exemptions from the Affordable Care Act's contraceptive mandate); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020) (a state "cannot disqualify some private schools [from a subsidy program] solely because they are religious" without violating the Free Exercise clause); and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (holding the ministerial exception applies "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith"). These decisions are discussed in the final rule's analysis as appropriate and applicable.

In this final rule, OFCCP has sought to follow the principles articulated by these recent decisions and orders, and has interpreted older federal appellate-level case law in light of them as applicable. OFCCP has chosen a path consistent with the Supreme Court's religion and Title VII jurisprudence as well as what OFCCP views to be the more persuasive reasoning of the federal courts of appeals in these areas of the law.

A. Title VII and the EEOC Generally

Some commenters on the NPRM agreed that OFCCP's proposal was appropriately consistent with Title VII principles. For example, a faith-based advocacy organization commented that the religious employer exemption in federal contracting regulations is modeled on Title VII, and should therefore be understood "in the strong way" the Title VII exemptions have traditionally been understood.

Other commenters asserted that OFCCP's proposal was inconsistent with Title VII overall. Some of these commenters stated that the proposal's interpretation of the exemption was contrary to congressional intent. For example, an affirmative action

professionals association commented that Congress has repeatedly declined to extend the Title VII exemption to government-funded entities. A lesbian, gay, bisexual, and transgender (LGBT) rights advocacy organization commented that, at the time Title VII was enacted, Congress could not have envisioned that religious organizations that would qualify for the Title VII exemption would also seek to contract with the federal government, "let alone be given a broad right to discriminate based on religion while accepting federal funding."

In a related vein, OFCCP also received comments objecting generally to the provision of a religious exemption for federal contractors or specifically to OFCCP's proposal. Most of these commenters characterized the religious exemption as taxpayer- or government-funded discrimination that was contrary to the purpose of E.O. 11246. For example, an affirmative action professionals association commented that "[t]he Federal Government should not be in the business of funding employment discrimination" and emphasized that religious organizations should not expect to maintain autonomy and independence from the government when they solicit and accept government contracts. An international labor organization submitted a similar comment, stating that organizations that choose to accept government funding through government contracts should not be allowed to conduct what it described as discrimination against qualified job applicants and employees.

Relatedly, a public policy research and advocacy organization commented that no one should be disqualified from a taxpayer-funded job because they are the "wrong" religion or do not adhere to any religion. A technology company commented that the proposal conflicted with the spirit of nondiscrimination law. A group of U.S. Senators commented: "The government cannot use religious exemptions as a pretext to permit discrimination against or harm others."

Some religious organizations were among the commenters that opposed the provision of a religious exemption for federal contractors. One religious organization commented that, in line with its commitment to religious freedom, it opposed granting government contracts to organizations that, in its words, discriminate against qualified individuals based on their practices and beliefs. One religious organization commented that barring people from taxpayer-funded jobs based on their faith violates principles of equality and meritocracy. Another faith-

based organization cited First Amendment separation of church and state principles, and commented that, while some religious organizations hire staff based on religion, accommodations for religious hiring should not be applied broadly in the federal contracts context, as federal contracts are not provided to advance religious ends. Other commenters stated that the proposal's expansion of the exemption was contrary to Title VII case law or principles. For example, an international labor organization commented that, in its view, the proposed rule mischaracterized federal case law in order to transform provisions designed to protect workers from religious discrimination into exemptions that would allow federally funded employers to discriminate against workers for religious reasons.

Some commenters stated that the proposal was inconsistent with the interpretation of Title VII by the EEOC, the agency primarily responsible for enforcing Title VII. A group of state attorneys general commented that OFCCP should not undermine the EEOC's efforts, "as would occur under the Proposed Rule, which takes positions contrary to the EEOC." The state attorneys general asserted that the proposal would not increase clarity because it would create two separate legal standards for federal contractors and OFCCP staff—one under Title VII and one under E.O. 11246. A contractor association asserted that "federal contractors could face the Hobson's choice of determining whether compliance with an OFCCP regulation will result in liability under Title VII." Other commenters stated that the overall proposal departed from OFCCP's prior interpretation, which they asserted had been consistent with the EEOC's interpretation of Title VII prior to August 2018, when OFCCP issued Directive 2018–03, concerning the religious exemption in section 204(c) of E.O. 11246. For example, a public policy research and advocacy organization asserted that, until August 2018, the Department consistently interpreted the E.O. 11246 religious exemption narrowly to permit preferences for coreligionists by certain religious organizations, and applied the "motivating factor" test to evaluate claims of discrimination.

OFCCP agrees with the comments stating that the rule will provide necessary clarity for contractors and potential contractors about the scope of the E.O. 11246 religious exemption. Regarding comments that a religious exemption protecting government contractors is contrary to congressional

intent or that such an exemption is misplaced in the government contracting context, that question is not at issue in this rulemaking. The religious exemption was added to E.O. 11246 almost twenty years ago, and OFCCP's implementing regulations are nearly as old. The existence of the exemption itself is not at issue in this rulemaking.

Regarding comments that the rule deviates from the EEOC's interpretation of the Title VII religious exemption or creates two separate standards, OFCCP believes these concerns are unfounded. This rule is restricted to the application of the religious exemption. The vast majority of contractors and their employees, as well as OFCCP's enforcement program, will be unaffected by this rule. As for the religious exemption specifically, OFCCP has followed the Title VII case law it finds most persuasive, especially in light of the principles of religious equality and autonomy reinforced by recent executive orders and Supreme Court decisions. OFCCP has also adapted Title VII principles to ensure a proper fit in the government contracting context. OFCCP's specific choices in this regard and how they compare to the EEOC's stated views are explained more fully in the section-by-section discussion and a section at the end of this preamble. OFCCP has also made some revisions to align this rule even more closely with Title VII. But even assuming any variation with the EEOC as to the exemption, this rule does not create a "Hobson's choice" for government contractors. The exemption, to describe it most broadly, is an optional accommodation for religious organizations, not a requirement mandating compliance. In the rare, hypothetical instance where a contractor would be entitled to the E.O. 11246 exemption but not the Title VII exemption, the contractor would not face conflicting liability regardless of its choice: Rather, it would face potential liability under one enforcement scheme rather than two. OFCCP acknowledges that it is often helpful to regulated parties for regulators to try to harmonize their approaches when enforcing related legal requirements. OFCCP believes its approach here is consistent with Title VII and religious-accommodation principles, adapted appropriately to its own regulatory context and the government contracting community.

OFCCP also is not concerned about this rule purportedly decreasing clarity by creating two standards for additional reasons. For one, it was not a concern primarily raised by commenters who may qualify for the E.O. 11246 religious

exemption. Those commenters—the ones who would actually need to negotiate the purportedly two different standards—were by and large supportive of the rule and did not raise this concern. For another, OFCCP believes that this rule, which incorporates many recent Supreme Court decisions and other case law and is in accord with recent Executive Orders and guidance from the Department of Justice, offers clarity as compared to less recent guidance from EEOC that does not incorporate these more recent developments.

B. The Relevance of Recent Supreme Court Cases

Commenters both supported and opposed OFCCP's acknowledgement of recent Supreme Court cases granting antidiscrimination protections for persons bringing religious claims in a variety of contexts. These cases included *Hobby Lobby*, *Trinity Lutheran*, and *Masterpiece Cakeshop*. Supreme Court decisions in employment and religion cases issued after the proposed rule's publication are addressed elsewhere in the preamble as appropriate.

Some commenters expressed support for OFCCP's interpretations of these Supreme Court cases and their application to the proposal in general. For example, a group of members of the U.S. House of Representatives noted approvingly that the proposed rule was consistent with these cases, each of which "came with the cost" of religious Americans shouldering the material, emotional, and spiritual burdens associated with litigating issues related to their faith. Discussing *Masterpiece Cakeshop*, a religious public policy women's organization commented that the Supreme Court in that case acknowledged "the blatant, systematic government bias" against the owner of Masterpiece Cakeshop for refusing to participate in a same-sex wedding ceremony, noting that the owner continues to be harassed for his faith "to this day." The commenter stated that this and other such cases prove that further clarification regarding existing First Amendment protections are necessary. Addressing *Trinity Lutheran*, a religious public policy advocacy organization asserted that the Supreme Court in that case made clear that Trinity Lutheran Church's status as a church did not prevent it from participating on an equal playing field with secular organizations in seeking government grants. The commenter continued that OFCCP's proposed rule simply reaffirmed a principle the

Supreme Court had held to be consistent with the First Amendment.

Other commenters criticized OFCCP's reliance on these Supreme Court cases. Many of these commenters stated that the cases were inapplicable because they did not involve federal contractors. For example, a secular humanist advocacy organization criticized the proposed rule for its reliance on case law unrelated to employment discrimination laws or the text of E.O. 11246. Many of the commenters stated that the cases cited, if interpreted properly, did not provide support for OFCCP's proposal. For example, a labor union commented that the decisions cited did not authorize "the expansive view that the Proposed Rule seeks to support." A group of U.S. Senators commented: "The Court has long held federally-funded employers cannot use religion to discriminate. Each of the cases cited in the proposed rule are consistent with that approach."

Many of the commenters who criticized OFCCP's discussion of *Masterpiece Cakeshop* pointed to this sentence from the Court's opinion: "While . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727. A labor union asserted that *Masterpiece Cakeshop* was irrelevant in the "entirely secular" context of federal contracting, and argued that the Establishment Clause dictates that federal contracting must be entirely secular. A transgender civil rights organization commented that, in the proposed rule, OFCCP did not suggest that its existing requirements or prior conduct reflect the sort of hostility to religious beliefs that the Court was concerned with in *Masterpiece Cakeshop*, and noted that, on the contrary, "EEO requirements for federal contractors fall squarely within the 'general rule' stated by the Court." A group of state attorneys general commented that, if anything, *Masterpiece Cakeshop* stands for the proposition that overly broad religious objections to civil rights laws of general applicability are inappropriate.

Commenters also criticized OFCCP's discussion of *Trinity Lutheran*. Many of these commenters read the decision narrowly—as holding that "the state violated the First Amendment by denying a public benefit to an otherwise eligible recipient solely on account of its religious status," as one contractor

association described it—and asserted that the decision was therefore inapplicable to OFCCP's proposal. Some of these commenters pointed to a footnote in the Court's opinion limiting it to "express discrimination based on religious identity with respect to playground resurfacing." *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. Many commenters stated that there are legally significant distinctions between government grant programs and government contracts. A labor union argued, regarding the Supreme Court's decision, that it would have been perfectly lawful for the government to deny grants to religious applicants who restricted access to their playgrounds on the basis of sexual orientation, for example. The union also asserted that "Federal contracting is not a generally available public benefit, but a reticulated system for the funding and delivery of governmental functions and services by private parties." A religious organization commented that *Trinity Lutheran* did not address whether a religious institution can discriminate with public funds, and stressed that the government's interest in prohibiting discrimination in taxpayer-funded jobs is "of the highest order." A group of state attorneys general commented that the Court's decision drew a careful distinction between situations where a benefit is denied to an entity based solely that entity's religious identity and situations involving neutral and generally applicable laws that restrict an entity's actions. The group asserted that E.O. 11246's anti-discrimination provisions are directed toward the latter. An LGBT rights advocacy organization commented that, because the decision involved a religious grant applicant that had agreed to abide by certain nondiscrimination provisions, its holding was inapplicable in the federal contracting context where funding is awarded on a competitive basis, as well as in situations where the contractor has no intention of complying with governing nondiscrimination rules.

Some commenters similarly criticized OFCCP's discussion of *Hobby Lobby*. Many of these commenters quoted or paraphrased the following paragraph from the Supreme Court's decision:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on

racial discrimination are precisely tailored to achieve that critical goal.

Hobby Lobby, 573 U.S. at 733. For example, a city public advocate argued that the *Hobby Lobby* decision affirmed that securing equal access to workplace participation is a compelling interest. A civil liberties and human rights legal advocacy organization commented that the Court in *Hobby Lobby* expressly declined to promulgate a rule authorizing for-profit corporations that willingly enter into contracts with the federal government to discriminate against workers "because of who they are." A contractor organization commented that it is "not at all clear" that *Hobby Lobby* supports the idea that religious rights override any other legal rights, given that the decision concerns only the availability of government programs.

Finally, some commenters criticized OFCCP's discussion of *Hosanna-Tabor*. Many of these commenters pointed out that this case applied the (constitutionally grounded) ministerial exception developed by courts and not the (statutory) Title VII religious exemption enacted by Congress. Some commenters expressed doubt that the ministerial exception was applicable to federal contractors. For example, a transgender legal professional organization commented that, though the ministerial exception bars ministers from pursuing employment discrimination cases, most federal contractors are unlikely to employ ministers or others who "preach or teach the faith." Other commenters expressed concern that OFCCP intended to broaden the scope of the religious exemption to mimic the ministerial exception and asserted that *Hosanna-Tabor* did not support such an expansion. For example, a labor union commented that the decision could not be read to extend the ministerial exception to lay people employed by religious institutions, or to private for-profit businesses whose owners may also hold religious beliefs.

OFCCP believes the critical comments here are misplaced because OFCCP did not acknowledge these Supreme Court cases for the propositions that commenters said the agency did. OFCCP acknowledged in the NPRM that these Supreme Court cases did not specifically address government contracting. And indeed, with the exception of *Hosanna-Tabor*, they did not specifically address employment law, Title VII, or E.O. 11246. Rather, OFCCP noted the recent Supreme Court cases for the general and commonsense propositions that the government must

be careful when its actions may infringe private persons' religious beliefs and that it certainly cannot target religious persons for disfavor. These principles are not new, but these recent cases show that those principles remain vital. That is especially important when government at times has been callous in its treatment of religious persons.³ Those general themes of caution, permissible accommodation, and equality for religious persons have informed the policy approach in this rule. Where specific holdings or language in these Supreme Court decisions—and additional Supreme Court decisions issued since—suggest answers to specific aspects of this rule, they are noted in the section-by-section analysis. Comments on those more specific issues are addressed there as well.

C. Clarity and Need for the Rule

The NPRM noted that prior to its publication, some religious organizations provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in section 204(c) of E.O. 11246 and codified in OFCCP's regulations. The NPRM also noted that while "only a subset of contractors and would-be contractors may wish to seek this exemption, the Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it." 84 FR at 41679. The NPRM also noted throughout OFCCP's desire to provide clarity in this area of regulation.

OFCCP received numerous comments addressing the need for the proposed rule. Some commenters stated that the proposal was necessary to ensure that religious entities could contract with the federal government without compromising their religious identities or missions. Many of these commenters noted the important services provided by religious organizations. For example, a religious school association encouraged the federal government to protect religious staffing "in all forms of federal funding," asserting that doing so would enable religious organizations to expand the critical services they provide. A religious liberties legal organization likewise commented that religious organizations are often uniquely equipped to respond to the

needs of the communities they serve and predicted that the proposal would allow religious contractors to better "order[] their affairs." A religious convention commission approved of the rule on the basis that the government should not be in the business of judging theology or privileging certain religious beliefs over others.

A few commenters expressed support for the proposal specifically because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identity that were added when E.O. 11246 was amended by Executive Order 13672 (E.O. 13672). 79 FR 42971 (July 23, 2014). For example, a faith-based advocacy organization praised OFCCP for "the important positive precedent that will be set by the proposed strong protection of the religious staffing freedom in the context of the requirement of no sexual-orientation or gender-identity employment discrimination in federal contracting." An evangelical chaplains' advocacy organization commented that "E.O. 13672 . . . prohibited military chaplains from selecting religious support contractors who did not affirm sexual orientation, same-sex marriage and gender identity" in violation of these chaplains' free exercise rights.

Some commenters agreed with OFCCP's observation that religious organizations have been reluctant to provide the government with goods or services as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption. One individual commenter who identified himself as a legal adviser to federal contractors noted that imposing "pass through" contracting obligations on subcontractors can be challenging, as religious subcontractors often fear that complying with federal anti-discrimination laws will require them to compromise their religious integrity. Two other commenters offered examples or evidence of religious organizations' reluctance to participate in other contexts, such as federal grants. A religious medical organization cited a survey suggesting that many individuals working in faith-based organizations (FBOs) overseas feel that the government is not inclined to work with FBOs, and called for outreach programs to correct this perception.

A religious legal organization referenced an audit of the Department of Justice's Office of Justice Programs (OJP) which revealed that, though religious organizations were interested in participating in many programs, "the percentage of OJP funds distributed to

religious organizations to help the public through these programs was abysmally small—0.0025%." The organization cited the concern of religious organizations that their right to hire members of their faith would be eroded as one of the reasons for this discrepancy.

Many commenters expressed skepticism that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the religious exemption. Most of these commenters stated that OFCCP had provided no evidence to support its claim. For example, a legal think tank commented that the proposal was "a regulation in search of a problem," and criticized OFCCP for failing to provide data regarding the number of religious organizations reluctant to enter into federal contracts, the number of contractors that have invoked the Section 204(c) exemption in the past, and the number of contractors expected to avail themselves of the "expanded exemption" in the proposed rule. A labor union commented: "[T]here is no evidence that the current, settled interpretation of the E.O. 11246 religious exemption has deterred organizations from submitting competitive bids for federal contracts or prevented them from obtaining such contracts. At best, the Proposed Rule is an unjustified rulemaking solution in search of a problem."

A few commenters stated that the proposal was unnecessary given the applicability of Title VII case law. For example, a contractor association commented that the extent to which religious employers can condition employment on religion has been addressed by a long line of Title VII cases, rendering an executive rulemaking on this topic unnecessary. Some commenters cited evidence that federal contracts are being awarded to faith-based organizations. For example, a group of state attorneys general cited the 2016 congressional testimony of Oklahoma Representative Steve Russell, who explained that more than 2,000 federal government contracts were being awarded to religious organizations and contractors per year. As examples of faith-based organizations that were awarded contracts in the previous year, the state attorneys general listed the following:

Army World Service Office (\$27.5 million), Mercy Hospital Springfield (\$14.4 million), Young Women's Christian Association of Greater Los Angeles California (\$10.2 million), City of Faith Prison Ministries (\$5.2 million), Riverside Christian Ministries, Inc. (\$2.7 million), Jewish Child and Family

³ See, e.g., *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368 (2018); *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30; *Holt v. Hobbs*, 574 U.S. 352, 359 (2015).

Services (\$2.1 million), Catholic Charities, various affiliates (over \$1 million in sum total), to name a few.⁴

In addition, several commenters cited a report from a progressive policy institute noting that some religious organizations continue to be federal contractors despite their objections to a lack of an expanded religious exemption in E.O. 13672.

Some commenters expressed skepticism that the proposal would encourage participation in federal contracting because, they asserted, the rule as proposed would increase rather than reduce confusion. For example, a contractor association commented that OFCCP's proposal would create more confusion than clarity for federal contractors. An atheist civil liberties organization echoed this concern, commenting that the proposal would increase confusion because, in its view, the proposed rule deviated from decades of Title VII law. Other commenters stated that the proposal would have negative effects because of increased uncertainty about or expansion of the exemption. These commenters stated that the proposal would undercut other entities' enforcement of nondiscrimination obligations, increase EEOC enforcement actions, increase contractors' noncompliance, and strain OFCCP's resources. For example, a group of state attorneys general commented that, given the prevalence of workplace discrimination, expanding E.O. 11246's religious organization exemption to lessen OFCCP's oversight could result in employers claiming the exemption in bad faith when faced with charges of discrimination. The state attorneys general commented that the proposed rule had the potential to strain OFCCP's limited resources due to employers requesting determinations of whether they are exempt, and challenging the applicability of OFCCP enforcement actions already underway.

OFCCP appreciates the comments supporting its view that clarity regarding the exemption would be useful, and notes their accounts of religious organizations that are hesitant to participate as government contractors, as well as their evidence of a perception among faith-based organizations that the federal government could do more to demonstrate that it will select the best organizations for its partners, whether faith-based or not. Given certain statements by these commenters regarding discrimination on the basis of

sexual orientation or gender identity, OFCCP repeats here as it did many times in the NPRM that the religious exemption does not permit discrimination on the basis of other protected categories. The section-by-section analysis of *Particular religion* addresses the application of the religious exemption and other legal requirements to E.O. 11246's other protections including those pertaining to sexual orientation and gender identity, and the application of the Religious Freedom Restoration Act (RFRA) in certain situations.

Regarding comments that the rule is unnecessary because religious organizations are not presently deterred from contracting with the government, OFCCP believes that clarifying the law for current contractors is a valuable goal in itself, regardless of whether more religious organizations would participate as federal contractors or subcontractors. The disputes among commenters over the proper interpretation of the Title VII case law suggests as well that the guidance provided by this rule would be valuable to the contracting community. And in fact, as just noted, other commenters offered evidence that faith-based organizations have indeed been reluctant to contract with the federal government because of the lack of certainty about the religious exemption. The fact that some faith-based organizations have been willing to enter into federal contracts or subcontracts does not mean that other faith-based organizations have not been reluctant to do so. Admittedly, OFCCP cannot perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers compare to the whole of the contracting pool. But neither does OFCCP find persuasive commenters' assertions that faith-based organizations are already well-represented among government contractors, when those assertions are based on examples showing contracting awards to them totaling only tens of millions, when the federal government expended \$926.5 billion on contractual services in fiscal year 2019⁵ and, according to one estimate, faith-based organizations account for hundreds of billions of dollars of economic activity annually in the United States.⁶ OFCCP

⁵ See USA Spending, Spending Explorer (select Object Class, Fiscal Year 2019), https://www.usaspending.gov/#/explorer/object_class.

⁶ See Brian J. Grim and Melissa E. Grim, "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis," *Interdisciplinary Journal of Research on Religion*, vol. 12 (2016), article 3, p. 10, 25, (describing

disagrees that the rule will introduce confusion. OFCCP anticipates this rule will have no effect on the vast majority of contractors or the agency's regulation of them, since they do not and would not claim the religious exemption. As commenters noted, religious organizations do not appear to be a large portion of federal contractors. While this rule may add clarity that encourages more religious organizations to seek to become federal contractors and subcontractors, OFCCP does not believe the increase will greatly influence the composition or behavior of the contractor pool that it regulates. The exemption is a helpful accommodation for this small minority of religious organizations that may seek its protection. For them specifically, the rule is intended to bring clarity. For instance, as explained below, this rule provides a clear three-part test for determining whether an entity can qualify for the exemption. Contrary to the assertions of some commenters, and as described more fully below, Title VII case law offers differing tests on a jurisdiction-by-jurisdiction basis, and some of those tests provide little guidance at all. As another example, this rule provides a clear approach to determining when a religious employer is appropriately taking action on the basis of an employee's particular religion, another area where the case law is not uniform.

OFCCP also disagrees that this rule will impede the agency's enforcement efforts. OFCCP promulgates this rule from a position of familiarity with its own enforcement resources, priorities, and budget. For the reasons just stated above, OFCCP does not see this rule as significantly affecting the vast majority of its work. OFCCP also does not anticipate a flood of employers claiming the exemption in bad faith when faced with discrimination claims. That has not been the experience under the Title VII exemption thus far: The number of reported cases involving the exemption since 1964 are in the dozens, not the thousands. And in those cases, the employer may or may not have succeeded in claiming the exemption or defending against a discrimination claim, but in nearly all the employer did not appear to invoke the exemption nefariously, in bad faith. OFCCP is also optimistic given the federal government's experience under the RFRA. This law provides generous accommodation for religious claims and

revenues of faith-based charities, congregations, healthcare networks, educational institutions, and other organizations), www.religjournal.com/pdf/jrr12003.pdf.

⁴ The commenter cited *USASPENDING.GOV*, <https://www.usaspending.gov/#/recipient>.

strict boundaries for the federal government, yet neither the courts nor OFCCP have been inundated with claims.⁷

OFCCP appreciates all comments received, and for the reasons stated believes that proceeding with a final rule clarifying the religious exemption is warranted. For the small minority of current and potential federal contractors and subcontractors interested in the exemption, this will help them understand its scope and requirements and may encourage a broader pool of organizations to compete for government contracts, which will inure to the government's benefit. For the vast majority of contractors, OFCCP does not expect this rule to affect their operations or OFCCP's monitoring and enforcement.

This final rule is an Executive Order 13771 (E.O. 13771) deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA determined that this rule is not a "major rule," as defined by 5 U.S.C. 804(2). Details on the estimated costs of this rule can be found in the economic analysis below.

II. Section-by-Section Analysis

The NPRM proposed five new definitions to clarify key terms used in OFCCP's religious exemption: *Exercise of religion*; *Particular religion*; *Religion*; *Religious corporation, association, educational institution, or society*; and *Sincere*. The regulatory codification of the underlying exemption itself—which is not at issue in this rulemaking—is found at 41 CFR 60–1.5(a)(5). The new definitions were proposed to be placed with the rest of the regulations' generally applicable definitions at 41 CFR 60–1.3. The NPRM also proposed adding a rule of construction to § 60–1.5 to provide the maximum legally permissible protection of religious exercise.

This final rule retains the same basic structure as the NPRM, with a few changes. First, there have been some modifications to some of the definitions, and one proposed definition, for *Exercise of religion*, is not included in

the final rule, as explained below. Second, this final rule adds several illustrative examples within the definition of *Religious corporation, association, educational institution, or society* to better illustrate which organizations qualify for the religious exemption. Third, this final rule adds a severability clause.

A. Section 60–1.3 Definitions

The definitions added to § 60–1.3 are interrelated, so they are discussed below in a particular order. This order is different from that presented in the NPRM. The change in order is not substantive. The change is intended only to make the rule as a whole easier to understand.

1. Definition of Religion

OFCCP's proposed definition of *Religion* provided that the term is not limited to religious belief but also includes all aspects of religious observance and practice. The proposed definition was identical to the first part of the definition of "religion" in Title VII: "The term 'religion' includes all aspects of religious observance and practice, as well as belief" 42 U.S.C. 2000e(j). The proposed definition omitted the second portion of the Title VII definition, which refers to an employer's accommodation of an employee's religious observance or practice, because that would have been redundant with OFCCP's existing regulations. OFCCP's regulations at 41 CFR part 60–50, Guidelines on Discrimination Because of Religion or National Origin, contain robust religious protections for employees, including accommodation language substantially the same as that in the portion of the Title VII definition omitted here. Compare 42 U.S.C. 2000e(j), with 41 CFR 60–50.3. Those provisions continue to govern contractors' obligations to accommodate employees' and potential employees' religious observance and practice.

The proposed definition of *Religion* is used by other agencies. It is identical to the definition used by the Department of Justice in grant regulations implementing section 815(c) of the Justice System Improvement Act of 1979. See 28 CFR 42.202(m). The Small Business Administration has used the same definition as well in its grant regulations. See 13 CFR 113.2(c).

Some commenters generally supported the proposed definition, noting that it is legally sound, as it tracks the Title VII definition and provides broad protection for religious entities. Commenters also noted that the definition is sensible and will aid

contractors in understanding the exemption.

Other commenters argued that importing the definition from Title VII is inappropriate because the context of Title VII is protection of an employee's individual religious beliefs in the workplace, not those of the employer. A legal professional organization raised the concern that this definition is overbroad as applied to the employer, particularly where it could allow a government-funded employer to make faith-based employment decisions beyond those currently allowed under Title VII and E.O. 11246. Commenters also objected to the omission of the second part of the Title VII definition, arguing that the weighing of the burden that an employee's request for religious accommodations places on an employer is an important limitation on Congress's intent to accommodate religion in the workplace. Commenters stated that, in their view, an employee's requested accommodations may impose no more than a *de minimis* burden on the employer. Commenters argued that OFCCP's proposed definition is broader than Congress intended in that it does not consider the burden the employer's assertion of the religious exemption would impose on employees, thus allowing religious employers to take adverse actions against employees based on religious belief no matter the hardship it causes them. Some commenters argued that partially importing the Title VII definition would "muddy the waters" rather than provide clarity.

Other commenters requested clarification on the proposed definition of *Religion*. Specifically, some commenters proposed that the final rule clarify that "observance and practice" includes refraining from certain activities. Another commenter noted that the proposed rule did not explain the extent to which it might displace employees' right to reasonable accommodation of their religious beliefs and practices if such accommodation conflicts with the contractor's religion.

For the reasons described above and in the NPRM, and considering the comments received, OFCCP is finalizing the proposed definition of *Religion* without modification. No change is needed to make clear that inaction or omission can be a form of "observance and practice." See, e.g., *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (holding the "exercise" of religion protected by the First Amendment "involves not only belief and profession but the performance of (or abstention from) physical acts"); see also *Espinoza*, 140

⁷ See 42 U.S.C. 2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior government interests."); *Holt*, 574 U.S. at 368 (rejecting the argument that the only workable rule is one of no exceptions); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) (rejecting "slippery-slope argument" that RFRA-mandated exceptions would become unworkable).

S. Ct. at 2277 (Gorsuch, J., concurring) (“The right to be religious without the right to do religious things would hardly amount to a right at all.”).

OFCCP disagrees with commenters who argued that the definition of *Religion* is overbroad and would permit contractors to make faith-based employment decisions beyond those permitted by law. The definition is the same as that used in other federal regulations and the same as that used in Title VII when read in conjunction with the rest of OFCCP’s regulations. The definition must also be construed in harmony with those regulations, the requirements of which remain in force just as strongly as before this regulation’s promulgation.

OFCCP also disagrees that it should import the second half of Title VII’s definition of *religion* into its general list of definitions in § 60–1.3. OFCCP’s regulations in part 60–50 governing protection of employees’ religion and national origin already contain this language and remain in force, and employers must continue to comply with them. The definition of *Religion* added to § 60–1.3 is intended to apply generally, to both employers and employees.

Regarding comments about burden on employees’ exercise of religion, OFCCP looks to the functioning of the religious exemption. E.O. 11246, like Title VII, requires employers to accommodate employees’ religious practices to a prescribed extent. But the religious exemption is precisely that: An exemption that relieves “religious organizations from Title VII’s [or E.O. 11246’s] prohibition against discrimination in employment on the basis of religion.” *Amos*, 483 U.S. at 329. That logically includes a lesser exemption from the duty to accommodate religious practice. While religious organizations can accommodate employees’ religious practices, and in many instances may find that desirable, under the exemption, they are not required to do so. See *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 194 (4th Cir. 2011).

2. Definition of Religious Corporation, Association, Educational Institution, or Society

One of the primary objectives of this rulemaking is to clarify the conditions of eligibility for the religious exemption. Thus the NRPM proposed a definition of *Religious corporation, association, educational institution, or society*. This term is used in E.O. 11246 section 204(c) and 41 CFR 60–1.5(a)(5), and it is the same term used in the Title VII

religious exemption at 42 U.S.C. 2000e–1(a). The definition as proposed would apply to a corporation, association, educational institution, society, school, college, university, or institution of learning.⁸

As explained in the NPRM, clarity on this topic is essential because federal courts of appeals have used a confusing variety of tests, and the tests themselves often involve unclear or constitutionally suspect criteria. The NPRM favored, with some modifications, the test used by the U.S. Court of Appeals for the Ninth Circuit in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam). This was for several reasons, including because the *World Vision* test generally prevents invasive inquiries into matters of faith, the uncertainty and subjectivity of a multifactor balancing test, and the inherently difficult and constitutionally suspect exercise of measuring the quantum of an organization’s religiosity. See 84 FR 41681–84.

The controlling per curiam opinion in *World Vision* offered a four-pronged test for determining an entity’s qualification for the religious exemption:

an entity is eligible for the . . . exemption, at least, if it is [1] organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

World Vision, 633 F.3d at 724 (per curiam).

This four-pronged test reflects the overlap of agreement between the two judges in the majority, Judges O’Scannlain and Kleinfeld, who also each wrote separate concurrences that laid out their own preferred tests. Both judges agreed on the first two prongs, that the entity be organized for a religious purpose⁹ and hold itself out to

the public as carrying out that religious purpose. The third and fourth prongs reflect Judge Kleinfeld’s view. See *id.* at 748 (Kleinfeld, J., concurring). Regarding the third prong, Judge O’Scannlain would have employed a broader formulation, requiring that the employer engage “in activity consistent with, and in furtherance of, those [founding] religious purposes.” *Id.* at 734 (O’Scannlain, J., concurring). As to the fourth prong, Judge Kleinfeld restricted the exemption to organizations that charge little or nothing for their goods or services, regardless of their formal incorporation as a nonprofit organization. See *id.* at 745–47 (Kleinfeld, J., concurring). Judge O’Scannlain would have broadened the fourth prong (in most instances) by requiring nonprofit status, including nonprofit organizations that charge market rates for their goods or services. See *id.* at 734 (O’Scannlain, J., concurring).

The NPRM proposed to follow a modified *World Vision* test. The NPRM proposed adopting the first two prongs of the per curiam opinion. The NPRM favored Judge O’Scannlain’s formulation of the second prong given the significant constitutional difficulties that accompany determining whether an organization is “primarily” religious. The NPRM also proposed to revise Judge O’Scannlain’s phraseology, that the entity be engaged “in activity” consistent with those religious purposes, with the requirement that the entity be engaged “in exercise of religion” consistent with a religious purpose. No material change was intended by this adjustment; it was meant to capture in succinct regulatory text Judge O’Scannlain’s lengthy discussion that the kind of activity contemplated under this prong is religious exercise. See 84 FR at 41683; see also *World Vision*, 633 F.3d at 737–38 (O’Scannlain, J., concurring). Finally, the NPRM proposed not to adopt the fourth prong of the test, on grounds that a no-charging rule would exclude many bona fide religious organizations, especially in the government contracting context, and that an absolute bar on for-profit organizations was tenuous given other court decisions and the Supreme Court’s more recent decision in *Hobby Lobby*. See 84 FR at

⁸ The words “school, college, university, or institution of learning” also appear in 41 CFR 60–1.5(a)(6), the exemption for religious educational organizations. They were included in the definition to make clear that the definition’s listing of “educational institution” includes schools, colleges, universities, and institutions of learning. Depending on the facts, an educational organization may qualify under the § 60–1.5(a)(5) exemption, the § 60–1.5(a)(6) exemption, both, or neither. The inclusion of educational organizations is maintained in the final rule.

⁹ To be precise, Judge O’Scannlain’s formulation was that the entity be “organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents).” *World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring). Judge Kleinfeld noted that some people organize in religious bodies “with no corporate apparatus” and expressed concerns about the exemption being defeated by an “[a]bsence of corporate papers.” *Id.* at 745

(Kleinfeld, J., concurring). Judge Kleinfeld wrote that this “narrowness problem may be repairable by a tweak in the test,” *id.*, which may be why the per curiam opinion does not include Judge O’Scannlain’s parenthetical referring to Articles of Incorporation. The difference is slight—a “tweak.” OFCCP’s approach to this first factor, including the necessary evidence to satisfy it, is discussed below in this preamble.

41684. The proposed rule could also be viewed as essentially following Judge O'Scannlain's concurrence save for his requirement that the entity be nonprofit to qualify for the exemption.

In response to comments and a subsequent reevaluation of *World Vision* and other case law, OFCCP is revising the proposed regulatory text in this final rule. The final rule's test can be viewed as generally adopting Judge O'Scannlain's concurrence in *World Vision*, including by adopting a fourth prong. Satisfaction of this test will be sufficient to qualify for the exemption, and OFCCP believes that this is the means by which most organizations interested in the exemption will qualify. However, OFCCP acknowledges that in certain rare circumstances, an organization might not satisfy the non-profit prong of the *World Vision* test yet still present strong evidence that it possesses a substantial religious purpose. Thus the regulatory text includes an alternative means of satisfying the fourth prong: When an organization does not operate on a not-for-profit basis, it must present "other strong evidence that it possesses a substantial religious purpose." The final rule also adds several examples to illustrate how the test will be applied. The final rule also adds a clarifying provision regarding the meaning of "consistent with and in furtherance of" a religious purpose, a phrase used in one of the test's prongs. The Department does not anticipate many for-profit organizations claiming the exemption, and as explained through the examples and their accompanying discussion, it may be quite difficult for such organizations to do so.

This section of the preamble addresses this topic as well as other comments regarding OFCCP's proposed definition of *Religious corporation, association, educational institution, or society*. OFCCP believes its definition is reasonable in light of Title VII and Supreme Court case law and that it will contribute to one of OFCCP's primary goals in this rulemaking, which is to increase economy and efficiency in government contracting by providing for a broader pool of government contractors and subcontractors. Issues specific to the EEOC's view on this matter are also discussed below and later in a separate part of this preamble.

a. The Selection of *World Vision* as the Basis for the Religious Organization Test

OFCCP received numerous public comments on its proposed definition, including comments on OFCCP's discussion of the shortcomings in some Title VII case law. Some commenters

agreed that OFCCP should reject non-*World Vision* tests based on these shortcomings. For example, a religious legal organization commented that the proposed test "eliminates the subjectivity inherent in the *LeBoon* tests. It further eliminates the Establishment Clause violation present when a court determines whether an organization is 'religious enough,' and it also prevents inter-religion discrimination."

Some commenters who supported OFCCP's proposed definition commented that it provided important clarification that would be helpful to religious organizations in meeting their missions. For example, a religious school association commented that the proposal is especially important considering that local control and leadership are central to many of its participating schools' beliefs. A religious charities organization commented that the proposed definition would help it advance its mission of providing essential services to people in need—a mission rooted in its religious convictions.

Other commenters disagreed with OFCCP's characterization of the existing religious employer tests in Title VII case law. For example, a legal professional organization noted that courts have generally agreed that the following factors are relevant in deciding whether an organization qualifies for the religious exemption: (1) The purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed upon staff and members of the organization; and (4) the extent of religious practices in or the religious nature of products and services offered by the organization.

Other commenters opposed the proposed definition because they viewed it as too broad and unsupported by Title VII case law. For example, an organization that advocates separation of church and state asserted that the definition in the proposed rule has not been proposed or used by any federal court and represents an attempt by OFCCP to vastly expand the scope of the existing narrow exemption. A labor organization likewise commented that, in its view, the definition in the proposed rule is contrary to law and does not reflect the Title VII definition.

Some commenters objected generally to OFCCP's selection or modification of the *World Vision* test. For example, one contractor association commented that the proposed rule removes critical limits on the standard set forth by Judge O'Scannlain. Another contractor association emphasized that *World*

Vision involved the removal of two employees by a religious organization based on the employees' failure to adhere to the organization's religious views. Therefore, according to the association, the *World Vision* test should not apply to for-profit organizations holding themselves out as religiously motivated. A group of U.S. Senators criticized the proposal not only for adopting the test set forth in the concurrence, but also for modifying part of that test.

A legal think tank asserted that OFCCP appeared to have created its own test, designed to qualify more types of contractors for the exemption. This commenter went on to say that the "exceedingly more expansive criteria" proposed by OFCCP are untethered to Title VII case law and not in line with the "measured" exemption required by the Establishment Clause, quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("Our decisions indicate that an accommodation [of religious observances] must be measured so that it does not override other significant interests.").

As explained in the NPRM, OFCCP believes that a *LeBoon*-type test invites subjectivity and uncertainty. See *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007). That is problematic in any circumstance, but especially so in the context of government contracting, where parties' obligations should be as clear as possible. OFCCP also declines to attempt to write a definition that purports to synthesize all the Title VII case law on this subject. OFCCP is doubtful that such a task could be done, especially given Judge O'Scannlain's observation (with which Judge Kleinfeld agreed) that several factors used by other courts are constitutionally suspect, including, contrary to the commenter's suggestion above, an assessment of the religious nature of an organization's products and services. See *World Vision*, 633 F.3d at 730–32 (O'Scannlain, J., concurring); *id.* at 741 (Kleinfeld, J., concurring). OFCCP's approach in the final rule, like *World Vision*, instead requires consideration of a discrete set of factors that can be reliably ascertained in each case.

OFCCP acknowledges that the definition it is promulgating here modifies the *World Vision* test in some respects, or alternatively can be viewed as following Judge O'Scannlain's concurrence with one addition. OFCCP describes those modifications in more detail below along with its reasons for making them, including the need to provide clarity to contractors and enforcement staff. OFCCP disputes the

relevance of commenters' assertions that these modifications are being made for the purpose of qualifying more organizations for the exemption. OFCCP acknowledges that the modifications may allow marginally more organizations to qualify for the exemption and that the final rule is intended to increase the pool of federal contractors. But, as described herein, OFCCP believes the test adopted by this final rule is appropriately measured and serves the purpose of qualifying only genuinely religious organizations for the exemption.

b. OFCCP's Application of the Definition Generally

The NPRM proposed how OFCCP would apply the factors in its proposed test for religious organizations. The NPRM stated "that it would be inappropriate and constitutionally suspect for OFCCP to contradict a claim, found to be sincere, that a particular activity or purpose has religious meaning"; that "all the factors . . . are determined with reference to the contractor's own sincerely held view of its religious purposes and the religious meaning (or not) of its practices"; and that the proposed three-factor test would be exclusive "stand-alone components and not factors guiding an ultimate inquiry into whether an organizations is 'primarily religious' or secular as a whole." 84 FR at 41682–83.

The NPRM proposed this approach for several reasons. The NPRM relied on *World Vision's* concerns about courts' substituting their own judgment for what has religious meaning when the question is disputed: "The very act of making that determination . . . runs counter to the 'core of the constitutional guarantee against religious establishment.'" *World Vision*, 633 F.3d at 731 (O'Scannlain, J., concurring) (quoting *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977)). "[I]nquiry into . . . religious views . . . is not only unnecessary but also offensive. It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Id.* (alterations in original) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (internal quotation marks omitted)). Further, such inquiries could lead to discrimination among religions. *See id.* at 732 & n.8. The NPRM also drew on Supreme Court and Title VII case law showing the constitutional and practical difficulties of determining whether a particular religious belief is "central" to one's faith or whether an organization is "primarily" religious. *See* 84 FR at 41682–83.

Commenters expressed a variety of views on the NPRM's proposed approach. Some were supportive. For instance, a religious legal organization commented that Judge O'Scannlain's test requires little judicial "'trolling' through" an organization's religious beliefs, because it is based exclusively on information the organization makes public. Relatedly, the same commenter observed that OFCCP staff can easily and consistently apply the test, with positive implications for the rule of law. Other commenters objected generally to OFCCP's description of how it would determine whether a contractor had met the test. For example, a civil liberties organization expressed concern that OFCCP would not enforce baseline evidentiary standards in determining whether an entity meets the test's factors. A contractor association commented that the modified *World Vision* test "is unclear on its face and problematic in application." A transgender civil rights organization commented that the test relies on ill-defined criteria that must be measured from the perspective of the employer.

Many of the commenters who opposed the proposed definition expressed concern that it would have negative consequences. For example, a legal professional association asserted that the proposal would allow even nominally religious entities to discriminate on the basis of religion in hiring, potentially exposing them to legal liability under federal and state law despite their ability to retain their status as federal contractors. A group of state attorneys general stated that OFCCP's proposed test represents a sharp departure from precedent and thus would be difficult for OFCCP staff and adjudicators to apply. The attorneys general also commented that the test would likely cause non-compliance by increasing legal uncertainty about which organizations qualify.

Other commenters requested clarity. Regarding the NPRM's statement that the three factors would be standalone provisions rather than factors guiding an ultimate "primarily religious" inquiry, a contractor association commented that, in its view, the statement was unclear and did not lend credence to OFCCP's assertion that the test would be easy to apply or likely to be consistent in application. The commenter asked for clarification as to how OFCCP would apply the factors of the test as standalone factors, rather than as factors leading to the ultimate determination whether the contractor is primarily religious or secular. The commenter sought explanation from OFCCP as to how it could easily conduct the required

analysis when even the courts struggle to do so. The commenter requested more specific examples of how the proposed test will apply and asked that the contractor community be consulted before a test is adopted.

OFCCP appreciates these comments and has re-reviewed *World Vision* and other relevant case law in light of them. *World Vision* and its antecedent cases in the Ninth Circuit, as well as *LeBoon* in the Third Circuit, begin from the premise that the religious exemption should cover only organizations that are, in fact, primarily religious. But courts have labored over how to operationalize that requirement into a set of factors that can be applied neutrally, objectively, and with minimal constitutional entanglement. *See World Vision*, 633 F.3d at 729 (O'Scannlain, J., concurring) ("Though our precedent provides us with the fundamental question—whether the general picture of *World Vision* is primarily religious—we must assess the manner in which we are to answer that question in the case at hand."); *LeBoon*, 503 F.3d at 226. That does not mean that courts have dispensed with an organization's need to present evidence in order to claim the exemption. Rather, it means that the evidence required must be of a kind that courts are competent to evaluate and that avoids entanglement. *See World Vision*, 633 F.3d at 730–33 (O'Scannlain, J., concurring); *cf. NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 & n.10 (1979); *id.* at 507–08 (appendix). Indeed, one of the purposes of Congress's expansion of the Title VII religious exemption to cover all of an employer's activities, rather than simply its religious activities, was to avoid difficult line-drawing between religious and secular activities and the interference with religious organizations that could result. *See Amos*, 483 U.S. at 336. In OFCCP's view, *World Vision* generally, and Judge O'Scannlain's concurrence in particular, has done the best job of formulating a test that meets the competing and delicately balanced goals of giving the exemption only its proper reach while employing useable and constitutionally proper inquiries.

With that in mind, OFCCP clarifies here its general approach to applying the exemption, addresses the particular evidence needed for each factor, and adds to the regulatory text examples with accompanying explanation to further illustrate its approach. First, OFCCP acknowledges the need to clarify and revise its statement that the factors are "stand-alone components and not factors guiding an ultimate inquiry" in order to make clear the agency's intent. 84 FR at 41683. OFCCP agrees with

commenters that the aim of any test in this context is to determine whether the organization qualifies as a religious organization, and that any components are intended to guide or define that ultimate inquiry. The NPRM's statement was intended to mean that OFCCP would apply the proposed three factors as the exclusive elements for ascertaining whether an organization qualifies for the religious exemption, rather than as mere considerations to be weighed along with other facts and circumstances.

OFCCP affirms that approach here as the predominant path by which organizations are anticipated to qualify for the exemption. This approach is consistent with *World Vision*. The per curiam opinion and both concurrences provided slightly different factors, but in each instance the factors were presented as sufficient to determine an organization's entitlement to the exemption. See *World Vision*, 633 F.3d at 724 (per curiam) (holding "an entity is eligible for the . . . exemption, at least, if it" meets four factors (emphasis added)); *id.* at 734 (O'Scannlain, J., concurring) (holding "a nonprofit entity qualifies for the . . . exemption if it establishes that it" satisfies three factors (footnote omitted)); *id.* at 748 (Kleinfeld, J., concurring) ("To determine whether an entity is a 'religious corporation, association, or society,' determine whether it [satisfies the four factors]").

Second, the *World Vision*-derived test promulgated here is not a subjective one. OFCCP shares commenters' concern about contractors attempting to claim the exemption with little evidence other than their own testimony that theirs is a religious organization. (Though OFCCP is also skeptical that many contractors would attempt to do so. As noted above, bad-faith claims to the Title VII exemption have been rare.) The *World Vision* factors have been selected because they provide objective criteria for determining an organization's religious status without the need for intrusive religious inquiries. See *id.* at 733 (O'Scannlain, J., concurring) (holding where religious activities or purposes are "hotly contested, . . . we should stay our hand and rely on considerations that do not require us to engage in constitutionally precarious inquiries"). The *World Vision* factors are similar to a test used in the National Labor Relations Act context, which similarly "avoids . . . constitutional infirmities" while providing "some assurance that the institutions availing themselves of the *Catholic Bishop* exemption are *bona fide* religious institutions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335,

1344 (D.C. Cir. 2002); see also *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 831 (D.C. Cir. 2020).

It is true that in applying the *World Vision* factors, OFCCP will not substitute its own judgment for a contractor's view—found to be sincere—that a particular activity, purpose, or belief has religious meaning. For instance, OFCCP would not contradict a drug-rehabilitation center's view, found to be sincere, that its work is a religious healing ministry by stating that its work is merely secular healthcare delivery. See *Amos*, 483 U.S. at 344 (Brennan, J., concurring) (finding religious organizations "often regard the provision of [community] services as a means of fulfilling religious duty"); cf. *World Vision*, 633 F.3d at 745 (Kleinfeld, J., concurring) ("Religious missionaries and Peace Corps volunteers both perform humanitarian work, but only the latter is secular."). Any other course would risk severe constitutional difficulties. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . ." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). But a contractor must prove its sincerity, which is a question of fact to be proved or disproved in the same manner as any other question of fact. And questions about religious characterization apply to only some aspects of the test. For instance, whether an organization operates on a nonprofit basis is a factual determination to which religious characterizations have little if any relevance. Similarly, as clarified in this final rule, an organization's holding itself out as religious requires an objective evidentiary showing. Finally, OFCCP does not defer to any contractor's assessment that it is entitled to the exemption itself. Whether an organization is a religious corporation, association, educational institution, or society under E.O. 11246 is a legal determination based on whether the organization satisfies the relevant factors.

OFCCP next addresses specific issues related to each factor, including the evidence necessary to satisfy each factor.

c. The First Factor: The Organization's Religious Purpose

As stated in the NPRM, to qualify for the religious exemption, a contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose. Cf. *Universidad Cent. de*

Bayamon v. NLRB, 793 F.2d 383, 401 (1st Cir. 1985) (finding no NLRB jurisdiction when, among other things, an educational institution's mission had "admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education"). A religious purpose can be shown by articles of incorporation or other founding documents, but that is not the only type of evidence that can be used. See *World Vision*, 633 F.3d at 736 (O'Scannlain, J., concurring); *id.* at 745 (Kleinfeld, J., concurring) (noting that some religious entities have "no corporate apparatus"). And finally, "the decision whether an organization is 'religious' for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization." *Id.* at 735–36 (O'Scannlain, J., concurring) (quoting *LeBoon*, 503 F.3d at 226–27).

Some commenters objected that this factor, as described in the NPRM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters stated that the proposal was inconsistent with Judge O'Scannlain's requirement of demonstrating religious purpose through "Articles of Incorporation or similar foundational documents." *Id.* at 734. For example, a labor union asserted that OFCCP's implementation of this factor would be "more lax than Judge O'Scannlain's concurrence." A contractor association stated that the test was vague and overly simple. An individual commenter requested more guidance as to what types of evidence OFCCP would accept to prove a contractor's organization for a religious purpose. An organization that advocates separation of church and state commented that an organization that fails to document a religious purpose in any of its foundational documents was likely not organized for a religious purpose.

OFCCP appreciates these comments and is revising its approach in response. OFCCP agrees that additional clarity is needed here and that this factor should require documentary evidence of an organization's religious purpose in its foundational documents. Judge O'Scannlain's concurrence examined *World Vision*'s Articles of Incorporation, bylaws, core values, and mission statement. See *id.* at 736. An organization may have other foundational documents, such as a statement of faith, company code of conduct, business policies, or other

governance documents demonstrating a religious purpose. No one particular document is necessary. For instance, some federal contractors may be unincorporated proprietorships or partnerships and thus not have formal corporate-formation documents. But the organization must be able to show a religious purpose in documents that are central to the organization's identity and purpose. OFCCP believes this requirement for documentary evidence will reduce uncertainty, provide objective means for the agency to confirm an organization's satisfaction of this factor of the test, and help contractors better understand the kind of showing they will need to make to satisfy this factor.

OFCCP emphasizes that it will not challenge a sincere claim characterizing a document's statements as religious in the contractor's view. *See id.* at 735–36. But OFCCP will rarely be able to find a claim of religious purpose to be sincere where the documents themselves are no different from standard corporate documents or where an organization adds a religious purpose to its documents after it becomes aware of potential discrimination liability or government scrutiny, including through an OFCCP compliance review. Sincerity is a factual determination, so each case where sincerity is at issue will turn on its own particular circumstances.¹⁰

d. The Second Factor: Engages in Activity Consistent With, and in Furtherance of, Its Religious Purpose

Second, the contractor must engage in activity consistent with, and in furtherance of, its religious purpose. Here too, “religious purpose” means religious as “measured with reference to the particular religion identified by the contractor.” *Id.* This factor is adopted from Judge O’Scannlain’s *World Vision* concurrence rather than the per curiam opinion. *Cf. id.* at 734. The regulatory text of the final rule has been slightly revised from the proposed language to more closely reflect Judge O’Scannlain’s formulation. This factor is now the second factor in the test rather than the third. No material change is intended. This factor also now states that the organization must exercise religion consistent with, and in furtherance of, “its” religious purpose, rather than “a” religious purpose. OFCCP does not view this change as significant, since a religious organization is quite unlikely to further a religious purpose other than its own.

As explained in the NPRM, OFCCP proposed not to follow the *World Vision* per curiam opinion’s formulation of this factor for both practical and legal reasons. The per curiam opinion would require a contractor to be “engaged primarily in carrying out [its] religious purpose.” *Id.* at 724 (per curiam) (emphasis added). But such a formulation would invite OFCCP to balance things that cannot be balanced consistently and leave contractors without the kind of clarity that ought to prevail in contractual relations. Further, the Supreme Court and lower courts have cautioned against drawing lines between religious activity or belief that is “central” or “primary” and religious activity or belief that is not. *See* 84 FR at 41682, 41683.

Also as explained in the NPRM, OFCCP proposed to use the phrase “engages in exercise of religion” rather than Judge O’Scannlain’s phrase, “engages in activity.” *See World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring) (“engaged in activity consistent with, and in furtherance of, those religious purposes”). No material change was intended by this adjustment; it was meant to capture in succinct regulatory text Judge O’Scannlain’s lengthy discussion that the kind of activity contemplated under this prong is religious exercise. *See* 84 FR at 41683; *see also World Vision*, 633 F.3d at 737–38.

OFCCP received many comments on this aspect of the NPRM. A religious organization asked OFCCP to clarify that “consistent” as used in the third factor does not mean that OFCCP will be assessing “the coherence or consistency of the contractor’s religious beliefs, *see Thomas v. Review Bd.*, 450 U.S. 707 (1981) (forbidding such an inquiry), but only [making] a determination that the contractor is engaged in activity reflecting a religious, as opposed to a secular, purpose.” OFCCP confirms that its intent in including this element is to determine whether the contractor’s exercise of religion is consistent with its religious purpose, not to test the internal consistency of a contractor’s religious beliefs. To make this point as clear as possible, OFCCP has added regulatory text explaining that “[w]hether an organization’s engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization’s own sincere understanding of its religious tenets.”

As with other factors, some commenters asserted that this factor, as described in the NPRM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient

evidence. Many of these commenters stated that the incorporation of “exercise of religion” as defined in RFRA into this factor further loosened the standard. For example, a group of state attorneys general asserted that incorporation of the RFRA standard revealed confusion on the part of OFCCP as to the fundamental difference between the religious organization exemption and RFRA. The state attorneys general stated that the religious organization exemption is triggered only when an organization’s exercise of religion is so significant that the organization’s overall identity becomes religious and criticized the proposed rule for focusing instead on whether an organization engages in exercises of religion generally. A civil liberties organization characterized the preamble as mistakenly stating that inquiry into the religious nature of entities’ actions is impermissible. A labor union commented that this aspect of OFCCP’s proposal could lead businesses to feign religiosity solely for the purpose of cloaking discriminatory activity.

Some commenters also criticized the exclusion from OFCCP’s proposed test of the requirement that a contractor be “primarily religious,” or “engaged primarily in carrying out that religious purpose.” Some of these comments stated that OFCCP did not persuasively explain why it was excluding this element from the definition. A contractor association commented that Title VII’s religious organization exception has traditionally been limited to institutions whose “purpose and character are primarily religious,” and that OFCCP has no basis to depart from this principle. An anti-bigotry religious organization commented that OFCCP should consider all relevant circumstances in determining whether a contractor is indeed religious, as OFCCP proposed to do for *Sincere* (that is, taking into account all relevant facts). The organization commented that the Supreme Court in *Hosanna-Tabor* reviewed the employee’s religious and secular functions, undermining OFCCP’s claim that it cannot engage in a similar type of balancing.

OFCCP disagrees with the idea that this factor, either as proposed or as adopted in the final rule, confuses the religious exemption with RFRA. An organization that exercises religion under RFRA may not satisfy this factor of the test, yet even if it did, that alone would not satisfy the other factors of the test necessary to claim the E.O. 11246 religious exemption. Further, as will be discussed shortly, OFCCP has revised this prong to adhere to Judge

¹⁰ As noted in the proposed rule, *see* 84 FR at 41685, sincerity is often not at issue.

O'Scannlain's formulation, which should alleviate any confusion regarding RFRA.¹¹

OFCCP agrees with commenters that activity consistent with the contractor's religious purpose must be a substantial aspect of the contractor's operations. Insofar as the NPRM could be read to suggest that a one-time or de minimis amount of religious activity would be sufficient, OFCCP clarifies that understanding here. The need for a material amount of religious activity flows from the text used in the regulation, that the entity "engage in religious activity." To engage is "[t]o employ or involve oneself; to take part in; to embark on," Black's Law Dictionary (11th ed. 2019), or to "involve oneself or become occupied; participate," American Heritage Dictionary (5th ed. 2020). It suggests more than occasional or half-hearted efforts. The case law further illustrates that there must be a significant level of religious activity. For instance, *World Vision* easily satisfied that requirement since activity consistent with its religious purpose was "essentially all *World Vision* appears to do." *World Vision*, 633 F.3d at 737–38 (O'Scannlain, J., concurring). The examples added to the final regulatory text also help illustrate the religious activity needed to qualify for the exemption.

OFCCP disagrees with commenters to the extent they argue that an organization must engage solely in religious activity (and explains below that such an inquiry would be difficult and constitutionally imprudent). When an organization engages in other, secular, activities, that alone does not diminish its ability to satisfy this factor of the test. See *LeBoon*, 503 F.3d at 229; cf. *Univ. of Great Falls*, 278 F.3d at 1342. This is made clear by the text of the religious exemption. The Title VII exemption was expanded in 1972 (and that expanded language is used in E.O. 11246) to cover religious organizations' employees engaged in any of the organization's activities, rather than only employees engaged in the organization's religious activities. Thus the exemption contemplates that religious organizations will engage in activities that are not religious, and it makes clear that religious organizations do not forfeit the exemption simply because they do.

OFCCP also disagrees with commenters who argued that the

organization's religious activity under this factor must be shown to "constitute a comprehensive religious identity."

That is simply a rephrasing of the ultimate inquiry underlying the *World Vision* test. This factor has a crucial role to play in that inquiry, but it should not be mistaken for the whole of it. One of the most useful aspects of the *World Vision* test is that it provides a step-by-step framework for assessing an organization's religious nature, including this factor, rather than leaving the inquiry an open-ended assessment in which a religious organization is simply known when it is seen. Cf. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Regarding comments that applying Judge O'Scannlain's concurrence rather than a "primarily engaged" factor is an unjustified departure from Title VII jurisprudence or reflects an overly prophylactic view of religious inquiry, OFCCP respectfully disagrees. OFCCP's position requires being mindful of the distinction between the test's underlying inquiry and the factors used to ascertain the answer to that inquiry. The test's underlying inquiry is whether an organization's "purpose and character are primarily religious." See, e.g., *World Vision*, 633 F.3d at 726 (O'Scannlain, J., concurring). But *World Vision* operationalized that inquiry into four factors. Thus any constitutional or practical problems regarding the inquiry's "primarily religious" formulation are academic because OFCCP will be answering the inquiry by means of applying the factors. That is one of the reasons why OFCCP prefers the *World Vision* test to other formulations.

When it comes to those four factors, however, the *World Vision* per curiam opinion carried forward a "primarily" inquiry in two of the factors: The organization must be "engaged primarily in carrying out [its] religious purpose" and must "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Id.* at 724 (per curiam). Judge O'Scannlain's well-reasoned concurrence used an alternative formulation that avoids the "primarily" questions. OFCCP believes the better choice is to adopt the concurrence. The main problem with determining whether an organization is "primarily" engaged in its religious purpose—as opposed to substantially or materially or genuinely engaged in its religious purpose—is not that it requires a determination that the organization is engaged in significant religious activity, something that can be ascertained easily enough, but rather that it requires

comparison between the amount of religious and secular activity at an organization. In essence, the organization must engage in a greater quantum of religious activity than secular activity, though without specifying whether the ratio must be 51:49, 70:30, or 99:1. However, any attempt to so compare religious and secular activity leads to additional problems: Some activities do not clearly fall on one side of the line or the other, and a court's or an agency's attempts to determine on which side of the line those activities fall can lead to constitutionally intrusive inquiries. See, e.g., *Cathedral Acad.*, 434 U.S. at 133 (observing the "excessive state involvement in religious affairs" that may result from litigation over "what does or does not have religious meaning"). Moreover, even when all activities are properly categorized, it is unclear what weight each should have. See, e.g., *Univ. of Great Falls*, 278 F.3d at 1343 (observing that a test that requires ascertaining an entity's "substantial religious character" or lack thereof "boils down to 'is it sufficiently religious?'"). OFCCP avoids these problems by adopting Judge O'Scannlain's formulation of this prong.

OFCCP agrees with commenters that some courts have nonetheless undertaken the task of comparing secular and religious activity when examining the religious exemption. See *LeBoon*, 503 F.3d 217; *Kamehameha Sch.*, 990 F.2d 458; *Boydston v. Mercy Hosp. Ardmore, Inc.*, No. CIV–18–444–G, 2020 WL 1448112 (W.D. Okla. Mar. 25, 2020). OFCCP disagrees that it also must do so when Judge O'Scannlain's concurrence provides a viable alternative. That alternative is especially attractive to OFCCP as an enforcement agency and as a regulator of government contractors. In both instances a factor that offers more clarity than another gives better notice to contractors, better guidance to field staff, and crisper lines to the bargain between the two parties.

e. The Third Factor: Holding Itself Out as Religious

Third, the contractor must hold itself out to the public as carrying out a religious purpose. Again here, and as explained in the NPRM, "religious purpose" "must be measured with reference to the particular religion identified by the contractor." *World Vision*, 633 F.3d at 736 (O'Scannlain, J., concurring). The NPRM proposed that a contractor could satisfy this requirement in a variety of ways, including by evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing

¹¹ Because of this change, the phrase "exercises religion" no longer appears in this prong. Thus, as explained later in this preamble, the definition for *Exercise of religion* is no longer needed and has been removed from the final rule.

materials, or by affirming a religious purpose in response to inquiries from a member of the public or a government entity. *See* 84 FR at 41683.

Again, some commenters stated that this factor, as described in the NRPM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters criticized OFCCP's proposal for allowing a contractor to meet this requirement by declaring its religious purpose in response to an inquiry from a government entity such as OFCCP itself. Commenters asserted that, as a result, almost any employer could designate itself a religious organization. Commenters also stated that taxpayers, employees, and applicants therefore would not necessarily have notice that the religious exemption could be applied. Commenters stated that this factor would thus not serve as the "market check" that Judge O'Scannlain envisioned. *World Vision*, 633 F.3d at 735 (O'Scannlain, J., concurring) (quoting *Univ. of Great Falls*, 278 F.3d at 1344). A group of state attorneys general, for example, criticized OFCCP's proposal for purportedly relaxing Judge O'Scannlain's "'market check' that would come from requiring an organization to hold itself out to the public as religious," which "could come at a cost in terms of broader public support." One contractor association remarked that, under the proposed rule, a federal contractor could satisfy this factor simply by responding to an OFCCP inquiry, whereas *World Vision* had always identified itself as a Christian organization, requiring its descriptor statement on all its communications. Another contractor association commented: "Making such a showing [for example, in response to an inquiry] is very easy and may or may not actually align with actual corporate purpose."

OFCCP appreciates these comments and, here too, is clarifying its approach in response. OFCCP agrees that a contractor could not satisfy this factor simply by affirming a religious purpose in response to one public or government inquiry, if that was all the contractor could put forward as evidence. More would be needed to show that the public was on notice of the organization's religious nature.

How much more is a factual question that cannot be defined with complete specificity, but the case law provides some guideposts. *World Vision* easily satisfied this requirement: Its logo was a stylized cross; religious artwork and texts were displayed throughout its campus; its communications guidelines

required references to its Christian identity in all external communications; and its employment guidelines expressly required subscription to particular Christian beliefs. *See id.* at 738–40. Very recently, a district court held that a Catholic hospital and its affiliates satisfied the requirement when they held "themselves out to the public as sectarian through their display of religious symbols in their facilities and through their sectarian mission statement and values statements displayed on [their] public website." *Boydston*, 2020 WL 1448112, at *5. In the analogous NLRA context, a university satisfied the test when, "in its course catalogue, mission statement, student bulletin, and other public documents, it unquestionably holds itself out to students, faculty, and the broader community as providing an education that, although primarily secular, is presented in an overtly religious, Catholic environment." *Univ. of Great Falls*, 278 F.3d at 1345. The university also filled its campus, classrooms, and offices "with Catholic icons, not merely as art, but it claims as an expression of faith." *Id.*

In short, a contractor satisfies this requirement when the contractor makes it reasonably clear to the public that it has a religious purpose. As noted in the NPRM, evidence of a religious purpose can come from the contractor's website, publications, advertisements, letterhead, or other public-facing materials, and in statements to members of the public. Evidence can also include religiously inspired logos, mottos, or the like; and religious art, texts, music, or other displays of religion in the workplace. Statements to the government in the ordinary course of business, such as corporate documents or tax filings, can also be probative. Such statements should be distinguished from statements to the government made in the course of an investigation or litigation in which the contractor's religious purpose is at issue. No one piece of evidence is required or, most likely, sufficient. But together the evidence must show that the contractor is presenting itself to the outside world as religious.

f. The Fourth Factor: Operating on a Not-for-Profit Basis

OFCCP proposed not to adopt the fourth factor set out in *World Vision*: That the entity seeking exemption "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." 633 F.3d at 724 (per curiam). The NPRM proposed this course for several reasons: Many religious entities may operate discount retail stores or otherwise engage in the

marketplace;¹² religiously oriented hospitals, senior-living facilities, and hospices may engage in substantial and frequent financial exchanges;¹³ the religious exemption in E.O. 11246 pertains to government contracting, an economic activity in which most participants are for-profit entities;¹⁴ other courts have not considered dispositive an organization's for-profit or nonprofit status, or the volume or amount of its financial transactions; *Amos* left open the question of whether for-profit organizations could qualify for the exemption; and the Supreme Court's more recent decision in *Hobby Lobby*, which held that for-profit organizations can exercise religion, counseled against an absolute prohibition on allowing for-profit organizations to qualify for the exemption.

OFCCP received a wide variety of comments on this aspect of the NPRM. Some commenters agreed with OFCCP's reasons for declining to require that a contractor "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." For example, a religious liberties organization commented that federal contractors typically engage in substantial exchanges of goods and services, and therefore religious organizations would be categorically denied the section 204(c) exemption if they became federal contractors. Other commenters opposed the exclusion of the requirement that a contractor "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." A group of U.S. Senators commented that the existence of a financial motive constitutes strong evidence that the exercise of religion is not the objective of the entity. Some of these commenters stated that OFCCP did not persuasively explain why it was excluding this element from the definition.

OFCCP declines to restrict the exemption to those religious entities that charge little or nothing for their services. *Contra World Vision*, 633 F.3d at 724 (per curiam); *id.* at 747 (Kleinfeld, J., concurring). First, E.O. 11246 governs federal contractors, not grantees. Contractors by definition charge for

¹² *See* Brian J. Grim and Melissa E. Grim, "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis," *Interdisciplinary Journal of Research on Religion*, vol. 12 (2016), article 3, pp. 10, 24, <http://www.religjournal.com/pdf/ijrr12003.pdf>.

¹³ *See id.* at 7.

¹⁴ *See* General Service Administration, System for Award Management, Advanced Search—Entity (listing 410,021 active for-profit entities and 99,781 nonprofit and/or other-not-for-profit entities), sam.gov/SAM/pages/public/searchRecords/advancedEMRSearch.jsf (last accessed Oct. 2, 2020).

their goods and services, even if they are nonprofits. E.O. 11246's religious exemption would be a virtual nullity were it restricted to contractors that do not charge. Second, OFCCP agrees with Judge O'Scannlain that nonprofit status is a sufficiently reliable proxy for religious identity,¹⁵ without the need to restrict this factor further to only those organizations that do not charge. Judge O'Scannlain explained that nonprofit status, and its restrictions on monetary gain, is reliable evidence that the organization has religious aims rather than purely pecuniary ones, *see id.* at 734–35 (O'Scannlain, J., concurring), and OFCCP agrees. Plus, the narrower formulation would exclude many bona fide religious organizations, like certain hospitals and care facilities, that engage in substantial and frequent market transactions, including by charging sums to beneficiaries of their goods and services. And while religious educational institutions have their own particular exemption, it would seem odd to think that their charging for books, tuitions, and dormitories would call into question their religious status. Third, one of the reasons OFCCP is promulgating this rule is to encourage broader participation in government contracting and subcontracting. Restrictions that would unduly restrict the exemption's availability could affect the size of the pool, to the detriment of the government's interests in a competitive and diverse field of potential contractors.

OFCCP also received many comments on its proposal to remove the requirement that organizations be nonprofit to qualify for the exemption. As mentioned above, OFCCP has substantially revised this aspect of the rule in response to commenters' concerns. Some commenters agreed with the proposal that it was not necessary for a contractor to "be nonprofit." For example, a religious civil rights organization commended the proposal for affirming that the owners of for-profit entities do not have to forfeit their religious convictions. Those commenters agreed with OFCCP's explanation that *Hobby Lobby* counsels against a stark distinction between nonprofit and for-profit corporations. For example, a religious legal organization commented: "[A]s the Supreme Court noted in *Hobby Lobby*, a for-profit corporation substantially engaged in an exchange of goods and services can exercise religion."

Other commenters opposed the proposal not to make nonprofit status a determinative factor. For example, an anti-bigotry religious organization emphasized that Judge O'Scannlain's concurrence in *World Vision* focused on whether the employer's purpose is non-pecuniary, while Judge Kleinfeld's analysis focused on whether the employer provided services at no cost or for a nominal fee. The organization criticized the proposed rule for rejecting both factors. Commenters asserted that OFCCP's proposal not to make nonprofit status a determinative factor would unacceptably broaden the exemption. A religious organization asserted that the proposed rule would allow for-profit corporations to exploit faith in order to justify discrimination, and that the spirit of religious institutions would be diminished if houses of worship were placed in the same category as for-profit institutions.

Some commenters stated that the proposal would allow discrimination by contractors that should not be entitled to the religious exemption. A labor organization commented that even for-profit companies, whose primary purpose is, by definition, to make a profit, could protect themselves from discrimination claims by claiming to have a religious purpose.

Some commenters stated that the proposed removal of the nonprofit requirement was inconsistent with Title VII case law interpreting the same term, including Judge O'Scannlain's own test. Many of these commenters stated that OFCCP had not cited any Title VII cases in which a court had found a for-profit entity to qualify for the religious exemption. For example, a contractor association commented that Judge O'Scannlain considered non-profit status to be an "especially significant" consideration, which was consistent with the reasoning in numerous Title VII cases. Some commenters stated that the proposed removal of the nonprofit requirement was inconsistent with guidance from the EEOC or was a reversal of OFCCP's previous position. Many of these commenters stated that OFCCP gave inadequate reasons for the deviation. For example, a group of state attorneys general commented that the proposed reversal was not justified by the executive branch's contracting authority, which "must be exercised within the boundaries of Title VII's prohibitions." A contractor association commented that omitting a legal requirement because it could be difficult to apply does not align with OFCCP's stated commitment to follow the rule of law and to apply Title VII principles.

Some commenters specifically objected to OFCCP's reliance on *Hobby Lobby* as justifying or requiring the proposed removal of the nonprofit status factor. Most of these commenters stated that *Hobby Lobby* was inapplicable because it centered not on the Title VII religious exemption but on RFRA, specifically on that statute's definition of "person." For example, a civil liberties organization commented that the Supreme Court in *Hobby Lobby* focused its analysis on the definition of the word "person" in RFRA and offered no insight into the definition or scope of the phrase "religious corporation" in the religious exemption context. A gender equality advocacy organization commented that RFRA goes far beyond what is constitutionally required by subjecting any laws burdening religious exercise to strict scrutiny and, thus, the question of RFRA's application should not dictate a company's eligibility for a Title VII religious exemption.

Some commenters also stated that *Hobby Lobby* has not been applied in subsequent Title VII religious exemption cases. These commenters typically cited *Garcia v. Salvation Army*, 918 F.3d 997 (9th Cir. 2019). In that case, the Ninth Circuit found that the Salvation Army satisfied the requirement that it "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts" both because it is a nonprofit (Judge O'Scannlain's approach) and because it gives away or charges only nominal fees for its services (Judge Kleinfeld's approach). *Id.* at 1004.

In addition to distinguishing *Hobby Lobby* on the ground that it addressed RFRA and not the Title VII religious exemption, commenters also stated that key limitations present in *Hobby Lobby* were not reflected in OFCCP's proposal. In particular, they stated, *Hobby Lobby* held that only *closely held* for-profit corporations could invoke RFRA, but OFCCP's proposal included no such limitation, and the Court in *Hobby Lobby* considered harms an exemption would impose on third parties, but OFCCP did not consider third-party harms the commenters believed the proposal would cause. Commenters also stated that *Hobby Lobby* did not address government contractors. For example, a women's rights advocacy organization commented that, while *Hobby Lobby* dealt with a general requirement on all non-grandfathered insurance plans, the proposed rule deals with businesses that willingly enter contracts with the federal government. According to the organization, "[a]n entity does not have

¹⁵ In the next few paragraphs, this preamble explains further why and how OFCCP is limiting the exemption to nonprofit organizations in most circumstances.

a right to a contract that it is unwilling to perform.”

In consideration of these comments, OFCCP is revising the definition of *Religious corporation, association, educational institution, or society* in the final rule. OFCCP recognizes that, as Judge O’Scannlain observed, nonprofit status is “strong evidence” that an organization has a nonpecuniary purpose. *World Vision*, 633 F.3d at 734–35 (O’Scannlain, J., concurring); *see also Amos*, 483 U.S. at 344 (1987) (Brennan, J., concurring). Nonprofit status also allows a determination of religious purpose to be made objectively and without engaging in a more searching inquiry. With that said, OFCCP recognizes that, in certain rare circumstances, an organization might be for-profit yet still be fairly considered a religious rather than secular organization.

Thus the final rule adds a fourth requirement: That the contractor either “(A) operates on a not-for-profit basis; or (B) presents other strong evidence that it possesses a substantial religious purpose.” Paragraph (A) has been written in a manner that covers federal contractors that do not have formal tax-exempt status under 26 U.S.C. 501(c)(3) but operate in substantial compliance with 501(c)(3)’s requirements. *See World Vision*, 633 F.3d at 745 (Kleinfeld, J., concurring) (noting the need for a small adjustment to the test to cover small groups that do not formally incorporate). Paragraph (A) meets the goals of certainty and clarity in contracting for what OFCCP believes will be the vast majority of contractors interested in the exemption. Paragraph (B) is a helpful contingency for situations where a contractor may not satisfy this prong of the test but in all fairness should be considered a qualifying religious organization. This alternative test is consistent with *World Vision* and the more recent Ninth Circuit case highlighted by commenters, *Salvation Army*, 918 F.3d 997. *World Vision*’s brief per curiam opinion stated that an organization is eligible for the exemption “at least” when it meets the four factors. 633 F.3d at 724 (per curiam) (emphasis added). Judge O’Scannlain’s opinion stated that other factors may be relevant in other cases. *See id.* at 729–30 (O’Scannlain, J., concurring). In *Salvation Army*, the court applied an “all significant religious and secular characteristics” standard as well as noted that the *Salvation Army* satisfied the *World Vision* test. *See Salvation Army*, 918 F.3d at 1003–04.

In his *World Vision* concurrence, Judge O’Scannlain described nonprofit

status as “especially significant” because of its evidentiary value. He wrote that nonprofit status “bolsters a claim that [an organization’s] purpose is nonpecuniary,” “provides strong evidence that its purpose is purely nonpecuniary,” “makes colorable a claim that it is not purely secular in orientation,” and “bolster[s] a ‘contention that an entity is not operated simply in order to generate revenues . . . , but that the activities themselves are infused with a religious purpose.’” *World Vision*, 633 F.3d at 734–35 (O’Scannlain, J., concurring) (quoting *Amos*, 483 U.S. at 344 (Brennan, J., concurring)).¹⁶ OFCCP agrees with these observations, which is why it has adopted nonprofit status as a sufficient means for satisfying this factor of the test.

There may be rare situations, however, where an organization is legally constituted as a for-profit enterprise yet infused with religious purpose. In those situations, the organization would need to come forward with strong evidence that its goals are religious rather than pecuniary—evidence comparable in probative weight to nonprofit status. OFCCP has added examples within the regulatory definition of *Religious corporation, association, educational institution, or society* to illustrate some of these rare instances, including a contractor that provides chaplaincy services to the military and a kosher caterer that supplies meals for federal events. OFCCP doubts that an entity that is not closely held could ever satisfy this requirement, especially since such an entity would have multiple and disparate shareholders. *See Hobby Lobby*, 573 U.S. at 717 (“[T]he idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”). OFCCP likewise doubts that an entity could qualify if it predominantly provides undifferentiated marketplace goods or services that are not associated with an expressly religious purpose or a charitable, educational, humanitarian, or other eleemosynary purpose.

OFCCP has also modified the NPRM’s definition of *Religious corporation, association, educational institution, or society* to reflect these considerations. Unlike the proposed rule, which stated only that a religious organization need not be nonprofit, the final rule now

¹⁶ These varying statements span the range from “not purely secular” to “purely nonpecuniary.” OFCCP’s regulatory text attempts to strike a balance down the middle, using the phrase “possesses a substantial religious purpose.”

requires that the organization, if for-profit, present “other strong evidence that it possesses a substantial religious purpose.” This formulation attempts to synthesize the various statements in *World Vision* and *Amos* as to the quantum of religious purpose an organization must have, and recognizes their reasoning that nonprofit status serves as a valuable evidentiary proxy for religious purpose. Thus the final rule requires a for-profit organization to put forward strong evidence to demonstrate that it does indeed have a substantial religious commitment rather than serve solely as a vehicle to facilitate profit-making or other secular ends. This formulation recognizes that an organization may have more than one purpose, but its religious one must be substantial. It would not be enough, for instance, that an organization feature a scriptural quote in marketing materials or make a brief reference to religious values on its “About Us” web page. The examples in the regulatory text may be instructive to readers on this point.

This new regulatory text is also consistent with *Hobby Lobby*’s observation that a corporation need not choose absolutely between financial objectives and other objectives:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. . . . If for-profit corporations may pursue such worthy objectives [as supporting charitable causes, environmental measures, or working conditions beyond those required by law], there is no apparent reason why they may not further religious objectives as well.

Hobby Lobby Stores, 573 U.S. at 711. OFCCP believes that the approach promulgated here, which has been modified from that in the NPRM, is consistent with Title VII case law. Again, *World Vision* set out a four-factor test that, if satisfied, is sufficient for organizations to qualify for the exemption. But as *Salvation Army* and other cases show, there are other ways to qualify for the exemption. *See Salvation Army*, 918 F.3d 997; *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). In these other cases, nonprofit or for-profit status has been treated as an important factor, but not as dispositive. That is similar to this final rule’s approach.

For the same reason, OFCCP disagrees that its approach is an unjustified change in agency position. Until this rulemaking, OFCCP had not set forth the specific factors it would use to decide which organizations qualify for E.O. 11246’s religious exemption; rather, in

withdrawn subregulatory guidance OFCCP stated that it would follow EEOC and court interpretations of Title VII and apply an all-facts-and-circumstances test. To the extent that withdrawn statement could be considered the position of the agency, for the reasons stated in this preamble, OFCCP now believes such a test is too indeterminate and involves potential legal infirmities, and that a more-defined test will give better clarity to contractors and foster a broader pool of potential contractors and subcontractors. It is certainly true, as commenters asserted, that OFCCP's general position is to follow Title VII principles when interpreting E.O. 11246. For the reasons stated in this preamble OFCCP believes its approach is consistent with Title VII principles and Supreme Court case law, and better furthers the goals of this rulemaking. The minor differences between the EEOC's approach to determining which organizations can claim the exemption and OFCCP's definition of *Religious corporation, association, educational institution, or society* are addressed later in this preamble.

OFCCP also disagrees with commenters who argued that *Hobby Lobby* is irrelevant to this issue. Certainly *Hobby Lobby* was not a Title VII case. But *Hobby Lobby's* holding that for-profit corporations qualify as "persons" who can exercise religion under RFRA is hard to square with a rule that a for-profit entity can never be a religious organization eligible for E.O. 11246's religious exemption. And much of its reasoning has broader implications. The Supreme Court observed that furthering the religious freedom of corporations, whether for-profit or nonprofit, furthers individual religious freedom. *See Hobby Lobby*, 573 U.S. at 707. The Supreme Court found no reason to distinguish between for-profit sole proprietorships—which had brought Free Exercise claims before the Supreme Court in earlier cases—and for-profit closely held corporations. *See id.* at 709–10. And as just stated, the Supreme Court noted that every U.S. jurisdiction permits corporations to be formed "for any lawful purpose or business," *id.* at 711 (internal quotation marks omitted), including a religious one, *see id.* at 710–11.

OFCCP is required to give some consideration to that language in formulating its own test here. If for-profit corporations can exercise religion and further religious objectives as well as pecuniary ones, then OFCCP should consider carefully whether they should be categorically excluded from qualification as religious organizations

under the religious exemption. *Hobby Lobby* does not demand a result one way or the other on that issue, but OFCCP has found the case to be an important data point in support of its approach here.

Regarding commenters' concerns that a removal of the nonprofit requirement would unacceptably broaden the exemption, OFCCP has revised the regulatory text as described above. OFCCP does not anticipate many for-profit organizations seeking to qualify for the exemption, and those that do will need to satisfy the other three prongs—which themselves contain significant evidentiary requirements—plus provide strong evidence of their religious nature. OFCCP believes this test will ensure that only bona fide religious organizations will qualify.

Finally, regarding comments about so-called third-party harms, OFCCP recognizes that *Cutter v. Wilkinson* stated that government must adequately account for accommodations' burdens on others. 544 U.S. 709, 720 (2005). OFCCP believes it has adequately accounted for any burdens on others that this rule may cause, and on balance believes that the vindication of the law's religious protections, the need for clarity in this area of contracting, and the potential expansion of the government's contracting pool justify any burdens on third parties. *See infra* section III.B.5.

Further, under controlling Supreme Court precedent, the Establishment Clause allows accommodations that remove a burden of government rules from religious organizations, reduce the chilling on religious conduct, or reduce government entanglement. *See Amos*, 483 U.S. at 334–39. Any third party burdens that might result from such accommodations are attributable to the organization that benefits from the accommodation, not to the government, and, as a result, do not violate the Establishment Clause. *Id.* at 337 n.15. In the *Sherbert* line of Free Exercise Clause cases that later became the basis of RFRA, dissents and concurrences routinely pointed to such burdens on third parties but did not persuade the majorities of any Establishment Clause violation.¹⁷

¹⁷ *See, e.g., Thomas*, 450 U.S. at 723 n.1 (Rehnquist, J., dissenting) (citing several burdens on the system and other beneficiaries, including that "[w]e could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted"); *Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972) (White, J., concurring) (outlining the state's legitimate interest in educating Amish children, especially ones that leave their community but finding the evidence of harm insufficient); *Yoder*, 406 U.S. at 245 (Douglas, J., dissenting) (arguing

The Supreme Court has applied this principle to allow accommodations that litigants claimed caused significant third-party harms. For example, the Supreme Court upheld the Title VII exemption for religious employers—discussed in Section 8—despite the alleged significant harms of expressly permitting discrimination against employees on the basis of religion. *See Tex. Monthly*, 489 U.S. 1, 18 n.8 (1989) (citing *Amos*). This is consistent with *Hobby Lobby*, which expressly held that a burden lawfully may be removed from a religious organization even if it allows such a religious objector to withhold a benefit from third parties. *Hobby Lobby*, 573 U.S. at 729 n.37 ("Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals."). Ultimately, government action that removes such a benefit merely leaves the third party in the same position in which it would have been had government not regulated the religious objector in the first place. Otherwise, any accommodation could be framed as burdening a third party. That would "render[] RFRA meaningless." *Hobby Lobby*, 573 U.S. at 729 n.37. "[F]or example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants)." *Id.*; *see also* Attorney General's Memorandum, Principle 15, 82 FR at 49670.

Finally, OFCCP views these comments as addressed more to the religious exemption itself, which is not at issue here, than to this rule. Congress decided in enacting Title VII, and the President decided in amending E.O. 11246, that preserving the integrity of religious organizations merited an exemption from the religious-neutrality requirements that would otherwise apply to their employees. OFCCP does not and could not question those judgments. Further, insofar as commenters argued that the test expands the number of contractors that might qualify for the exemption, that fact alone does not show any third-party harm. Indeed, among the rule's intended purposes is expanding the pool of

that the decision "imperiled" the "future" of the Amish children, not their parents).

contractors while avoiding religious entanglement. No contractor is compelled to seek the exemption, and no contractor so exempted is compelled by receipt of the exemption to take any particular employment action. *See Amos*, 337 n.15. To the contrary, the Title VII case law confirms that religious employers have flexibility to accommodate employees' religious preferences if they so choose. *See Kennedy*, 657 F.3d at 194. Additionally, OFCCP discusses below, regarding the scope of the exemption, how this rule interacts with other protected classes and the proper balance between employers' and employees' freedoms and rights. OFCCP believes it has provided an accommodation that reasonably addresses these interests.

g. Other Features

The final rule retains two proposed non-determinative features in the definition of *Religious corporation, association, educational institution, or society*. Those are the statements that the organization "may or may not" "have a mosque, church, synagogue, temple, or other house of worship" or "be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition." With regard to these features, some commenters expressed support, and other commenters expressed opposition. For example, one religious education association commented, in support of the absence of a requirement that the contractor "[h]ave a mosque, church, synagogue, temple, or other house of worship" that religious schools that are controlled by a body of religious leaders directly connected to the school are no less "controlled by a religious organization" than are schools controlled by hierarchical religious denominations. OFCCP continues to believe that requiring these features could lead the agency to discriminate among religions, which could violate the First Amendment's Establishment Clause. *See World Vision*, 633 F.3d at 732 & n.9 (O'Scannlain, J., concurring). For these reasons and the reasons described in the preamble to the proposed rule, *see* 84 FR at 41684, OFCCP agrees with the commenters who stated that it is appropriate not to require that contractors have these features to be deemed religious.

3. Definition of Exercise of Religion

OFCCP proposed to define *Exercise of religion* as the term is defined for purposes of RFRA. RFRA, in 42 U.S.C. 2000bb-2(4), defines "exercise of religion" to mean "religious exercise" as

defined in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc-5(7). RLUIPA, in turn, defines "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." This definition is well-established and prevents problematic inquiries into the "centrality" of a religious practice, which are discussed later in this preamble. However, the phrase "exercise of religion" in the proposed rule appeared only as part of the proposed definition of *Religious corporation, association, educational institution, or society*. That definition has been changed to adhere more closely to Judge O'Scannlain's concurrence in *World Vision*, and the words "exercise of religion" no longer appear in that prong of the definition. Thus there is no need for regulatory text to define them. With that said, OFCCP will look to general principles of First Amendment law and the RFRA-RLUIPA definition of "exercise of religion" when assessing whether an organization is engaging "in activity consistent with, and in furtherance of," its religious purpose, and when assessing whether its employment action has a religious basis. Therefore, OFCCP addresses below the comments received on the proposed definition of *Exercise of religion*.

Several commenters generally approved of the definition for the reasons stated in the NPRM, while others generally opposed the proposed definition. Those generally opposed asserted that RFRA was not a relevant authority given that it is a different statute, that the borrowed provision was vague and did not provide clarity but rather represented an attempt to "create new law," and that the breadth of the definition did not provide "guardrails for the manner in which employers can require their employees to adhere to certain principles." Others commenters raised more specific issues. A group of state attorneys' general noted that the broad definition of religious exercise in RFRA is moderated by its substantial burden requirement, which the proposed definition did not include. Others noted issues with the term in the context of the "engages in" language directly preceding it; some believed the two in tandem were vague and overbroad, while one commenter sought specific guidance in the final rule that "religious speech" could be an exercise of religion.

OFCCP has considered these comments and continues to believe that the RFRA-RLUIPA definition of "exercise of religion" is relevant in this context, although, for the reasons stated

above, there is no need for the final rule to define the term. RFRA and RLUIPA are well-established laws regarding religious freedom that are broadly applicable, and they provide a familiar framework that will assist OFCCP in assessing both whether a contractor is engaging "in activity consistent with, and in furtherance of," its religious purpose and whether its employment action has a religious basis.

4. Definition of Sincere

The principles discussed above with regard to the definition of *Exercise of religion* are incorporated in the definition of *Sincere* that OFCCP proposed. In line with court precedent and OFCCP's principles, the critical inquiry for OFCCP is whether a particular employment decision was in fact a sincere exercise of religion. Consistent with that inquiry, and for the reasons explained above, the final rule's definition of *Particular religion* specifies that the religious tenets the contractor applies to its employees must be "sincere." OFCCP, like courts, "merely asks whether a sincerely held religious belief actually motivated the institution's actions." *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 330 (3d Cir. 1993). The religious organization's burden "to explain is considerably lighter than in a non-religious employer case," since the organization, "at most, is called upon to explain the application of its own doctrines." *Id.* "Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim." *Id.*; *see United States v. Seeger*, 380 U.S. 163, 185 (1965) (holding whether a belief is "truly held" is "a question of fact"). The sincerity of religious exercise is often undisputed or stipulated. *See, e.g., Hobby Lobby*, 573 U.S. at 717 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs."); *Holt*, 574 U.S. at 361 ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.").

Further, as the Supreme Court has repeatedly counseled, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (quoting *Thomas*,

450 U.S. at 714) (internal quotation marks omitted); *see also, e.g., United States v. Ballard*, 322 U.S. 78, 86 (1944) (“[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”). To merit protection, religious beliefs must simply be “sincerely held.” *E.g., Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989); *Seeger*, 380 U.S. at 185. Courts have appropriately relied on the “sincerely held” standard when evaluating religious discrimination claims in the Title VII context. *See, e.g., Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481–82 (2d Cir. 1985); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978). In such cases, a court must “vigilantly separate the issue of sincerity from the factfinder’s perception of the religious nature of the [employee’s] beliefs.” *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 57 (1st Cir. 2002) (alteration in original) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation marks omitted).

Some commenters opposed requiring only that exercise of religion be “sincere,” which they characterized as broadening the exemption. They warned that this expands exercise of religion beyond its current meaning and that sincerity cannot be reasonably applied. For example, a labor union stated that “sincerity” is not a concept that can sensibly be applied to organizations, much less to for-profit businesses that would be included in the scope of the religious exemption under the Proposed Rule. A group of state attorneys general commented that, by requiring only sincerity, OFCCP “seeks to expand RFRA’s already broad definition of ‘exercise of religion.’” An individual commenter wrote that the proposal would grant large for-profit government contractors a hiring exemption as long as they could articulate any strongly held belief.

Other commenters expressed support for a sincerity test. For example, a religious liberties legal organization wrote: “Attempts to use religion to hide discriminatory intent are generally not successful.” OFCCP agrees with these commenters. Other commenters also expressed general support for the proposed definition, stating that it will help ensure that important protections against discrimination remain in place while at the same time preventing government overreach and protecting religious practice. For instance, the same religious liberties legal organization commented that legal

precedent regarding sincerity and the compelling government interest in preventing discrimination will survive without excessive government involvement.

Many other commenters opposed the proposed, arguing that it would not require entities to be internally consistent in applying their self-proclaimed religious tenets to various groups. For instance, a group of U.S. Senators asserted that the proposed definition “does not require consistency in the application of policy based upon religious tenets” such that an entity opposed to body modification, for instance, could ignore tenets regarding tattoos but fire a transgender worker for seeking health care without triggering scrutiny. An LGBT rights advocacy organization echoed this concern. Some commenters also opposed OFCCP’s statement that “the sincerity of religious exercise is often undisputed or stipulated” because, they stated, it raised concerns regarding the depth of OFCCP’s inquiry under the proposed definition. A state civil rights organization commented, for instance, that this portion of the preamble seemed to signal that OFCCP will not inquire about sincerity, despite the fact that whether a belief is sincerely held can only be determined by weighing the strength of evidence. Likewise, an organization that advocates separation of church and state commented that the preamble’s discussion, particularly its “equivocal views” on policies aimed at determining the sincerity of an adverse employment action, creates uncertainty as to whether OFCCP will actually weigh factors intended to determine sincerity. An LGBT rights advocacy organization expressed substantially identical concerns.

As noted in the NPRM, in assessing sincerity, OFCCP will take into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. *See Kennedy*, 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to “consider some attempt at compromise”); *LeBoon*, 503 F.3d at 229 (“[R]eligious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection.”); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 199–200 (11th Cir. 1997). But despite commenters’ focus on the need for “internal consistency” in religious organizations’ doctrine—such as a rule that if tattoos are permitted, transgender medical procedures must be as well—

rather than consistency across similarly situated employees, OFCCP cannot assess the “relative severity of [religious] offenses” or otherwise weigh doctrinal matters, for that would “violate the First Amendment.” *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 139 (3d Cir. 2006).

OFCCP will also evaluate any evidence that indicates an insincere sham, such as acting “in a manner inconsistent with that belief” or “evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.” *Philbrook*, 757 F.2d at 482 (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981)) (internal quotation marks omitted); *cf., e.g., Hobby Lobby*, 573 U.S. at 717 n.28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”); *United States v. Quaintance*, 608 F.3d 717, 724 (10th Cir. 2010) (Gorsuch, J.) (“[T]he record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front . . .”). OFCCP’s application of the religious exemption is described in more detail below.

Despite these assurances, several commenters who opposed the proposed definition said that it is vague or unworkable in practice. For instance, a group of state attorneys general expressed concern that the definition may increase confusion among contractors seeking to claim religious exemptions because the question of how a for-profit organization can demonstrate the sincerity of its religious beliefs is largely untested. Thus, according to the attorneys general, contractors will have to contend with a high level of uncertainty in addition to their obligations under Title VII. A religious legal organization that otherwise supported the proposed rule highlighted the fact that the proposed definition of *sincere* is “simply what courts determine ‘when ascertaining the sincerity of a party’s religious exercise or belief.’” The commenter expressed skepticism that courts could arrive at a concise and uniform test for the meaning of the term without more specific guidance from OFCCP.

OFCCP disagrees that ascertaining the sincerity of an organization’s religious exercise, even a for-profit one, will foster confusion or that it presents insurmountable practical difficulties. Religious sincerity is a familiar and

well-developed legal principle. It has been applied in regards to a religious organization's decisions under the Title VII religious exemption. *See, e.g., Little v. Wuerl*, 929 F.2d 944, 946 (3d Cir. 1991) ("Little does not challenge the sincerity of the Parish's asserted religious doctrine."). And the Supreme Court rejected a similar argument "that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation." *Hobby Lobby*, 573 U.S. at 717. Here, as there, questions of corporate religious beliefs are likely to arise only for closely held corporations, and "[s]tate corporate law provides a ready means for resolving any conflicts" *Id.* at 718.

OFCCP also acknowledges the constitutional and prudential limitations on its inquiry that may come into play when religious matters are involved. OFCCP will not compare religious doctrines or practices in evaluating sincerity. *See, e.g., Curay-Cramer*, 450 F.3d at 139 ("[A]ssess[ing] the relative severity of [religious] offenses . . . would violate the First Amendment."); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 626 (6th Cir. 2000) ("[T]he First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices."). Nor will OFCCP require contractors to adhere to strict, uniform procedures to demonstrate sincerity. *See Kennedy*, 657 F.3d at 194; *LeBoon*, 503 F.3d at 229. And where "it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision," then OFCCP will apply the E.O. 11246 religious exemption. *Curay-Cramer*, 450 F.3d at 141.

Some commenters objected to OFCCP's stated commitment to applying the ministerial exception. For instance, a city public advocate observed that OFCCP's claim that it will evaluate any factors that indicate insincerity is undermined by the proposed rule's commitment to the ministerial exception. Nevertheless, OFCCP respects and must apply the ministerial exception. The ministerial exception is an application of the Establishment and Free Exercise clauses of the First Amendment. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 189–90 (finding that the ministerial exception bars "an employment discrimination suit brought on behalf of a minister" and observing that the exception "is not limited to the

head of a religious congregation," nor subject to "a rigid formula for deciding when an employee qualifies as a minister").

For the reasons described above and in the NPRM, and considering the comments received, OFCCP finalizes the proposed definition without modification.

5. Definition of Particular Religion

In the NPRM, OFCCP proposed to define *Particular religion* to clarify that the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. The NPRM explained that this definition flows directly from the broad definition of *Religion*, discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer, which would clarify past statements from OFCCP suggesting that the exemption was restricted solely to hiring coreligionists. The NPRM stated that the proposed definition was consistent with Title VII case law as well as Supreme Court case law holding that the government burdens religious exercise when it conditions benefits on the surrender of religious identity.

The NPRM noted that the religious exemption does not permit religious employers to discriminate on other protected bases. The NPRM described how courts have used a variety of approaches and doctrines to distinguish claims of religious discrimination from other claims of discrimination while avoiding entangling inquiries under the First Amendment, and that OFCCP proposed to do the same. *See* 84 FR at 41679–81.

In a later part of the NPRM describing the proposed terms *Exercise of religion* and *Sincere*, OFCCP gave additional detail on its proposed approach for applying the religious exemption. The NPRM noted that sincerity is the "touchstone" of religious exercise and that OFCCP would take into account all relevant facts when determining whether a sincere religious belief actually motivated an employment decision. The NPRM also proposed applying a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion. *See* 84 FR at 41684–85.

OFCCP received comments on all these aspects of its proposal. In response to the comments, the agency has made

some adjustments in its explanation regarding how it views and will apply this definition. These include changing to a motivating factor standard of causation and providing additional clarification, particularly on the interaction of the religious exemption with other protected categories, including the importance of RFRA. As to the regulatory text, the word "sincere" has been inserted into the phrase "acceptance of or adherence to *sincere* religious tenets as understood by the employer as a condition of employment," to make clear both the requirement of sincerity and, by reference to the definition of *Sincere*, how sincerity is tested. Otherwise the definition is being finalized as proposed.

Insofar as OFCCP's view expressed here and in the proposed rule is a change from its prior position as to the definition of *Particular religion* under the exemption and the permissible practices of contractors and subcontractors who qualify as religious organizations, OFCCP believes the change is justified for all the reasons stated in the proposed rule and directly below. A broader view of the religious exemption is also consistent with one of OFCCP's primary goals in this rulemaking, which is to increase economy and efficiency in government contracting by providing for a broader pool of government contractors and subcontractors. Issues specific to the EEOC's view on this matter are discussed further in a separate part of this preamble.

a. Burdens on Religious Organizations in Contracting

As described in the NPRM, OFCCP's approach here is consistent with Supreme Court decisions emphasizing that "condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (holding the government burdens religious exercise when it so conditions "a benefit or privilege," "eligibility for office," "a gratuitous benefit," or the ability "to compete with secular organizations for a grant" (quoted sources omitted)); *accord* E.O. 13831 § 1 ("The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by

law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities.”).

A few commenters praised OFCCP’s reliance on *Trinity Lutheran* to establish the principle that benefits cannot be conditioned on surrendering religious status. For example, a religious public policy women’s organization stated that no one should be forced to abandon their faith when operating their business or participating in government programs. Similarly, a religious liberty legal organization commented that religious contractors should be allowed to serve on equal terms as all other contractors, without having to compromise their faith-based identities.

A few commenters stated that *Trinity Lutheran* and other Supreme Court cases discussed in the preamble to the NPRM do not support or require the proposed definition. For example, an organization that advocates separation of church and state commented that religious organizations are already eligible to compete for government contracts, which is all that is required by *Trinity Lutheran*. In addition, a religious organization commented that “the rule violates the Establishment Clause of the First Amendment by funding positions which require specific religious beliefs and customs.” OFCCP believes, however, that its interpretation of the scope of the religious exemption is consistent with the principles of religious freedom articulated in *Trinity Lutheran* and other Supreme Court cases.

First, restricting religious organizations’ ability to employ those aligned with their mission burdens their religious exercise, even when those employees do not engage in expressly religious activity. As the Supreme Court recognized in *Amos*, the religious exemption’s protection for all activities of religious organizations alleviates the burden of government interference with those religious organizations’ missions. See *Amos*, 483 U.S. at 336. And as the Department of Justice’s Office of Legal Counsel has concluded:

[T]he Court’s opinion in *Amos*, together with Justice Brennan’s concurring opinion in the case, indicates that prohibiting religious organizations from hiring only coreligionists can “‘impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.’” The .” Mem. for Brett Kavanaugh, Assoc. Counsel to the Pres., from Sheldon T. Bradshaw, Deputy Ass’t Att’y Gen., Office of Legal Counsel further explained: *Re: Section 1994A (Charitable Choice) of H.R. 7, The Community Solutions Act* at 4 (June 25, 2001). . . . Many religious organizations and associations engage in

extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular—in the sense that it does not include religious teaching, proselytizing, prayer or ritual—the religious organization’s performance of such functions is likely to be “infused with a religious purpose.” *Amos*, 483 U.S. at 342 (Brennan, J., concurring). And churches and other religious entities “often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.” *Id.* at 344 (footnote omitted). In other words, the provision of “secular” social services and charitable works that do not involve “explicitly religious content” and are not “designed to inculcate the views of a particular religious faith,” *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), nevertheless may well be “religiously inspired,” *id.*, and play an important part in the “furtherance of an organization’s religious mission.” *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

31 O.L.C. 162, 172 172–73 (2007)

Second, this burden exists even when not imposed directly. The Office of Legal Counsel, in the same opinion, further recognized that a burden on religious organizations’ free exercise of religion can occur not only through direct imposition of requirements but through conditions on grants or other benefits, citing many of the same cases cited in *Trinity Lutheran* for that proposition. See 31 O.L.C. at 174–75; *Trinity Lutheran*, 137 S. Ct. at 2022. Those concerns about burdening religious exercise through conditions naturally extend to conditions on contracts as well. See Office of the Att’y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 2, 6, 8, 14a–16a (Oct. 6, 2017), available at www.justice.gov/opa/press-release/file/1001891/download. Third, the definition of *Particular religion* promulgated here attempts to alleviate that burden by permissibly accommodating religious organizations. “[T]he government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause. . . . There is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’” *Amos*, 483 U.S. at 344 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)). See also E.O. 13279 § 4; 68 FR at 56393 (codified at 41 CFR 60–1.5(a)(5)). This rule relieves religious organizations of government interference by permitting them to take into account their employees’ particular religion—including acceptance of or

adherence to religious tenets—to ensure their employees are committed to the religious organization. In some instances, as described below, RFRA may also come into play to require accommodations.

Regarding the comment that the rule violates the Establishment Clause by funding positions that require specific religious beliefs or customs, that is a criticism of the E.O. 11246 religious exemption itself, which has been part of federal law for nearly twenty years and is not at issue in this rulemaking. This is addressed more below.

b. The Exemption’s Scope: Coreligionists

As explained in the NPRM, the religious exemption is not restricted to a purely denominational preference. The religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. This definition flows directly from the broad definition of *Religion*, discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer. It is also consistent with Title VII case law holding that “the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” *Little*, 929 F.2d at 951; see also, e.g., *Kennedy*, 657 F.3d at 194 (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization’s ‘religious activities.’” (quoting *Little*, 929 F.2d at 951)); *Hall*, 215 F.3d at 624 (“The decision to employ individuals ‘of a particular religion’ under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.” (citing, *inter alia*, *Little*, 929 F.2d at 951)); *Killinger*, 113 F.3d at 200 (“[T]he exemption [in 42 U.S.C. 2000e–1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer’s when the work is connected with carrying out the institution’s activities.”).

This approach is also consistent with Supreme Court decisions emphasizing that “condition[ing] the availability of benefits upon a recipient’s willingness

to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.” *Trinity Lutheran*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel*, 435 U.S. at 626 (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (holding the government burdens religious exercise when it so conditions “a benefit or privilege,” “eligibility for office,” “a gratuitous benefit,” or the ability “to compete with secular organizations for a grant” (quoted sources omitted)); *accord* E.O. 13831 § 1 (“The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities.”).

OFCCP believes this clarification will assist contractors that have looked for guidance on the religious exemption in OFCCP’s past statements. These past statements may have suggested that the exemption permits qualifying organizations only to prefer members of their own faith in their employment practices. *See, e.g.*, OFCCP, Compliance Webinar (Mar. 25, 2015), available at https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf (“This exemption allows religious organizations to hire only members of their own faith.”). OFCCP based such statements on guidance from the EEOC, the agency primarily responsible for enforcing Title VII. *See, e.g.*, EEOC, EEOC Compliance Manual § 12–I.C.1 (July 22, 2008) (“Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.”). However, with this final rule, OFCCP is clarifying that it applies the principles discussed above, permitting qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions. The case law makes clear that qualifying employers “need not enforce an across-the-board policy of hiring only coreligionists.” *LeBoon*, 503 F.3d at 230; *Killinger*, 113 F.3d at 199–200 (“We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption.”).

Some commenters expressed support for OFCCP’s proposal to extend the definition beyond preferring coreligionists, which they viewed as

overly narrow, to include acceptance of or adherence to religious tenets as a condition of employment. Many of these commenters agreed with OFCCP that the definition as proposed was necessary to ensure that religious organizations could carry out their missions without losing their identities. For example, a religious school association commented that being able to ensure that applicants and employees concur with its schools’ religion-based conduct expectations is essential to fulfilling the schools’ religious mission. Similarly, a religious civil rights organization commented that the entire “raison d’être” of religious non-profits would be undermined if employees could subvert their religious missions. Other commenters, including a religious medical organization, a religious liberty coalition, and a state religious public policy organization, echoed these sentiments in support of the proposal. A private religious university further asserted that the proposed definition would increase religious diversity, because its protections are not limited to hiring decisions based on co-religiosity but also allow organizations to hire based on applicants’ support for their religious missions.

Many commenters asserted that the proposed definition conflicts with the EEOC’s interpretation, OFCCP’s previous interpretation, or both. For example, a civil liberties organization commented that the EEOC interprets the text of the Title VII religious exemption to mean that religious organizations may give employment preference to members of their own religion. Several commenters referred to OFCCP’s previous interpretation as reflected in its 2015 answers to FAQs regarding the E.O. 13672 Final Rule.¹⁸ For example, a legal think tank noted that in 2015, OFCCP issued guidance mirroring the EEOC’s interpretation of the Title VII religious exemption and confirming that the plain text of section 204(c) is limited to religious organizations with hiring preferences for coreligionists and to the ministerial exemption. Other commenters, including an LGBT legal services organization, a reproductive rights organization, and a public policy research and advocacy organization, made similar points.

OFCCP appreciates the various comments received on this topic. After careful consideration, OFCCP disagrees with the comments arguing that the religious exemption should extend no

further than a coreligionist preference for several reasons.

First, a coreligionist preference could be construed narrowly, as some commenters seemed to urge, as allowing religious organizations to prefer those who share a religious identity in name but nothing more. OFCCP disagrees that the exemption should be construed to permit religious employers to prefer fellow members of their faith—or people who profess to be members of their faith—but forbid requiring their adherence to that faith’s tenets in word and deed. Religious employers can require more than nominal membership from their employees, as shown by *Amos*, where the plaintiffs were discharged for failing to qualify for a certificate showing that they were members of the employer’s church and met certain standards of religious conduct. *See* 483 U.S. at 330 n.4; *Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791, 796 (D. Utah 1984) (describing plaintiffs’ failure to meet church worthiness requirements), *rev’d*, 483 U.S. 327; *see also Killinger*, 113 F.3d at 198–200 (holding despite plaintiff’s claim that he subscribed to university’s “legitimate religious requirements,” including the requirement to “subscribe to the 1963 Baptist Statement of Faith and Message,” he was permissibly removed from a teaching post in the divinity school “because he did not adhere to and sometime[s] questioned the fundamentalist theology advanced by the [school’s] leadership” (first alteration in original)). Any other course would entangle OFCCP in deciding between competing views of a religion’s requirements—in essence, deciding for example, “who is and who is not a good Catholic.” *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1500 (E.D. Wis. 1986) (holding despite plaintiff’s claim to be Catholic, a Catholic religious university permissibly declined to hire her “because of her perceived hostility to the institutional church and its teachings”), *aff’d in part, vacated in part*, 814 F.2d 1213 (7th Cir. 1987). OFCCP is not permitted to make such determinations. *See Our Lady of Guadalupe*, 140 S. Ct. at 2068–69 (“[D]etermining whether a person is a ‘co-religionist’ will not always be easy. *See* Reply Brief 14 (‘Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?’). Deciding such questions would risk judicial entanglement in religious issues.”); *Hall*, 215 F.3d at 626–27 (“If a particular

¹⁸ These 2015 FAQs are archived at https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

religious community wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory and therefore warrants Title VII liability.” (quoted source omitted); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449–50 (1969) (“Plainly, the First Amendment forbids civil courts from playing such a role [in interpreting particular church doctrines and their importance to the religion].”).

In addition, some commenters argued that the religious exemption might allow religious employers to require faithfulness of a coreligionist employee, but the exemption does not permit them to impose religious requirements on their other employees. OFCCP declines to so narrow its interpretation of the exemption. The exemption was expanded decades ago to include employees engaged not just in the organization’s religious activities, but in any of its activities. And the purpose of the religious exemption is to preserve “the ability of religious organizations to define and carry out their religious missions.” *Amos*, 483 U.S. at 335. As other commenters stated, some religious organizations hire employees outside their faith tradition yet require those employees to follow at least some religious standards in order to preserve the organization’s integrity. Courts have recognized the legitimacy of that view. See *Kennedy*, 657 F.3d at 190–91 (holding a religious nursing-care facility affiliated with the Roman Catholic Church was protected by the religious exemption when it took action against an employee of a different faith who refused to change her own religiously inspired garb); *Little*, 929 F.2d at 951 (“[I]t does not violate Title VII’s prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.” (emphasis added)). This view is also consistent with guidance from the U.S. Department of Justice. See Office of the Att’y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty (Oct. 6, 2017), www.justice.gov/opa/press-release/file/1001891/download (stating that, under the Title VII religious exemption, “a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent

with the precepts of the Lutheran community sponsoring the school”). Beyond compromising the integrity of religious organizations, OFCCP would be wary of drawing a line here between coreligionist employees and other employees for other reasons. As illustrated by the cases declining to decide “who is and who is not a good Catholic,” OFCCP does not believe it should or could in disputed cases decide who is a coreligionist. This would be especially difficult when the employer has no particular denomination, as there would be no simple denominational match between the employer and employee. Cases like *World Vision* and *Little v. Wuerl* show that a religious organization may require that its employees subscribe to certain precepts regardless of their particular religious affiliation, if they have any affiliation at all. OFCCP must, and should, treat these religious organizations equally with those that have a defined denominational membership. See *World Vision*, 633 F.3d at 731 (O’Scannlain, J., concurring).

OFCCP also views an artificial line between coreligionists and non-coreligionists as presenting an unwelcome either-or dilemma for religious organizations. By declining to draw such a line, a religious organization would be permitted to require certain religious practices or conduct from its coreligionist employees, but not from its non-coreligionist employees; yet the religious organization would also be permitted to, for instance, decline to hire or promote that same non-coreligionist altogether. In other words, a religious organization could discriminate against a non-coreligionist altogether in hiring or promotion, but could not instead offer a job or promotion contingent on adherence to certain mission-oriented religious criteria. Religious organizations should be, and under this rule continue to be, permitted to use this middle ground. See *Kennedy*, 657 F.3d at 194.

c. The Exemption’s Scope: Employment Practices

In a related vein, commenters also shared their views on not only which employees should be covered by the exemption, but also which employment practices of religious organizations should be protected by the exemption. Some of these commenters asserted that the proposed definition was too broad. For example, a transgender civil rights organization commented that, because the proposed definition encompasses “all aspects of religious belief,

observance and practice as understood by the employer,” it would permit the subjective viewpoint of the employer to determine what constitutes religion. Similarly, a reproductive rights organization claimed that the proposed rule would expand the scope of the exemption in violation of federal law.

As explained above in the discussion of the definition of *Religion*, OFCCP has chosen a definition that is well-established in federal law, including in the text of Title VII. See 42 U.S.C. 2000e(j). And as explained above in the discussion of the definition of *Religious corporation, association, educational institution, or society*, OFCCP has significant constitutional and practical concerns about substituting its own judgment for a contractor’s view—found to be sincere—that a particular activity, purpose, or belief has religious meaning. It bears repeating: Any other course would risk “[t]he prospect of church and state litigating in court about what does or does not have religious meaning [, which] touches the very core of the constitutional guarantee against religious establishment.” *Cathedral Acad.*, 434 U.S. at 133. OFCCP will refrain from resolving disputes between employers and employees as to what has religious meaning or not, when the employer proves its sincere belief that something does have religious meaning. However, as explained in more detail below, just because an employment practice is religiously motivated does not mean that it is always protected by the exemption.

This leads to a separate set of issues raised by commenters. Many commenters who opposed the proposed definition stated that it is inconsistent with Title VII in one or more respects. For example, a group of state attorneys general stated that the proposed definition is contrary to the text of Title VII and congressional intent. Specifically, the group pointed out that the plain language of the exemption covers only employer preferences based on a “particular religion,” meaning that religious employers cannot broadly discriminate on the basis of religion by, for instance, adopting policies such as “Jews and Muslims Need Not Apply.” Some commenters stated that the proposed definition is unsupported by Title VII case law. For example, a civil liberties organization criticized OFCCP for not citing to court decisions holding that the Title VII exemption is intended to shield employers from all religiously motivated discrimination, as opposed to discrimination that is “on the basis of

religion alone.”¹⁹ A city commented that OFCCP’s reliance on *Little*, 929 F.2d 944; *Kennedy*, 657 F.3d 189; *Hall*, 215 F.3d 618; and *Killinger*, 113 F.3d 196, is misplaced and misleading because, in each of those cases, the courts found that a religious institution with a substantiated religious purpose could discriminate against an employee performing work connected in some manner to the institution’s religious mission.

The NPRM did not suggest that the religious exemption would permit religious organizations to single out other religions for disfavor. No employer OFCCP is aware of holds such an exclusionary policy; no commenter identified such an employer; and such a policy would run contrary to the country’s experience under the Title VII religious exemption, where no litigant to OFCCP’s knowledge has asserted such a policy. Instead, the mine run of cases have involved a church, religious educational institution, or religious nonprofit raising the defense that it is only requiring employees or applicants—whether strictly defined as coreligionists or not²⁰—to follow its own religiously inspired standards of belief or conduct. The exemption historically has been a shield, not a sword, and it remains so under this rule.

OFCCP also believes it has relied properly on cases like *Little* and *Kennedy*. As stated in the NPRM, these cases hold that the religious exemption “includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” *Little*, 929 F.2d at 951; *see also, e.g., Kennedy*, 657 F.3d at 194 (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization’s ‘religious activities.’”) (quoting *Little*, 929 F.2d at 951); *Hall*, 215 F.3d at 624 (“The decision to employ individuals ‘of a particular religion’ under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.” (citing, inter alia, *Little*, 929 F.2d at 951)); *Killinger*, 113 F.3d at 200 (“[T]he exemption [in 42 U.S.C. 2000e–

1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer’s when the work is connected with carrying out the institution’s activities.”); *accord* Att’y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty (Oct. 6, 2017), www.justice.gov/opa/press-release/file/1001891/download (“[R]eligious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations’ religious precepts.”).

These cases were grounded in the basic principle that these religious employment criteria are permitted because they are necessary for the religious organization’s integrity. *See Little*, 929 F.2d at 950 (“[T]he legislative history . . . suggests that the sponsors of the broadened exception were solicitous of religious organizations’ desire to create communities faithful to their religious principles.”); *Kennedy*, 657 F.3d at 193 (finding the religious organization exemption “‘reflect[s] a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention.’” (alteration in original) (quoting *Little*, 929 F.2d at 951)); *Killinger*, 113 F.3d at 201 (“[F]ederal court[s] must give disputes about what particulars should or should not be taught in theology schools a wide-berth. Congress, as we understand it, has told us to do so for purposes of Title VII.”); *Hall*, 215 F.3d at 623 (“In recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions . . . Title VII has expressly exempted religious organizations from the prohibition against discrimination on the basis of religion . . .”). That means that the religious employer must explain how its sincere religious beliefs translate into particular religious requirements for its employees and applicants. *Cf. Geary*, 7 F.3d at 330 (“The institution, at most, is called upon to explain the application of its own doctrines.”). But the exemption does not require the religious employer to further prove that a particular employee or applicant’s adherence to those religious requirements is necessary, in any contested instance, to further the religious organization’s mission. That added burden would be contrary to the 1972 amendment of the Title VII religious exemption, which expanded the exemption from employees who perform work

connected to the organization’s religious activities to employees who perform work connected to any of the organization’s activities. As the Supreme Court observed, this expansion was aimed toward relieving religious organizations of the kind of burden sought by the commenters:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Amos, 483 U.S. at 336

OFCCP shares the same concerns about requiring contractors to justify otherwise-protected employment decisions as additionally furthering the organization’s mission. Difficulties could arise were OFCCP to draw distinctions between religiously motivated employment decisions that further an employer’s religious mission and those that do not. *Amos* observed that difficulty, in which the district court had drawn an at-least questionable distinction between the termination of a truck driver at a church-affiliated workshop (protected) with the termination of a building engineer at a church-affiliated gymnasium (not protected). *See id.* at 330, 333 n.13, 336 n.14. The exemption does not require such hair-splitting—indeed, it appears to forbid it—and OFCCP sees no useful reason to attempt drawing such distinctions. *See also Little*, 929 F.2d at 951 (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization’s ‘religious activities.’”).

d. The Exemption’s Scope: Other Protected Bases

i. Comments

As is made clear by the text of section 204(c) of E.O. 11246 and the corresponding regulation at 41 CFR 60–1.5(a)(5), the religious exemption itself does not exempt or excuse a contractor from complying with other applicable requirements. *See* E.O. 11246 § 204(c) (“Such [religious] contractors and subcontractors are not exempted or excused from complying with other requirements contained in this Order.”); 41 CFR 60–1.5(a)(5) (same). Thus, religious employers are not exempted from E.O. 11246’s requirements regarding antidiscrimination and affirmative action, generally speaking;

¹⁹ This point is addressed more fulsomely in the next section regarding E.O. 11246’s other protected bases.

²⁰ For the reasons discussed earlier, OFCCP does not believe restricting the exemption to a purely coreligionist preference is required or the most reasonable approach.

notices to applicants, employees, and labor unions; compliance with OFCCP's implementing regulations; the furnishing of reports and records to the government; and flow-down clauses to subcontractors. See E.O. 11246 §§ 202–203.

Although Title VII does not contain a corresponding proviso, courts have generally interpreted the Title VII religious exemption to be similarly precise, so that religious employers are not exempted from Title VII's other provisions protecting employees. See, e.g., *Kennedy*, 657 F.3d at 192; *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); cf. *Hobby Lobby*, 573 U.S. at 733 (rejecting “the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . .”).

Many commenters nevertheless assumed that OFCCP would apply the proposed definition to allow religious contractors to discriminate on bases other than religion. Most of these commenters stated that doing so would be contrary to E.O. 11246, and they argued that OFCCP lacks authority to expand the existing exemption or grant any new exemption. For example, a civil liberties organization commented that the preamble indicates that OFCCP intends to authorize discrimination based even on other protected bases like sex or race, contrary to the text of E.O. 11246. Similarly, a group of U.S. Senators commented that the proposed rule would allow employers to discriminate against employees on bases other than religion by, for instance, permitting employers to justify sex discrimination based on their religious tenets.

These commenters pointed to the second sentence of section 204(c) of E.O. 11246 as supporting their criticism. For example, a legal think tank commented that it was unclear how the proposed rule's “expansive definition of ‘particular religion’” could be reconciled with its insistence that “an employer may not . . . invoke religion to discriminate on other bases protected by law.”

Other commenters also stated that it would be inconsistent with Title VII case law to allow religious contractors to discriminate on bases other than religion. These commenters, including a legal think tank, a group of state attorneys general, a labor union, a civil liberties organization, and a

reproductive rights organization, cited cases in which, they asserted, courts prohibited religious employers from discriminating on bases other than religion. For example, the civil liberties organization commented that courts have consistently prohibited religious organizations from discriminating on other bases, including sex, even where that discrimination is motivated by the organization's sincere religious beliefs (citing *Rayburn*, 772 F.2d at 1166; *Kennedy*, 657 F.3d at 192; *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982), *abrogated on other grounds* by *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010); *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802, 807 (N.D. Ill. 1992); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980); *accord McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972)).

Some commenters argued that religion has long been used as a way to justify discrimination. For example, an affirmative action professionals association asserted that religious freedom has historically been invoked to defend slavery, the denial of women's suffrage, Jim Crow laws, and segregation. That commenter cited a recent news story in which a mixed-race couple was allegedly denied the use of a hall for a wedding because of the owner's religious beliefs.

Several commenters expressed concern specifically about the effect of the proposal on E.O. 11246's protections from discrimination based on sexual orientation and gender identity. For example, an LGBT rights advocacy organization commented that it was troubled by the fact that OFCCP failed to cite sexual orientation and gender identity in the proposed rule as the protected characteristics most likely to be impacted by the rule. And a legal professional organization expressed concern that OFCCP may interpret E.O. 11246 to allow federal contractors to discriminate based on sexual orientation as long as they cite sincere religious reasons for doing so.

On the other hand, as noted above, other commenters expressed support for the proposal because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identity, which would provide them protection to staff their organizations consistent with their sincere religious beliefs.

Some commenters requested guidance to resolve the perceived conflict. For example, an individual commenter asked whether protection for a client's religion or protection for an applicant or

employee's sexual orientation and/or gender identity would prevail under the proposed regulations. A pastoral membership organization stated that if the terms “sexual orientation” and “gender identity” include conduct, it is difficult to determine whether the prohibition on discrimination based on sexual orientation and gender identity or the protection for religiously-motivated conduct applies.

Many of these commenters criticized the proposal for not clearly stating how OFCCP would resolve the perceived contradiction between its assertion that religious contractors would not be permitted to discriminate on other protected bases and its inclusion in the proposed definition of “acceptance of or adherence to religious tenets as understood by the employer as a condition of employment.” For example, the legal think tank asserted that OFCCP does not explain how it will apply these two provisions in cases in which they appear to conflict, and observed that the proposed regulatory text does not limit its definition of “religious tenets” to tenets defined without reference to race, color, sex, sexual orientation, gender identity, or national origin. A state's attorney general asserted that, because the proposed rule fails to define or limit the type of “conduct” that can form the basis of permissible discrimination by religious entities, it allows contractors to discriminate based on any arbitrary characteristic.

Many supportive commenters recommended that OFCCP resolve the perceived conflict by clarifying that the non-discrimination requirements of Title VII and E.O. 11246 do not apply under the corresponding religious exemptions. For example, an anonymous commenter suggested that OFCCP clarify that religious organizations are permitted to discriminate on the bases of sexual orientation and gender identity because, in the commenter's view, an action that falls within the religious exemption would be outside the bounds of Title VII and E.O. 11246, “regardless of whether it would otherwise be prohibited by other provisions.” Other supportive commenters offered a similar view, stating that the proposed definition provided helpful clarification. For example, a religious liberties legal organization criticized “the suggestion from the Obama administration” that the exemption should be limited to “religious people cannot be discriminatory for hiring only members of their own religion” rather than “non-discrimination law does not apply in religious contexts” as provided under

the Civil Rights Act, and praised the proposed rule for affirming that requiring adherence to an employer's religious tenets does not constitute discrimination. Similarly, a U.S. Senator commented that the proposed helpfully clarifies that religious employers that contract with the federal government retain the right to hire employees that support their religious mission, consistent with Title VII. Some supportive commenters also noted that the proposed definition was consistent with the First Amendment and Title VII case law. For example, a religious legal association and an association of evangelical churches and schools commented that the principle that religious employers should be allowed to require their employees to conduct themselves in accordance with the employers' code of moral conduct has been "almost universally" accepted by courts, who have relied alternatively on Section 702(a) of Title VII, the First Amendment's Religion Clauses, and other considerations recognizing that "religious organizations may have legitimate, nondiscriminatory reasons" for practicing their religious beliefs through employment decisions.

In a joint comment, a religious legal association and an association of evangelical churches and schools commented that Section 204(c) of E.O. 11246 should be construed to exempt religious organizations from the nondiscrimination mandates of Section 202, except to the extent that a religious organization's employment decision is based on race.

To address these comments, OFCCP here first discusses the applicable Title VII principles established by case law, including how those principles may apply where religious organizations maintain sincerely held beliefs regarding matters such as marriage and intimacy, which may implicate protected classes under E.O. 11246. OFCCP then discusses its recognition that religious organizations in appropriate circumstances will be entitled to relief under the Religious Freedom Restoration Act.

The public should bear in mind that this discussion is restricted solely to these difficult and sensitive questions raised by commenters. This rule does not affect the overwhelming majority of federal contractors and subcontractors, which are not religious, and OFCCP remains fully committed to enforcing all E.O. 11246 nondiscrimination requirements, including those protecting employees from discrimination on the bases of sexual orientation and gender identity. Even for religious organizations that serve as

government contractors or subcontractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some reasonable circumstances recognized by law. This rule provides clarity on those circumstances, consistent with OFCCP's obligations and desire to also respect and accommodate the free exercise of religion.

ii. Legal Principles

OFCCP acknowledges first and foremost the United States' deeply rooted tradition of respect for religion and religious institutions. Religious individuals and organizations operate within and contribute to civil society and do not relinquish their religious freedom protections when they participate in the public square.²¹

With respect to commenters' concerns and questions here, many relate to the interaction of two well-established Title VII principles: First, that religious organizations can take religion into account when making employment decisions; and second, that religious organizations cannot discriminate on other protected bases. Each of those two principles taken by itself has clear answers. Where an employment decision made on the basis of religion also implicates another protected basis, however, the law is less clear.

As to the first principle, virtually all commenters agreed with what the plain text of the exemption provides: That religious organizations can consider an employee's particular religion when taking employment action. As discussed elsewhere in this rule's preamble, commenters disagreed as to the scope of that exemption—which employees it applies to, and which employer actions—but the basic principle was not disputed.

As to the second principle, as many commenters recognized, E.O. 11246's other employment protections apply to religious organizations. Protections on the basis of race, color, sex, sexual orientation, gender identity, and national origin do not categorically disappear when the employer is a religious organization. Thus the religious exemption does not permit religious organizations to engage in prohibited discrimination when there is no religious basis for the action. For instance, a religious organization that declined to promote a non-ministerial employee not for religious reasons, but

because of animus borne of the employee's country of birth or skin color, would violate E.O. 11246. Courts in the Title VII context have engaged in careful, fact-bound inquiries to determine whether a religious organization's action was based on religion or instead on a prohibited basis.²² For instance, courts may inquire whether a plaintiff was subjected to adverse employment action because of his or her sex or because of a violation of religious tenets. *See, e.g., Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 655–56, 658 (6th Cir. 2000); *cf. EEOC v. Miss. Coll.*, 626 F.2d 477, 485–86 (5th Cir. 1980) (holding if religious organization shows that its decision was based on religion, the religious exemption prohibits a further inquiry into pretext). To that extent, courts are virtually uniform in the view that the religious exemption does not permit discrimination on bases other than religion.²³

The question posed here, however, is the interaction of those two principles: Specifically, the outcome when a religion organization's action is based on and motivated by the employee's adherence to religious tenets yet implicates another category protected by E.O. 11246. OFCCP concludes, as explained in detail below, that the religious exemption itself, as interpreted by the courts, has left the question open, but that such activity would also give rise to an inquiry under RFRA, which must be assessed based on applicable case law and the specific facts presented.

At the federal appellate court level, the question of the religious exemption's interaction with other protected bases was left open in, for instance, *EEOC v. Mississippi College*, where an EEOC subpoena did "not clearly implicate any religious practices of the College." 626 F.2d at 487. The court noted that the college had a scripturally rooted policy of hiring only men to teach courses in religion, but stated that "[b]efore the EEOC could require the College to alter that practice, the College would have an opportunity to litigate in a federal forum whether [the religious exemption] exempts or the first amendment protects that particular

²² See below for a more fulsome discussion of how courts have determined the applicability of the religious exemption.

²³ This is separate from the question of whether application of Title VII in any particular instance is tolerable under the First Amendment or other law, such as where the employee is a minister, *see Our Lady of Guadalupe*, 140 S. Ct. 2049, or where the employment relationship is otherwise "so pervasively religious" that it raises First Amendment concerns, *see DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993).

²¹ See Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty 1–2 (Oct. 6, 2017).

practice.” *Id.* The Seventh Circuit has similarly characterized the question of whether “the religious-employer exemptions in Title VII [are] applicable only to claims of religious discrimination” as “a question of first impression in this circuit.” *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1087 (7th Cir. 2014). Other courts have indicated that the religious exemption may be preeminent in such a situation. *See Little*, 929 F.2d at 951 (“[T]he permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.”); *see also Kennedy*, 657 F.3d at 194 (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices.” (quoting *Little*, 929 F.2d at 951)).

The only two federal appellate-level cases with fact patterns involving the precise issue are a pair of Ninth Circuit cases from the 1980s. The first, *EEOC v. Pacific Press Publishing Association*, held as a statutory matter that Title VII’s prohibitions on sex discrimination and on retaliation applied to a religious organization. *See* 676 F.2d 1272, 1277 (9th Cir. 1982). But the court determined that the practice at issue that resulted in sex discrimination “does not and could not conflict with [the employer’s] religious doctrines, nor does it prohibit an activity rooted in religious belief.” *Id.* at 1279. Regarding retaliation, the court held as a constitutional matter that Title VII’s anti-retaliation provision should apply to the religious organization even when the employee was dismissed for violating church doctrine that prohibited members from bringing lawsuits against the church. *See id.* at 1280.

The second decision, *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), is less instructive. It held in relevant part that Title VII could be applied to prohibit a religiously grounded health benefits program that benefited one sex more than the other. However, as a statutory matter, the court held that the religious exemption was not implicated because the employment practice did not concern the selection of employees based on their religion—the text of the exemption refers to “employment of individuals of a particular religion” ²⁴—

and as a constitutional matter noted that “[e]liminating the employment policy involved here would not interfere with religious belief and only minimally, if at all, with the practice of religion.” *Id.* at 1366, 1368.

The Supreme Court also has not answered whether an employment action motivated by religion but implicating a protected classification violates Title VII. The Court’s cases offer no clear conclusion whether the religious exemption should be read so narrowly that its protections are overcome by the rest of E.O. 11246’s (or Title VII’s) protections when they are both at issue. For example, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Court held that Title VII’s prohibition on discrimination because of sex includes discrimination on the basis of sexual orientation and transgender status. That holding itself is not particularly germane to OFCCP’s enforcement of E.O. 11246, which has expressly protected sexual orientation and gender identity since 2015. What is certainly germane is the Court’s recognition of the “fear that complying with Title VII’s requirement in cases like [*Bostock*] may require some employers to violate their religious convictions” and its assurance that it, too, was “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.” *Id.* at 1753–54. The Court then noted that Title VII contains “an express statutory exception for religious organizations,” but did not explain whether an employment action motivated by religion that implicates a protected classification violates Title VII. *Id.* at 1754.

Regardless, OFCCP ultimately does not need to answer this open question on the proper interpretation of the religious exemption in E.O. 11246, and declines to do so, because RFRA can guide the agency’s determination if and when a particular case presents a situation where a religiously motivated employment action implicates a classification protected under the Executive Order. As noted in *Bostock*, RFRA “prohibits the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of

agrees that the policy in *Fremont* would not be covered by the religious exemption because it did not pertain to the employee’s particular religion. Nothing about the employee’s religious beliefs or conduct would affect the policy—only his or her sex.

furthering that interest. [42 U.S.C.] § 2000bb–1.” *Id.* Moreover, “[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases. [42 U.S.C.] § 2000bb–3.” *Id.*²⁵ Concerns raised by supportive commenters in this rulemaking have alerted the agency that application of E.O. 11246 may substantially burden their religious exercise, especially if the religious exemption does not clearly protect their ability to maintain employees faithful to their practices and beliefs. The ministerial exception offers religious organizations broad freedom in the selection of ministers, but that is only a subset of their employees. *See generally Our Lady of Guadalupe*, 140 S. Ct. 2049. In contrast, the religious exemption applies to all of a religious organization’s employees, but the scope of its protections is not settled when religious tenets implicate other protected classes. Thus, the Department should consider RFRA, since in some circumstances neither the ministerial exception nor the religious exemption may alleviate E.O. 11246’s burden on religious exercise. *See Little Sisters of the Poor*, 140 S. Ct. at 2383–84 (holding agencies should consider RFRA when it is an important aspect of the problem involved in the rulemaking).

The discussion below addresses in general terms how OFCCP views its obligations under RFRA in the specific situation raised by commenters and addressed here: Where the religious organization takes employment action regarding an applicant or an employee, the employment action is motivated solely on the employee’s adherence to a sincere religious tenet, yet that tenet also implicates an E.O. 11246 protected category other than race (which is discussed separately). RFRA requires a fact-specific analysis, so the discussion here of necessity can speak only to OFCCP’s general approach; specific situations involving specific parties will require consideration of any additional, unique facts. And of course the contractor or subcontractor involved will need to demonstrate its religious sincerity and burden so that it falls within this rubric. Nonetheless, OFCCP believes its RFRA analysis here will provide clarity for religious contractors and subcontractors, regardless of how future cases may interpret the interplay of the religious exemption in and of itself with other protected classes under Title VII or E.O. 11246.

²⁵ RFRA was not raised before the Court in *Bostock*. Thus, the Court left that “question[] for future cases.” 140 S. Ct. at 1754.

²⁴ As explained elsewhere in this preamble, the religious exemption is more than a mere hiring preference for coreligionists. OFCCP nonetheless

iii. Application of the Religious Freedom Restoration Act

“Congress enacted RFRA in 1993 in order to provide very broad protection of religious liberty.” *Hobby Lobby*, 573 U.S. at 693. RFRA responded to “*Employment Division v. Smith*, 494 U.S. 872 (1990) [in which] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion” under the First Amendment, and restored by statute “the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).” 42 U.S.C. 2000bb(a)(4), (b)(1); see *Hobby Lobby*, 573 U.S. at 693–95.

Under RFRA, the federal government may not “substantially burden a person’s exercise of religion.” 42 U.S.C. 2000bb–1(a). Government is excepted from this requirement only if it “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.” *Id.* 2000bb–1(b).

RFRA “applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993,” *Id.* 2000bb–3(a), including agency regulations, see *Little Sisters of the Poor*, 140 S. Ct. at 2383. As “Federal law, and the implementation of that law,” E.O. 11246 fits within that scope as well.

(1) Substantial Burden

The question of whether government action substantially burdens an employer’s exercise of religion can be separated into two parts. See *Hobby Lobby*, 573 U.S. at 720–26; *Little Sisters of the Poor*, 140 S. Ct. at 2389 (Alito, J., concurring). First, the government must ask whether the consequences of noncompliance put substantial pressure on the objecting party to comply. See *Hobby Lobby*, 573 U.S. at 720–23. Second, the government must ask whether compliance with the regulation would violate or modify the objecting party’s sincerely-held religious exercise (as the objecting party understands that exercise and any underlying beliefs), including the party’s “ability . . . to conduct business in accordance with [its] religious beliefs.” *Hobby Lobby*, 573 U.S. at 724; see also *Sherbert*, 374 U.S. at 405–06.²⁶ If the answer to both

questions is yes, then the regulation substantially burdens the exercise of religion.

On the first question, noncompliance with the nondiscrimination requirements of E.O. 11246 could have substantial adverse consequences on religious organizations that participate in government contracting. One private religious university supportive of the proposed rule stated that it is “a large research university with dozens of active federal contracts at any given time,” while another stated that “religious organizations have long been significant participants in federal procurement programs.” Noncompliance with E.O. 11246 can result in awards of back pay and other make-whole relief to affected employees and applicants, cancellation or suspension of the contract, and even suspension or debarment. See E.O. 11246 § 202(7); 41 CFR 60–1.26. That is substantial pressure. Indeed, it is a substantial burden for the government to compel someone “to choose between the exercise of a First Amendment right and participation in an otherwise available public program.” *Thomas*, 450 U.S. at 716; *Sherbert*, 374 U.S. at 404 (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”). “Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed” for engaging in religious action. *Sherbert*, 374 U.S. at 404. “Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon

violate its religious beliefs. Instead, substantial pressure on a party to modify its religiously motivated practice is also sufficient to establish a substantial burden. See, e.g., *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 333 (D.C. Cir. 2018) (defining “substantial burden” under RFRA as “substantial pressure on an adherent to modify his behavior and to violate his beliefs”) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that government’s interest in eliminating employment discrimination at Catholic university was outweighed by university’s right of autonomy in its own domain); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (finding that right to free exercise of religion is “substantially burdened” within meaning of RFRA where state puts substantial pressure on adherent to modify his behavior and to violate his beliefs); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (“[D]efining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with the RFRA’s purpose to restore pre-*Smith* free exercise case law.”).

religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”). *Thomas*, 450 U.S. at 717–18.

On the second question, the Supreme Court emphasized in *Hobby Lobby* that, in determining whether compliance with a particular mandate would substantially burden the objecting party’s ability to operate in accordance with its religious beliefs, the federal government must “not presume to determine the plausibility of a religious claim.” *Hobby Lobby*, 573 U.S. at 724 (quoting *Smith*, 494 U.S. at 887). It is not for a court, or for OFCCP, to say whether a particular set of religious beliefs is “mistaken or insubstantial.” *Hobby Lobby*, 573 U.S. at 725. Furthermore, religious exercise means more than being able to express particular views—a right to freedom of religion requires the right to act in conformance with that religion. See *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring) (“The right to be religious without the right to do religious things would hardly amount to a right at all.”). It is this right to engage in conduct consistent with sincerely held belief—and a right to be free of demands to engage in conduct conflicting with those sincerely held beliefs—that RFRA protects. See *Little Sisters of the Poor*, 140 S. Ct. at 2390.

Compliance with the nondiscrimination provisions in E.O. 11246, if interpreted to apply when an employment action is motivated by religion yet also implicates a protected classification, could force religious organizations to violate their sincerely held religious beliefs or to compromise their religious integrity or mission by placing substantial pressure on them to violate or modify their religious tenets related to their employees and their religious communities. The comments on the proposed rule made this clear. For example, a private religious university noted the importance for religious employers to be able to “employ[] persons whose beliefs and conduct are consistent with [their] religious precepts.” Similarly, a nationwide ecclesiastical organization stated in its comment that faith-based organizations should be able to “lawfully prefer for employment those who, by word and conduct, accept and adhere to that faith as the organization understands it, regardless of the applicant’s or employee’s religious affiliation.” An association of religious universities echoed these sentiments, stating that “[o]ur schools are committed to upholding their religion-based standards by aligning

²⁶ Case law is clear that RFRA’s substantial burden test does not insist that a challenged government action require an objecting party to

employment expectations exclusively with applicants and employees who concur with these expectations. These expectations are essential to fulfilling our religious mission.” While the commenter explained that generally its associated “schools do not accept direct government funding,” it highlighted the importance for its members that “no organization should be excluded by the government from competing for contracts or other funds simply because the religious organization is serious about maintaining its religious identity and religious practices.”

The case law also indicates that certain E.O. 11246 obligations may impose a burden on religious organizations. *Bostock* expressly acknowledged that enforcing certain nondiscrimination provisions could pose challenges for religious employers under RFRA. See 140 S. Ct. at 1754. And many cases show instances of religious employers seeking to apply religiously inspired codes of conduct that pertain to matters of marriage and sexual intimacy. See *Little*, 929 F.2d at 946 (upholding termination of employee for violations of “Cardinal’s Clause,” which included “entry by the teacher into a marriage which is not recognized by the Catholic Church” (emphasis in original)); *Cline*, 206 F.3d at 666 (holding fact issue remained as to whether plaintiff was terminated for pregnancy or for whether she had “violated her clear duties as a teacher by engaging in premarital sex”); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 414 (6th Cir. 1996) (upholding district court’s determination that the defendant “articulated a legitimate, non-discriminatory reason for plaintiff’s termination when it stated that plaintiff was fired not for being pregnant, but for having sex outside of marriage in violation of Harding’s code of conduct” and rejecting claim of pretext when school’s president “had terminated at least four individuals, both male and female, who had engaged in extramarital sexual relationships that did not result in pregnancy”); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 872 (N.D. Ohio 1998) (dismissing Title VII claim of plaintiff fired for having affair and concluding that “[w]hatever Plaintiff’s own *post-hoc* claims may be regarding the relevance of her sexual conduct to her employment at a Catholic school, it is clear that the Diocese and Parish considered her sexual conduct to be relevant to her employment”); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 359–60 (E.D.N.Y. 1998) (noting in case with similar facts and holding as *Cline* that “[r]eligious institutions . . . are

provided leeway under federal constitutional and statutory law in regulating the sexual conduct of those in their employ in keeping with their religious views”); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270 (N.D. Iowa 1980) (“Nor does the court quarrel with defendant’s contention that it can define moral precepts and prescribe a code of moral conduct that its teachers . . . must follow.”).²⁷

Of particular concern here as well is that “[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission.” *Amos*, 483 U.S. at 336; cf. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (“[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.”). Here, out of fear of violating E.O. 11246’s requirements, a religious organization might simply choose to forsake certain of its religious tenets related to employment. That is a religious burden in itself. And that change could in turn result in the organization hiring and retaining employees who, by word or deed, undermine the religious organization’s character and purpose—but which the organization would feel compelled to accept rather than risk liability. That is a second religious burden, which in particular may pose a risk to smaller or nontraditional religious groups. Cf. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (noting that a bright-line test or multifactor analysis for the definition of “minister” “risk[s] disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some,” including by “caus[ing] a religious group to conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding”).

Alternatively, to avoid this problem, the religious organization might consider drawing stricter lines around those it considers “coreligionists,” for even the narrowest reading of the

religious exemption permits religious organizations to prefer “coreligionists” in employment decisions. In that case, religious organizations would draw strict lines by stating that certain behaviors, beliefs, or statements are anathema to the religion and take one outside the religious community. That way, employment action would be more readily identified as resting solely on religious grounds as a preference against a non-coreligionist. See *Mississippi College*, 626 F.2d at 484–85; cf. *Amos*, 483 U.S. at 343 (Brennan, J., concurring) (“A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believe that religious commitment was important in performing other tasks as well.”). Here, the religious burden would be government pressure on how the religious organization defines who is and who is not a member of its religious community.

Demonstrating burden is necessarily fact-dependent. There may be instances where the organization sincerely believes as a religious matter that it can tolerate some kinds of religious noncompliance from some of its employees without seriously compromising its religious mission or identity. That may be the case especially for employees in less prominent roles or who have little interaction with students or the public. But there may be other instances where, in the sincere view of the organization, a non-ministerial employee must adhere to the organization’s religious tenets as an important part of furthering the organization’s religious mission and maintaining its religious identity, and where strict enforcement of certain E.O. 11246 requirements would substantially burden those aims.

(2) Compelling Interest

Many courts have recognized the importance of the government’s interest in enforcing Title VII’s nondiscrimination provisions. See, e.g., *Rayburn*, 772 F.2d at 1169; *Pacific Press*, 676 F.2d at 1280. The following RFRA analysis does not address OFCCP’s enforcement program broadly, including the context of a religious organization’s discriminating on the basis of a protected characteristic other than religion for non-religious reasons. OFCCP will continue to fully enforce E.O. 11246’s requirements in those contexts. Rather, the compelling-interest analysis here focuses solely on the questions raised by commenters regarding a situation in which a religious organization takes employment

²⁷ *Amos* also implicated such facts. The appellee had been discharged for failing to “qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples,” which “are issued only to individuals who observe the Church’s standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.” *Amos*, 483 U.S. at 330 & n.4. The plaintiffs below had alleged that those standards necessitated employer inquiries into their “sexual activities” and “moral cleanliness and purity.” *Amos*, 594 F. Supp. at 830.

action based solely on sincerely held religious tenets that also implicate a protected classification.

To satisfy RFRA, OFCCP must do more than assert a generalized compelling interest on a “categorical” basis. *O Centro*, 546 U.S. at 431. Instead, “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 430–31 (quoting 42 U.S.C. 2000bb–1(b)). This requires “look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants.” *Id.* at 431.

Thus OFCCP must demonstrate that it has a compelling governmental interest in enforcing a nondiscrimination requirement against “particular religious claimants” (e.g., particular contractors who qualify for the religious exemption) when doing so places a substantial burden on the ability of those particular contractors to freely exercise their religion. *Id.* This statutory requirement is reflected in OFCCP’s current RFRA policy, under which “OFCCP will consider” a contractor’s request for “an exemption to E.O. 11246 pursuant to RFRA . . . based on the facts of the particular case.” OFCCP, *Religious Employers and Religious Exemption*, www.dol.gov/agencies/ofccp/faqs/religious-employers-exemption. As explained below, OFCCP has determined on the basis of several independent reasons that it has less than a compelling interest in enforcing nondiscrimination requirements—except for protections on the basis of race—when enforcement would seriously infringe the religious mission or identity of a religious organization.

Exceptions provided other contractors. OFCCP’s general interest in enforcing E.O. 11246 is less than compelling in the religious context addressed here, given the numerous exceptions from its nondiscrimination requirements it has authority to grant, and has granted, in nonreligious contexts. Granting accommodations in nonreligious contexts strongly suggests that OFCCP does not have a compelling interest in disfavoring religious contractors by refusing to grant accommodations in religious contexts. See *O Centro*, 546 U.S. at 436 (“RFRA operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability.’” (quoting 42 U.S.C.

2000bb–1(a))). When “[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct,” those exceptions suggest that “those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.” *Holt*, 574 U.S. at 367.

The President has granted OFCCP broad authority and discretion to exempt contracts from the requirements of E.O. 11246. Most prominent is section 204(a) of E.O. 11246, which authorizes the Secretary of Labor to grant exemptions from any or all of the equal opportunity clause’s requirements “when the Secretary deems that special circumstances in the national interest so require.” This is not the kind of language government typically uses when it seeks a policy of absolute enforcement. Rather, it is the kind of language government uses when granting highly discretionary power. Cf. *Webster v. Doe*, 486 U.S. 592, 600 (1988) (removing an employee “whenever the Director ‘shall deem such termination necessary or advisable in the interests of the United States’” is a standard that “fairly exudes deference to the Director” (quoting National Security Act § 102(c)). The Executive Order contains many other exceptions as well. Section 204(b) authorizes the Secretary to exempt contracts that are to be performed outside the United States, contracts that are for standard commercial supplies or raw materials, contracts that do not meet certain thresholds (dollar amounts or numbers of employees), and subcontracts below a specified tier. Section 204(d) authorizes the Secretary to exempt a contractor’s facilities that are separate and distinct from activities related to the performance of the contract, as long as “such an exemption will not interfere with or impede the effectuation of the purposes of this Order.” OFCCP’s implementing regulations contain exemptions as well. OFCCP has implemented section 204(b) to the maximum extent possible by exempting all contracts and subcontracts for work performed outside the United States by employees not recruited in the United States. See 41 CFR 60–1.5(3). OFCCP’s regulations also contain a religious exemption for religious educational institutions and permit a preference for “Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.” 41 CFR 60–1.5(6)–(7).

On several occasions OFCCP has used its power to exempt contracts “in the national interest.” “Prior administrations granted [national interest exemptions] for Hurricanes

Sandy and Katrina,”²⁸ and OFCCP has granted temporary exemptions from some E.O. 11246 requirements in response to more recent national disasters. OFCCP has similarly granted an exemption during the COVID–19 pandemic. See OFCCP, National Interest Exemptions, <https://www.dol.gov/agencies/ofccp/national-interest-exemption>. And the National Interest Exemptions that OFCCP has granted can be quite broad, applying, for example, to *all* new contracts providing coronavirus relief during the applicable time period. See OFCCP, Coronavirus National Interest Exemption Frequently Asked Questions, <https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q1>.

OFCCP has also issued a final rule effecting a permanent exemption from all OFCCP authority for healthcare providers that participate in the TRICARE program and have no otherwise covered contracts. The final rule expressed OFCCP’s view that a 2011 statute removed whatever authority OFCCP may have had over TRICARE providers and did not replace it with a separate nondiscrimination provision; Congress’ action indicates that OFCCP’s interest is less than compelling interest. See 85 FR 39834, 39837–39 (July 2, 2020). Additionally, the final rule exempted TRICARE providers on the alternative ground of a national interest exemption, citing its concern that “the prospect of exercising authority over TRICARE providers is affecting or will affect the government’s ability to provide health care to uniformed service members, veterans, and their families,” a determination that “pursuing enforcement efforts against TRICARE providers is not the best use of its resources” given a history of litigation and legal uncertainty in the area, and the need to “provide uniformity and certainty in the health care community with regard to legal obligations concerning participation in TRICARE.” *Id.* at 39839.

The various exemptions that OFCCP can and does provide in secular settings show that its interest in enforcing E.O. 11246’s requirements can give way to other considerations. Many of those same considerations exist here, so OFCCP’s enforcement interest should similarly give way to religious accommodation. For example, many of the same reasons underlying OFCCP’s exemption for TRICARE providers apply here as well: Conservation of resources in an area that could lead to protracted

²⁸ OFCCP, “Coronavirus National Interest Exemption Frequently Asked Questions,” Question #12, <https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q12>.

litigation; the need to bring clarity to a group of potential contractors under a cloud of legal uncertainty; and a goal of improving the government's access to certain services. In the TRICARE rule, the goal was to foster access to care for veterans and their families. In this rule, it is the goal of fostering the equal participation of religious organizations in government contracting and subcontracting in order to increase the contracting pool's competition and diversity and thus improve economy and efficiency in procurement. Likewise OFCCP's limited exemptions during emergencies and the pandemic demonstrate the agency's judgment that securing services for the government can override aspects of E.O. 11246's obligations. Here, too, a limited religious accommodation may encourage religious organizations to begin or continue participating in government contracting and subcontracting. And like those other exemptions, a religious accommodation here would be limited. It would be limited to employment action grounded in a sincere religious belief with respect to the employee's religion. It would not excuse religious organizations from their antidiscrimination obligations otherwise and never on the basis of race, nor from their affirmative-action obligations, reporting requirements, or other requirements under E.O. 11246.

E.O. 11246's many available exemptions, and OFCCP's history of recognizing exemptions, also undercuts the idea that individualized religious exemptions would undermine the agency's overall enforcement of E.O. 11246 or that their denial would be equitable to religious organizations. See *Holt*, 574 U.S. at 368 ("At bottom, this argument is but another formulation of the 'classic rejoinder . . . : If I make an exception for you, I'll have to make one for everybody, so no exceptions.' We have rejected a similar argument in analogous contexts, and we reject it again today.") (internal citations omitted) (quoting *O Centro*, 546 U.S. at 436); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) ("[W]e conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny.").

Recognizing the value that religious contractors provide, OFCCP has determined that it has less than a compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets

that also implicate a protected classification, other than race. OFCCP has determined that, in these circumstances, it should instead appropriately accommodate religion, especially when doing so (as with national interest exemptions) would foster a more competitive pool of government contractors. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988) (noting that "the Federal Government's interest in the procurement of equipment is implicated" where "[t]he imposition of liability on Government contractors" will cause the contractors to "decline to manufacture" a good or to "raise its price").

Establishment Clause concerns. OFCCP's interest in enforcing E.O. 11246 is attenuated when doing so seriously risks violating the Establishment Clause. But as noted earlier, strict application of all E.O. 11246 requirements to religious organizations could, in some instances, chill their protected religiously based requirements for employment out of fear of liability. It could also chill religious organizations from taking employment action despite an employee, by word or deed, undermining the religious organization's tenets and purposes.

Alternatively, it could incentivize religious organizations, because of the risk that the government might misunderstand the organization's motivations, to draw stricter lines around who it considers a coreligionist. In this situation, the religious organization would first take some form of purely religious action against an employee to designate the employee as no longer a part of the religious community, and then take employment action, so that employment action would be more readily identified as resting solely on grounds of religious preference. And it poses a risk to smaller or nontraditional religious groups, whose membership practices may not be as readily understood by the government. Cf. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

Such government pressure on religious organizations' membership and doctrinal decisions would raise serious concerns under not only the Free Exercise Clause, but the Establishment Clause as well. "[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion. . . . [A]ny attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060

(emphasis added) (quoting *Hosanna-Tabor*, 565 U.S. at 186 (opinion for the court)); see also *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("These are certainly dangers that the First Amendment was designed to guard against."). In essence, such an approach could have the unfortunate consequence of pushing religious organizations to extremes to avoid liability. Religious organizations could do so either by forsaking their religiously based requirements for employment, or by engaging in more definitive religious actions to demonstrate their religious disassociation from someone who breaches a religiously based requirement for employment. OFCCP also has concerns about inter-religious discrimination, since some bona fide religious organizations require adherence to a common set of beliefs or tenets but do not have a formal membership structure, see *World Vision*, 633 F.3d at 728 (O'Scannlain, J., concurring), so they may have more difficulty than traditional churches in showing that an employee or applicant is not (or is no longer) a coreligionist.

OFCCP cannot avoid this Establishment Clause problem by attempting to determine whether a religious organization's decision to deem someone a non-coreligionist was motivated by discriminatory animus rather than a sincere application of religious tenets. Unlike the fact-finding to determine the reason for an *employment* decision, which does not always raise Establishment Clause concerns, this would be fact-finding to determine the reason for a *religious* decision on community membership. Testing the basis of that decision would most likely violate the First Amendment. It would violate the religious organization's right to choose its membership free of government influence, and the process of inquiry alone into such a sensitive area "would risk judicial entanglement in religious issues." *Our Lady of Guadalupe*, 140 S. Ct. at 2069; see *Catholic Bishop*, 440 U.S. at 502.

The absence of a clear command. Finally, a compelling interest ought to be one that is clearly spelled out by the government. For instance, in his concurrence in *Little Sisters of the Poor*, Justice Alito observed that it was highly significant that Congress itself had not treated free access to contraception as a compelling government interest. See *Little Sisters of the Poor*, 140 S. Ct. at 2392–93 (Alito, J., concurring). Here, however, the scope of the religious exemption is unsettled. As discussed above, courts have consistently interpreted the religious exemption to

prohibit religious organizations from discriminating on bases other than religion. But *Bostock* left open the scope of the exemption's protection for religious discrimination, and only two federal court of appeal decisions have addressed a fact pattern in which a religious organization's religious tenets conflicted with a non-religious Title VII protection. See *Fremont*, 781 F.2d at 1368 (finding challenged religious practice outside the scope of the religious exemption and changing the practice would pose little interference with the organization's religious belief and practice); *Pacific Press*, 676 F.2d at 1279 (determining that the EEOC's action "does not and could not conflict with [the employer's] religious doctrines, nor does it prohibit an activity rooted in religious belief"). Without stronger legal evidence that the religious exemption's protections are cabined by E.O. 11246's other protections (and thus may seriously infringe religious freedom), OFCCP is hesitant to describe that theory as furthering a compelling government interest.

(3) Least Restrictive Means

In the third step of the RFRA analysis, OFCCP assesses whether its application of the religious burden to the person "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000bb-1(b)(2). Because OFCCP believes that it has less than a compelling interest in enforcing E.O. 11246 in the circumstances contemplated for purposes of this general RFRA analysis it need not consider whether that foreclosed enforcement would be by the least restrictive means. When the Supreme Court has found a regulation violated RFRA, the Court has permitted the regulatory agency to determine the correct remedy. See, e.g., *Hobby Lobby*, 573 U.S. at 726, 731, 736; 79 FR 51118 (Aug. 27, 2014) (proposed modification in light of *Hobby Lobby*). As a result, OFCCP has discretion to determine an appropriate accommodation without having to also determine the least restrictive alternative. As Justice Alito recently explained, RFRA "does not require . . . that an accommodation of religious belief be narrowly tailored to further a compelling interest. . . . Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective." *Little Sisters of the Poor*, 140 S. Ct. at 2396 (Alito, J., concurring). OFCCP further believes the RFRA approach outlined here is an appropriate accommodation, which applies only to bona fide religious employers and which permits only

employment actions based on sincere religious tenets; employees remain protected from discrimination motivated by animus or any other non-religious reason, and employment actions based on race always remain prohibited.

(4) The Harris Case

OFCCP does not view the Sixth Circuit's opinion in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), as requiring a different analysis here. In that case (one of three consolidated in *Bostock*), an employee of a funeral home informed the funeral home's owner of the employee's intention to present as a member of the opposite sex while at work. The owner stated that he would violate his religious beliefs were he to permit the employee to do so and terminated the employee. See *id.* at 568–69. In the ensuing litigation, the funeral home raised a RFRA defense. The Sixth Circuit held that Title VII discrimination claims "will necessarily defeat" RFRA defenses to such discrimination. *Id.* at 595. The court addressed each element of RFRA. Regarding substantial burden, the court held in relevant part that the employer's mere toleration of the employee's conduct to comply with Title VII is not an endorsement of it, so it was not a substantial burden. Regarding the furtherance of a compelling interest, the court held that failure to enforce Title VII would result in the employee suffering discrimination, "an outcome directly contrary to the EEOC's compelling interest in combating discrimination in the workforce." *Id.* at 592. Regarding least-restrictive means, the court held that enforcement of Title VII is itself the least-restrictive means for eradicating employment discrimination on the basis of sex. See *id.* at 593–97.

The defendant in *Harris* did not raise the RFRA issue to the Supreme Court, but the Court in *Bostock* nonetheless observed that, "[b]ecause RFRA operates as a kind of super statute . . . it might supersede Title VII's commands in appropriate cases." ²⁹ *Bostock*, 140 S. Ct. at 1754. To the extent *Harris* remains good law, OFCCP does not view the Sixth Circuit's RFRA analysis as applicable here, as the facts of the case are readily distinguishable from this rule's protections for religious organizations. The funeral home at the

center of the *Harris* case was not a religious organization. See 884 F.3d at 581. Unlike the religious employers that are OFCCP's focus here, the funeral home had "virtually no religious characteristics," *id.* at 582: No religiously inspired code of conduct, no doctrinal statement, and no other religious requirement for employees. Nor did the funeral home through its work seek to advance the values of a particular religion. See *id.* Indeed, the funeral home was clearly outside the scope of OFCCP's religious exemption—which exists to prevent E.O. 11246's nondiscrimination provisions from interfering with a religious organization's freedom to employ "individuals of a particular religion"—and furthermore the funeral home's own testimony indicated that its conduct was motivated by commercial rather than religious concerns. See *id.* at 576 n.5, 586, 589 n.10.

Bearing those key factual differences in mind, OFCCP disagrees that, at least as applied to religious organizations regulated by OFCCP, "tolerating" employee conduct that is contrary to the organization's sincerely held religious tenets can never constitute a substantial burden under RFRA, as the court held in *Harris*. *Id.* at 588. That holding is, at the very least, in tension with *Little Sisters of the Poor*, *Hobby Lobby*, and the Free Exercise Clause precedents they rested on. See *Hobby Lobby*, 573 U.S. at 723–25; see also *Little Sisters of the Poor*, 140 S. Ct. at 2383 ("[In *Hobby Lobby*,] we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities."); *id.* at 2390 (Alito, J., concurring) (observing that "federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable," including religious beliefs underlying complicity-based objections). When government requires conduct proscribed by religious faith on pain of substantial penalty, there is a burden upon religious exercise. See *Sherbert*, 374 U.S. at 404.

Additionally, the burden is even clearer for an objecting religious organization than it was for the funeral home in *Harris*. Unlike a secular employer, a religious organization has a religious foundation and purpose and may select its employees on the basis of their religious adherence. Requiring religious employers to maintain employees who disregard the organization's religious tenets thus more seriously threatens to undermine the organization's mission and integrity. This gives even more credence to a claim that forcing a religious employer

²⁹ The Court also observed that "other employers in other cases may raise free exercise arguments that merit careful consideration." *Bostock*, 140 S. Ct. at 1754.

to maintain such an employee would substantially burden its religious exercise.

OFCCP also does not view *Harris's* treatment of the compelling-interest prong of RFRA as persuasive when applied to religious organizations regulated by OFCCP. First, because the defendant was not a religious organization, the *Harris* court did not consider the antecedent question of whether the government has a compelling interest in applying nondiscrimination laws to a religious organization when doing so would threaten to compromise the organization's integrity or mission, with its attendant more-severe infringements on religious free exercise and establishment problems. As discussed above, there are instances where that could occur, so accordingly in that situation the RFRA analysis is different. Additionally, E.O. 11246 contains additional and discretionary exceptions that Title VII does not have, which further alter the compelling-interest balance.

(5) OFCCP's Compelling Interest in Prohibiting Racial Discrimination

In response to commenters who raised the issue, OFCCP reiterates here that it has a compelling interest in eradicating racial discrimination, even as against religious organizations. To be sure, OFCCP is currently unaware of any contractor contending that its religious beliefs required it to take employment actions that implicate race, and commenters supplied no evidence of that occurring. Nonetheless, in response to commenters' broader concerns, OFCCP makes clear here that its overwhelming interest in eradicating racial discrimination would defeat RFRA claims in the context addressed in this section of the rule's preamble. OFCCP will enforce E.O. 11246 against any contractor or subcontractor that takes employment actions on the basis of race, even if religiously motivated. At least one commenter that strongly supported the proposed rule likewise recognized that the religious exemption should not protect "a religious organization's employment decision . . . based on racial status."

OFCCP treats racial discrimination as unique because the Constitution does as well. The Supreme Court recognizes that "[r]acial bias is distinct." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). Indeed, a long history of the Court's "decisions demonstrate that racial bias implicates *unique* historical, constitutional, and institutional concerns." *Id.* (emphasis added). Although this final rule recognizes that

religious accommodations may be necessary in certain other contexts regarding considerations of sex, "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

The Supreme Court has elsewhere recognized the government's unique interest in eradicating racial discrimination. In *Hobby Lobby*, the Court considered "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," but explained that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 573 U.S. at 733. In *Bob Jones University*, the Court similarly concluded that the government had a "compelling" interest—described as "a fundamental overriding interest"—"in eradicating racial discrimination," and further explained the "governmental interest" in eradicating racial discrimination "substantially outweighs whatever burden" the government action in that case "place[d] on petitioners' exercise of their religious beliefs." *Bob Jones*, 461 U.S. at 604; see also *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (describing as "patently frivolous" the argument that a prohibition on racial discrimination "was invalid because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant's religion") (internal quotation marks omitted).

The government's heightened interest in eradicating racial discrimination is further exhibited by the Supreme Court's jurisprudence regarding the Equal Protection Clause of the Fourteenth Amendment. In Equal Protection Clause cases, the Court applies "strict scrutiny" to instances of race-based classifications, meaning that "all racial classifications, imposed by whatever federal, state, or local governmental actor . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Strict scrutiny presents a more pressing standard than the "intermediate scrutiny" that the Court applies in Equal Protection Clause cases to instances of sex-based classifications, see, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976)) ("[C]lassifications by gender must serve

important governmental objectives and must be substantially related to achievement of those objectives."); *id.* at 218 (Rehnquist, J., dissenting) (referring to the majority approach as "intermediate" scrutiny), and the "rational-basis scrutiny" that the Court has sometimes applied to classifications based on sexual orientation, see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996). The Supreme Court has further recognized that traditional views on marriage do not suggest bigotry or invidious discrimination but instead are held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015).³⁰ The Constitution, as interpreted by the Supreme Court, is more protective of race than other protected classifications. Thus, the Court's long-established Equal Protection jurisprudence supports the conclusion that although the government has an interest in eradicating discrimination on the bases of all protected classes, the governmental interest in eradicating racial discrimination is particularly strong. This final rule is consistent with that framework.

e. Application of the Religious Exemption

As explained in the proposed rule, when evaluating allegations of discrimination on bases other than religion against employers that are entitled to the Title VII religious exemption, courts carefully evaluate whether the employment action was permissibly based on the "particular religion" of the employee. The particulars vary. In the absence of direct evidence of discrimination on a protected basis other than religion, courts generally invoke the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether a religious employer's invocation of religion (or a religiously motivated policy) in making an employment decision was genuine or, instead, was merely a pretext for discrimination prohibited under Title VII. See *Cline*, 206 F.3d 651; *Boyd*, 88 F.3d 410; cf. *Geary*, 7 F.3d 324 (applying *McDonnell Douglas* in assessing religious-exemption defense to claim under the Age Discrimination in Employment Act). At least one other

³⁰ Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (stating that a clergy member's refusal to perform a gay marriage "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth").

case has noted that “[o]ne way” to show discriminatory intent using circumstantial evidence “is through the burden-shifting framework set out in *McDonnell Douglas*,” but another way is to “show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination.” *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012).

In undertaking this evaluation, OFCCP, like courts, “merely asks whether a sincerely held religious belief actually motivated the institution’s actions.” *Geary*, 7 F.3d at 330. The religious organization’s burden “to explain is considerably lighter than in a non-religious employer case,” since the organization, “at most, is called upon to explain the application of its own doctrines.” *Id.* “Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim.” *Id.*; see *Seeger*, 380 U.S. at 185 (holding whether a belief is “truly held” is “a question of fact”). The sincerity of religious exercise is often undisputed or stipulated. See, e.g., *Hobby Lobby*, 573 U.S. at 717 (“The companies in the case before us are closely held corporations, each owned and controlled by a single family, and no one has disputed the sincerity of their religious beliefs.”); *Holt*, 574 U.S. at 361 (“Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner’s belief.”). In assessing sincerity, OFCCP takes into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. See *Kennedy*, 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to “consider some attempt at compromise”); *LeBoon*, 503 F.3d at 229 (“[R]eligious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection.”); see also *Killinger*, 113 F.3d at 199–200. OFCCP will also evaluate any factors that indicate an insincere sham, such as acting “in a manner inconsistent with that belief” or “evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.” *Philbrook*, 757 F.2d at 482 (quoting *Barber*, 650 F.2d at 441)

(internal quotation mark omitted); cf., e.g., *Hobby Lobby*, 573 U.S. at 117 n.28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”); *Quaintance*, 608 F.3d at 724 (Gorsuch, J.) (“[T]he record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front.”).

Other decisions have not used the *McDonnell Douglas* framework, particularly when an inquiry into purported pretext would risk entangling the court in the internal affairs of a religious organization or require a court or jury to assess religious doctrine or the relative weight of religious considerations. See *Geary*, 7 F.3d at 330–31 (discussing cases). Depending on the circumstances, such an inquiry by a court or an agency could impermissibly infringe on the First Amendment rights of the employer. This arises most prominently in the context of the ministerial exception, a judicially recognized exemption grounded in the First Amendment from employment-discrimination laws for decisions regarding employees who “minister to the faithful.” *Hosanna-Tabor*, 565 U.S. at 189; see also *Our Lady of Guadalupe*, 140 S. Ct. at 2060. The exemption “is not limited to the head of a religious congregation,” nor subject to “a rigid formula for deciding when an employee qualifies as a minister.” *Hosanna-Tabor*, 565 U.S. at 190; see also *Our Lady of Guadalupe*, 140 S. Ct. at 2067. “The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.” *Hosanna-Tabor*, 565 U.S. at 189. The ministerial exception thus bars “an employment discrimination suit brought on behalf of a minister.” *Id.*; see also *Our Lady of Guadalupe*, 140 S. Ct. at 2073. In such a situation, it is dispositive that the employee is a minister; there is no further inquiry into the employer’s motive. See *Hosanna-Tabor*, 565 U.S. at 706 (“By imposing an unwanted minister, the state infringes the Free Exercise Clause . . . and the Establishment Clause”); see, e.g., *Rayburn*, 772 F.2d at 1169 (“In ‘quintessentially religious’ matters, the free exercise clause of the First Amendment protects the act of decision rather than a motivation behind it.”

(quoting *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 720 (1976))).

Some commenters, such as a religious legal association and an association of evangelical churches and schools, agreed with OFCCP that governmental inquiry into religious employers’ practices could violate the First Amendment. A religious legal organization commended OFCCP for deferring to religious organizations on matters of doctrine and religious observance, and commented that doing otherwise could lead to unconstitutional entanglement with religion. These are the constitutional concerns that likewise constrain courts’ analyses when an employer makes an employment decision based on religious criteria, yet the employee disputes the religious criteria. In those situations, courts have stated that “if a religious institution . . . presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.” *Little*, 929 F.2d at 948 (quoting *Mississippi College*, 626 F.2d at 485). Courts have noted the constitutional dangers of “choos[ing] between parties’ competing religious visions” and entangling themselves in deciding whether the employer or the employee has the better reading of doctrine, or which tenets an employee must follow or believe to remain in employment. *Geary*, 7 F.3d at 330; see *Curay-Cramer*, 450 F.3d at 141 (“While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas [this plaintiff] alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII. Comparing [plaintiff] to other Ursuline employees who have committed ‘offenses’ against Catholic doctrine would require us to engage in just the type of analysis specifically foreclosed by *Little*.”); *Little*, 929 F.2d at 949 (“In this case, the inquiry into the employer’s religious mission is not only likely, but inevitable, because the specific claim is that the employee’s beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts.”); *Maguire*, 627 F. Supp. at 1507 (“Despite [plaintiff’s] protests that she is a Catholic, ‘of a particular religion,’ the determination of who fits into that category is for religious

authorities and not for the government to decide.”).

Some commenters criticized OFCCP’s description of the extent to which it would be permissible to inquire into whether a religious employer’s adverse employment action was based on religion or on another protected characteristic. Many of these commenters believed OFCCP’s proposed approach is inconsistent with courts’ inquiry in Title VII cases. For example, a group of state attorneys general asserted that, unlike the definition in the proposed rule, Title VII jurisprudence and case law has required nuanced and fact-dependent inquiry into whether a religious employer discriminated against a worker based on his or her “particular religion” or on another protected basis. An LGBT rights advocacy organization criticized OFCCP for rejecting the traditional burden-shifting framework set forth in *McDonnell Douglas* and instead placing the burden on workers. Some of these commenters stated that OFCCP’s proposed inquiry would not be adequately rigorous. For example, a civil liberties and human rights legal advocacy organization asserted that OFCCP’s approach as described in the preamble “allows religion to serve as a pretext for discrimination, and creates roadblocks for individuals seeking to bring claims of discrimination against federal contractors.” An organization that advocates separation of church and state asserted that a more rigorous inquiry would not violate the First Amendment and stated that OFCCP’s concerns about impermissible entanglement are overblown and cannot justify its refusal to engage in any investigation of religious employers at all. An anti-bigotry religious organization similarly asserted that a more rigorous inquiry would not violate RFRA, citing *Hobby Lobby*, 573 U.S. at 733.

Some commenters believed the proposal did not clearly describe the inquiry that OFCCP would undertake to determine whether an adverse action was based on religion or another protected characteristic. For example, a legal think tank commented that OFCCP’s failure to meaningfully address various cases discussing the issue of pretext on the basis that they “turn on their individual facts” contravenes OFCCP’s stated goal of “bringing clarity and certainty to federal contractors.” OFCCP disagrees with these commenters’ characterization of the NPRM, but reiterates—and to the extent necessary, clarifies for their benefit—that OFCCP intends to apply the religious exemption as it has been

applied in the mine run of Title VII cases. In line with those cases, there are indeed aspects of the discrimination inquiry that are necessarily and rightly nuanced and fact-dependent, and there are aspects where inquiry can infringe upon religious organizations’ autonomy and are either prohibited or must be performed with care. The principles set out in those cases are reiterated below.

First, if a contractor raises the defense that an employee or applicant is covered by the ministerial exception, OFCCP can inquire whether that is in fact so. But if so, then that is the end of the inquiry. OFCCP will not apply the executive order in those circumstances. See *Our Lady of Guadalupe*, 140 S. Ct. at 2060–61; *Hosanna–Tabor*, 565 U.S. at 194–95.

Second, when the ministerial exception does not apply and the employee or applicant suffers adverse employment action by a contractor that is entitled to the religious exemption, OFCCP will apply traditional Title VII tools to ascertain whether the action was impermissible discrimination. In the absence of direct evidence of discrimination on a protected basis other than religion, this will typically involve application of the familiar *McDonnell Douglas* framework, in which (1) OFCCP must establish a prima facie case of discrimination on a protected basis other than religion; (2) the employer can respond with a nondiscriminatory reason, such as an explanation that its action was permitted under the religious exemption as pertaining to the individual’s particular religion; and (3) OFCCP, to find a violation, must rebut that explanation as a mere pretext. See *McDonnell Douglas*, 411 U.S. 792.

Third, ascertaining whether unlawful discrimination motivated an employer’s action requires consideration of all relevant facts and circumstances. OFCCP will consider all available evidence as to whether a religious organization’s employment action was in fact sincerely motivated by the applicant’s or employee’s particular religion—such as, for instance, their adherence to the organization’s religious tenets—or whether that was a mere pretext for impermissible discrimination.

Fourth, while OFCCP can inquire into the sincerity of the employer’s religious belief, it is constitutionally prohibited from refereeing internal religious matters of contractors that are entitled to the religious exemption. Thus OFCCP cannot decide, when the matter is disputed, whether the employer or the employee has the better reading of religious doctrine; whether an employee should be considered a faithful member

of a religious organization’s community; whether some religious offenses or requirements are more important than others and should merit particular employment responses; whether the employer’s sincerely held religious view is internally consistent or logically appealing; and similar issues.

Fifth, OFCCP believes these principles will cover the vast majority of scenarios, but there may be rare instances where an inquiry by a court or an agency into employment practices otherwise threatens First Amendment rights. See *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993) (“There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause.”). Commenters argued that this final caveat detracted from the clarity of the proposed rule. OFCCP disagrees. This observation merely notes, as have courts, that there may be instances outside the ministerial exception where a discrimination case might involve the kinds of questions prohibited by the First Amendment. See *id.* (finding employee’s failed religious duties were “easily isolated and defined,” so a trial could be conducted “without putting into issue the validity or truthfulness of Catholic religious teaching”). Instructive here are the sorts of questions found constitutionally offensive by the Supreme Court in *Catholic Bishop*, in which a hearing officer tested a witness’s memory and knowledge of Catholic liturgies and masses. See *Catholic Bishop*, 440 U.S. at 502 & n.10; *id.* at 507–08 (appendix); see also *Great Falls*, 278 F.3d at 1343. OFCCP believes these cases provide sufficient principles for the agency to properly guide its inquiry if and when needful.

f. Causation

OFCCP proposed to apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion. Specifically, where a contractor that is entitled to the religious exemption claims that its challenged employment action was based on religion, OFCCP proposed finding a violation of E.O. 11246 only if it could prove by a preponderance of the evidence that a protected characteristic other than religion was a but-for cause of the adverse action. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362–63 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). OFCCP stated

that this approach was necessary in situations where a religious organization, acting on a sincerely held belief, took adverse action against an employee on the basis of the employee's religion. OFCCP believed that application of the motivating factor framework in such cases might result in inappropriate encroachment upon the organization's religious integrity. However, the NPRM recognized that in prior notice-and-comment rulemaking implementing Executive Order 13665, 79 FR 20749 (Apr. 11, 2014) (amending E.O. 11246 to include pay transparency nondiscrimination), OFCCP rejected comments stating that a but-for causation standard was required and instead adopted the motivating factor framework as expressed in the Title VII post-1991 Civil Rights Act for analyzing causation. *See* 80 FR 54934, 54944–46 (Sept. 11, 2015).

A few commenters encouraged OFCCP to adopt the proposed but-for causation standard because they felt it would reduce government encroachment on religious autonomy. For instance, a private religious university commented that the proposed but-for standard is in line with statutory and First Amendment jurisprudence requiring the use of the least restrictive means to achieve government objectives that impinge on the exercise of religion. Another private religious university echoed this sentiment and added that the proposed but-for standard would enable religious entities to make employment decisions consistent with their sincerely held religious beliefs while still participating fully in the marketplace.

However, the majority of commenters who addressed the proposed but-for standard opposed it, and many recommended that OFCCP instead continue to apply the motivating-factor standard of causation to all claims of discrimination under E.O. 11246. These commenters cited a wide variety of concerns related to the proposed but-for standard.

Several commenters stated that the proposed standard would be too deferential to employers and/or impose too heavy a burden on employees. For instance, a national interfaith organization commented that, as long as an employer can cite another plausible reason for its actions, an employee cannot prove that discrimination occurred. The organization noted that under this standard, employees are far less likely to prevail.

Other commenters expressed skepticism at OFCCP's proffered rationale for departing from its established policy and practice of

interpreting the nondiscrimination requirements of E.O. 11246 in a manner consistent with Title VII principles. For instance, a national reproductive rights organization commented that, for decades, courts have resolved claims of employment discrimination by religious organizations without implicating the concerns OFCCP cites. The organization added that OFCCP's concerns about impermissible entanglement are overblown and unsupported by case law. A transgender legal professional organization expressed similar concerns.

Relatedly, a number of commenters opposed the proposed but-for standard on the basis that it conflicts with Title VII and related case law. Several of these commenters criticized OFCCP's reliance on *Nassar*, 570 U.S. at 362–63, and *Gross*, 557 U.S. at 180, and argued that these cases do not bridge the gap between the proposed but-for standard and Title VII principles. For instance, a contractor association commented: “The Supreme Court has adopted the ‘but for’ standard for retaliation claims under Title VII (*Nassar*) and for ADEA claims (*Gross*); it has not done so for discrimination claims under Title VII.” Similarly, an LGBT rights advocacy organization commented the two cases cited by OFCCP did not adopt a but-for causation requirement for Title VII or E.O. 11246 cases.

Additionally, multiple commenters expressed concern that the proposed but-for standard would run contrary to E.O. 11246's prohibition on discrimination and/or OFCCP's core mission of enforcing the Executive Order. For instance, a group of state attorneys general commented that the proposed but-for standard is contrary to law and exceeds OFCCP's authority because it impermissibly interprets the Executive Order's anti-discrimination provisions. And a national health policy organization commented: “The new proposed rule threatens to jeopardize the very mission of OFCCP and the original intent of the E.O. 11246 to protect workers from discrimination”

Finally, several commenters raised practical objections to the proposed but-for standard. For instance, an atheist civil liberties organization commented that applying different causation standards to cases involving similarly situated employers would “make it challenging for contractors seeking to comply with federal law, resulting in extra expense and legal confusion for workers and employers.” An organization that advocates separation of church and state expressed similar concerns, arguing that “status-based

discrimination claims based on identical conduct would be evaluated according to different standards of proof.”

Considering the comments received, OFCCP will apply the motivating-factor analysis to all claims of discrimination, including discrimination by religious organizations based on protected characteristics other than religion. OFCCP agrees that it can avoid impermissible entanglement while applying a motivating-factor standard of causation. *See, e.g., Curay-Cramer*, 450 F.3d at 139 (“[A]s long as the plaintiff did not challenge the validity or plausibility of the religious doctrine said to support her dismissal, but only questioned whether it was the actual motivation, excessive entanglement questions were not raised.”) (citing *Geary*, 7 F.3d at 330); *DeMarco*, 4 F.3d at 170–71)). Where there is a dispute as to whether an employment action was motivated by the employee's adherence to religious tenets, or instead was motivated by impermissible discrimination—a “one or the other” scenario—OFCCP will apply the principles just discussed in subsection II.A.5.e, “Application of the Religious Exemption.” Where instead an employment action is motivated by the employee's adherence or non-adherence to religious tenets that implicate another protected category, OFCCP will assess the action on a case-by-case basis in accordance with the general RFRA analysis discussed earlier. The approach adopted in this final rule is consistent with OFCCP's longstanding policy and practice as well as Title VII principles and case law.

f. Conclusion

For the reasons described above and in the NPRM, and considering the comments received, OFCCP finalizes the proposed definition of *Particular religion* without modification.

B. Section 60–1.5 Exemptions

This rule proposed to add paragraph (e) to 41 CFR 60–1.5 to establish a rule of construction for subpart A of 41 CFR part 60–1 that provides for the broadest protection of religious exercise permitted by the Constitution and laws, including RFRA. This rule of construction is adapted from RLUIPA, 42 U.S.C. 2000cc–3(g). Significantly, RFRA applies to all government conduct, not just to legislation or regulation. 42 U.S.C. 2000bb–1. Paragraph (e) is clarifying, since the Constitution and federal law, including RFRA, already bind OFCCP.

Some commenters expressed general support for the proposed rule of

construction based on the importance of protecting religious freedom, including constitutional protections. For example, a religious leadership and policy organization approved of the fact that the proposal gives religious freedom due deference by advocating for a broad and robust interpretation of its protections. In a joint comment, a religious legal association and an association of evangelical churches and schools commented that the proposed rule of construction reflects longstanding religious freedom principles recognized by Congress and protected by the First Amendment. A pastoral membership organization commented that the proposed rule of construction gives religious exercise the special protection required by the constitutional text and history. A religious professional education association commented that the proposed rule of construction provided clarity regarding the meaning, scope, and application of the religious exemption. Additional supportive commenters, including an evangelical chaplains' advocacy organization, stated that the rule of construction is consistent with executive orders and the Attorney General's memorandum on religious liberty.

Other commenters opposed the proposed rule of construction for a variety of reasons, including arguing that its application in this context would actually be inconsistent with the U.S. Constitution and federal laws. For example, a labor organization commented that the interpretation goes beyond the Constitution and law, including RFRA. An anti-bigotry religious organization further noted, with regard to RFRA, the Supreme Court's holding in *Hobby Lobby* that "anti-discrimination prohibitions are the least restrictive means of achieving the government's compelling interest in providing equality in the workplace," and commented that this principle applied with greater force to employment by federal contractors. Other commenters, including a group of state attorneys general and a transgender advocacy organization, cautioned that construing the religious exemption broadly would "exceed[] statutory and judicial limits" and conflict with the purpose and text of federal equal employment laws to provide maximum nondiscrimination protections for workers. A talent management assessment company commented that the "maximum extent permitted by law" standard was vague and left too much discretion to the agency charged with enforcement.

OFCCP did not intend, in proposing the rule of construction at § 60–1.5(e), to

create any new legal obligation or proscription on the rights of workers, but rather sought only to reaffirm existing protections found in federal law that already apply to OFCCP. The parallel rule of construction in RLUIPA has been in place for nearly 20 years and has proved to be a workable legal standard. OFCCP emphasizes that this rule of construction provides for broad protection of both employers' and employees' religious exercise. Moreover, by its terms, the provision limits the agency's interpretation of this protection to what is permitted under the U.S. Constitution, RFRA, and other applicable laws. It thus reflects the Supreme Court's recognition that, within the religion clauses of the First Amendment, there is "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. Accordingly, for the reasons described above and in the NPRM, considering the comments received, OFCCP finalizes the proposed rule of construction without modification.

C. Severability

The Department has decided to include severability provisions as part of this final rule. To the extent that any provision of this final rule is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect. Severability clauses have been added at the end of 41 CFR 60–1.3 and as a new paragraph, 41 CFR 60–1.5(f).

III. Other Comments

Numerous commenters raised a variety of other general points about the proposed rule.

A. Religious Liberty for Employees

Several commenters opposed the proposed rule as undermining or failing to promote religious liberty. For instance, a group of U.S. Senators commented that the proposed rule will allow employers to refuse to interview even highly qualified candidates simply because they do not regularly attend religious services in their employer's faith. According to the Senators, this could create a situation in which religious employers are allowed to discriminate against workers "who practice their faith differently—a fundamental right guaranteed by the Constitution." A religious women's organization echoed this concern and also stated that the proposed rule would

promote one interpretation of one religion—namely, evangelical Christianity—at the expense of religious liberty more broadly. Some commenters stated that the proposal would allow contractors to compel employees to follow their religious practices, which they argued directly violates Title VII and even the Constitution. A group of state attorneys general commented that, under the proposed rule, employers' religious freedom would come at the cost of the loss of the religious freedom of employees forced to abide by their employers' religious beliefs. A legal professional organization commented that the proposed rule would protect for-profit or nominally religious employers' right to require employees to participate in prayer or other religious practices. A religious organization commented that employers could invoke the religious exemption to coerce their workers into participating in certain religious practices under the threat of termination. Several other commenters, including a legal professional association, an organization that advocates separation of church and state, an anti-bigotry religious organization, and a migrants' rights organization, expressed general concern that the proposed rule would weaken religious liberty.

OFCCP believes that the final rule's overall effect will be to promote religious liberty. *See, e.g., Hobby Lobby*, 573 U.S. at 707 ("[P]rotecting the free-exercise rights of corporations like *Hobby Lobby*, *Conestoga*, and *Mardel* protects the religious liberty of the humans who own and control those companies."). The Supreme Court has described the expansion of the Title VII religious exemption as "lifting a regulation that burdens the exercise of religion." *Amos*, 483 U.S. 327, 338 (1987). As described above, the proposed definitions have been altered in the final rule to respond to commenters' concerns that nominally religious employers might qualify for the exemption, as well as to clarify the steps OFCCP will take in analyzing claims of discrimination by religious contractors. To the extent that commenters believe that the religious exemption itself increases employers' religious liberty at the expense of employees' religious liberty, OFCCP reiterates that it is required to administer the religious exemption as part of E.O. 11246. The President, following Congress's lead, has already decided how to balance the religious liberty of religious employers and their employees, and OFCCP cannot modify that. Additionally, claiming the

religious exemption and taking employment action under its protections is purely optional for employers; the government does not require any employment action that may be protected by the exemption.

B. Establishment Clause and Other Constitutional Questions

Several commenters stated that the proposal violates constitutional prohibitions on aiding private actors that discriminate. This concern was shared by an affirmative action professionals association, a civil liberties organization, a professional organization of educators, and an organization that advocates separation of church and state, among others. The civil liberties organization commented, for instance, that the proposed rule would permit contractors to discriminate with federal funds, thus putting the government's imprimatur on discrimination in violation of the Equal Protection and Establishment Clauses.

A variety of commenters opposed the proposed rule on the basis that it violates the Establishment Clause and/or general church-state separation principles. For instance, an atheist civil liberties organization commented that the proposed rule will violate the Constitution's religion clauses by involving the government in religious practice, promoting dominant religious practices, burdening unpopular religious practices, and harming third parties. Similarly, a labor union raised concerns that the rule crosses into territory proscribed by the Establishment Clause by authorizing federal contractors to advance their religious preferences and practices through the receipt of federal funds and the performance of public functions.

Other commenters stated that the proposed rule violates separation of powers. For instance, an LGBT rights advocacy organization stated that since 2001, Congress has repeatedly rejected efforts to extend the Title VII exemption to government-funded entities. Likewise, a consortium of federal contractors and subcontractors asserted that it would be inappropriate for OFCCP to regulate the religious exemption without direct and actual legislative or constitutional guidance.

Finally, several commenters, including an anti-bigotry religious organization and a civil liberties and human rights legal advocacy organization, raised concerns that the proposal violates a variety of other constitutional principles, including the no-religious-tests clause, the free speech clause, and the constitutional right of privacy.

Other commenters supported the proposed rule as consistent with constitutional principles. These commenters stated, among other things, that the proposal appropriately respects freedom of religion, helpfully clarifies that religious hiring protections apply even when federal funding is involved, and is consistent with the Establishment Clause. A religious liberties legal organization commented, for instance, that the proposed rule adheres to the traditional understanding that "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984)). A religious leadership and policy organization commented that the proposal reflects an accurate understanding of the free exercise of religion and "its place in our society."

OFCCP agrees with the commenters who stated that the proposal is consistent with constitutional principles. As noted in the NPRM and above, OFCCP believes that the final rule is supported by recent Supreme Court decisions that protect religion-exercising organizations and individuals under the U.S. Constitution and federal law. See, e.g., *Little Sisters of the Poor*, 140 S. Ct. 2367; *Espinoza*, 140 S. Ct. 2246; *Our Lady of Guadalupe*, 140 S. Ct. 2049; *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Trinity Lutheran*, 137 S. Ct. 2012; *Hobby Lobby*, 573 U.S. 682; *Hosanna-Tabor*, 565 U.S. 171. These decisions make clear, among other constitutional principles, that "condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel*, 435 U.S. at 626 (plurality opinion)); see also *Espinoza*, 140 S. Ct. at 2256. OFCCP believes that the final rule achieves consistency with these landmark Supreme Court decisions and is constitutionally valid. Moreover, the definitions and rule of construction adopted in the final rule will help OFCCP avoid the "constitutional minefield" into which some courts have fallen when adjudicating Title VII claims against religious organizations. *World Vision*, 633 F.3d at 730 (O'Scannlain, J., concurring). The final rule will enable OFCCP to apply the religious exemption without engaging in an analysis that would be inherently subjective and indeterminate, outside its competence, susceptible to

discrimination among religions, or prone to entanglement with religious activity. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261–62 (10th Cir. 2008); *Great Falls*, 278 F.3d at 1342–43. We address these points in more detail next.

1. Neutrality Toward Religion

The rule does not impermissibly favor religion. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court held that a religious organization is not disqualified from government programs that fund religious and nonreligious entities alike on a neutral basis. A "neutral basis" means that the criteria are neutral and secular, with no preference for religious institutions because of their religious character. *Id.*; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); U.S. Dep't of Justice, Office of Legal Counsel, *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, 2019 WL 4565486 (Aug. 15, 2019) ("*Religious Restrictions*") ("The neutrality principle runs throughout the Court's decisions, and is broadly consistent with a tradition of federal support for religious institutions that dates from the time of the Founding.").

This rule is motivated by legitimate secular purposes: To expand the eligible pool of federal contractors to include religious organizations, so that the federal government may choose from among competing vendors the best combination of price, quality, reliability, and other purely secular criteria; to clarify the law for religious organizations and thus reduce compliance burdens; to correct any misperception that religious organizations are disfavored in government contracting; and "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *Amos*, 483 U.S. at 336, by appropriately protecting their autonomy to hire employees who will further their religious missions. The final rule also has a religion-neutral effect. Under the final rule, both religious and secular organizations will retain the ability to bid on government contracts. Proposed vendors will have to compete solely on the basis of secular criteria. The use of sectarian criteria remains forbidden; nothing in the

proposed rule sanctions the use of sectarian criteria for contract awards.

2. Secular and Sectarian Activities

Nothing in the final rule sanctions direct federal funding of religious activities. In *Kendrick*, the Court forbade such direct funding of religious activity but upheld a statute authorizing payments to religious organizations that sought to eliminate or reduce the social and economic problems caused by teenage sexuality because the services to be provided under the statute were “not religious in character.” *Kendrick*, 487 U.S. at 605; *see also* U.S. Dep’t of Justice, Office of Legal Counsel, *Department of Housing and Urban Development Restrictions on Grants to Religious Organizations that Provide Secular Social Services*, 12 Op. O.L.C. 190, 199 (1998) (concluding that the government can fund a religious organization’s secular activities if they can be meaningfully and reasonably separated from the sectarian activities). Likewise here, in the relatively rare circumstances in which a proposed vendor both qualifies as a religious organization and receives a federal contract, the federal funds will pay the organization *to fulfill the terms of the secular contract*, not to pray or to proselytize.

Moreover, the Establishment Clause does not forbid the federal government from contracting with religious organizations for a secular purpose, even if the receipt of the contract incidentally helps the religious organization advance its sectarian purpose. As *Kendrick* explained, “Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . . To the extent that this congressional recognition has any effect of advancing religion, the effect is at most ‘incidental and remote.’” 487 U.S. at 607; *see, e.g., Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976) (“[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.”); *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012) (finding no Establishment Clause violation where city leased land to both secular and sectarian organizations). Here, as in *Kendrick*, nothing in the final rule “indicates that a significant proportion of the federal funds will be disbursed to ‘pervasively sectarian’ institutions.” *Kendrick*, 487 U.S. at 610. There are also no concerns that funds will be used for an “essentially religious endeavor”; rather, funds will be used to fulfill the

government’s secular contracting requirements. *Espinoza*, 140 S. Ct. at 225. The rule simply allows religious organizations to compete with secular organizations on the basis of secular criteria without being forced to compromise their religious purpose. Commenters objecting on this basis are dissatisfied with the existence of the exemption.

3. Respecting the First Amendment

Of great significance to OFCCP, the rule’s clarifications and accommodations better comport with the Free Exercise Clause by affording religious organizations an appropriate level of autonomy in their hiring decisions while still permitting them to engage in federal contracting. As the Court explained in *Trinity Lutheran*, 137 S. Ct. at 2022, the government violates the Free Exercise Clause when it conditions a generally available public benefit on an entity’s giving up its religious character, unless that condition withstands the strictest scrutiny. “[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.” *Id.*; *see also Locke v. Davey*, 540 U.S. 712 (2004) (holding government may not deny generally available funding to a sectarian institution because of its religious character); *Trinity Lutheran*, 137 S. Ct. at 2021 (“The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . [S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” (citing *Lukumi*, 508 U.S. at 546)). When the government conditions a program in this way, the government “has punished the free exercise of religion. “To condition the availability of benefits . . . upon [a recipient’s] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.” *Id.* at 2022 (quoting *McDaniel*, 435 U.S. at 626 (plurality opinion)); *cf. Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) (“[T]he ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.”)).

In a recent opinion, the Department of Justice’s Office of Legal Counsel concluded that the government violates the Free Exercise Clause by denying sectarian organizations an opportunity

to compete on equal footing for federal dollars. *See Religious Restrictions*, 2019 WL 4565486. As an initial matter, OLC explained that “[t]he Establishment Clause permits the government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content. There is nothing inherently religious in character about loans for capital improvement projects; this is not a program in which the government is ‘dol[ing] out crosses or Torahs to [its] citizens.’” *Id.* at *6 (citing *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009)). Because the capital-financing program at issue was a secular, neutral aid program, it did not violate the Establishment Clause. On the other hand, the government would violate the Free Exercise Clause by denying loans to an institution “in which a substantial portion of its functions is subsumed in a religious mission,” because such a restriction “discriminates based on the religious character of an institution.” OLC concluded that the appropriate balance was to deny loans under the program only for facilities that are predominantly used for devotional religious activity, or for facilities that offer only programs of instruction devoted to vocational religious education.

Here, some commenters made clear that the federal government’s current practice presented religious organizations with a dubious choice: They may participate in the government contracting process or retain their religious integrity, but not both. As one commenter noted, “If the best service provider or subcontractor happens to be a religious entity, they are often unwilling to comply with the federal anti-discrimination laws for fear that they will no longer be able to preserve the integrity of their organizations. This is a direct result of the uncertainty in the applicability of the religious exemption under the current law.” Similarly, another commenter, an association of medical professionals, recently surveyed health professional members working in faith-based organizations overseas and found that almost half, 49%, feel that the U.S. government is not inclined to work with faith-based organizations. The final rule thus removes any such concerns raised by contractors and instead provides appropriate religious accommodation.

4. Use of Federal Funds

Some commenters expressed concern that the rule would allow employers to use federal funds to discriminate against job applicants and employees on the

basis of religion. That is a critique of the E.O. 11246 religious exemption itself, not this rule. OFCCP cannot and does not by this rule reopen that determination by the President. Additionally, as noted earlier, claiming the religious exemption and taking employment action under its protections is purely optional for employers; the government does not require any employment action that may be protected by the exemption.

Regardless, as the Department of Justice's Office of Legal Counsel has pointed out, the federal government has repeatedly permitted religious organizations to receive federal funds while also maintaining autonomy over their hiring practices. See 31 O.L.C. 162, 185–86 (2007); accord Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 6 (Oct. 6, 2017), available at www.justice.gov/opa/press-release/file/1001891/download. Likewise, the proposed rule does not run afoul of the Establishment Clause merely because of the possibility that, in some rare instance, a court may determine that a particular contract award to a religious organization impermissibly endorses religion. “[W]hile religious discrimination in employment might be germane to the question whether an organization’s secular and religious activities are separable in a government-funded program, that factor is not legally dispositive.” U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum for William P. Marshall from Randolph D. Moss at 20 (Oct. 12, 2000), available at justice.gov/olc/page/file/936211/download. To the contrary, if the government “is generally indifferent to the criteria by which a private organization chooses its employees and to the identity and characteristics of those employees, there would be less likelihood that the government could reasonably be perceived to endorse the organization’s use of religious criteria in employment decisions.” *Id.* at 25. And in some situations, the religious exemption “might be a permissible religious accommodation that alleviates *special* burdens rather than an impermissible religious preference.” *Id.* at 30. For instance, the Office of Legal Counsel concluded that RFRA in one instance required the Department’s grant-making arm to exempt a religious organization from the religious nondiscrimination provisions of Title VII. See *id.*; see also 31 O.L.C. 162, 190 (2007). Here, several religious organizations commented that the current contracting rules erect a

barrier to participation by eroding their ability to hire members of their particular faith. Generally speaking, then, OFCCP, in line with case law from *Amos* to *Trinity Lutheran*, views this rule as merely providing permissible accommodation rather than impermissibly establishing religion.

5. Effects on Applicants and Employees

Finally, several commenters opposed the proposed rule on the basis that it would increase discrimination against contractors’ employees and applicants. Some cited historical discrimination against disadvantaged groups, warning that the proposal would cause a regression in civil rights protections, and stated that religion has often been used as a way to justify discrimination. For example, an affirmative action professionals association asserted that employment discrimination permitted by the proposed rule could eliminate the civil rights protections that minorities and women have enjoyed for decades.

Commenters also gave examples of how potential discrimination could play out. For example, an organization advocating for the separation of church and state commented that, for instance, an evangelical Christian might refuse to hire a gay man, but agree to hire a twice-divorced, thrice-married man, even though both homosexuality and divorce are prohibited by evangelical Christianity. An LGBT civil rights organization argued that even a construction company, janitorial service, or low-level healthcare provider could claim a religious mission and refuse to hire or provide services to single parents or individuals who become pregnant outside marriage or within a same-sex relationship.

Many commenters warned that adoption of the proposed rule would increase discrimination against lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, specifically. Some commenters alleged that the proposed rule was part of a concerted effort to roll back the rights of LGBTQ individuals and other disadvantaged groups. Several commenters stated that transgender employees in particular already face high rates of discrimination and poverty, and that this proposal would leave them even more vulnerable. A transgender civil rights and advocacy organization commented specifically that transgender people are already far more likely to be unemployed, and that approximately 1 in 4 earn less than \$24,000 per year. A women and family rights advocacy organization wrote that, currently, almost half of LGBTQ workers report actively concealing their

identity out of fear of discrimination, and that the proposal would exacerbate this issue. Commenters wrote that effects might include LGBTQ individuals being less inclined to seek HIV care and services for the aging, as well as facing increased vulnerability to trafficking. Others stated that the proposal would permit contractors to discriminate against people in same-sex relationships, including refusing to hire applicants, terminating employees when they marry someone of the same sex, or denying spousal benefits. Several commenters stated that even LGBTQ people of faith would be discriminated against.

Commenters also asserted that the proposed rule could increase discrimination against women and pregnant people based on religious beliefs about work, family roles, and reproduction. This included the possibility of discrimination against women for becoming pregnant outside of marriage, using contraception, using in vitro fertilization, seeking abortions, or getting divorced. An organization combatting hunger wrote that even facially neutral practices may “disproportionately” harm women, because when an employer opposes “sexual practices out of wedlock, those who bear the physical evidence—pregnancy—are going to be the ones that get fired.” Several commenters also stated that employers may discriminate against women based on religious beliefs that women should not work outside the home. For example, a women and family rights advocacy organization commented that some employers may refuse to hire women altogether, and that women may also be denied health insurance, professional growth opportunities, or other benefits because of an employer’s belief that women are not the “head of the household” and therefore do not need such benefits. Additionally, an interfaith policy and advocacy organization commented that an employer could cite a belief that women should not be alone with men they are not married to in order to deny female employees access to mentorship, training opportunities, and senior leadership positions in the workplace.

Commenters also asserted that the proposal would increase discrimination against religious minorities and/or atheists. Many stated that federal contractors should not be permitted to categorically exclude applicants of a particular religion. A transgender civil rights and advocacy organization commented that the proposed rule would promote sectarianism by allowing people of different faiths to

discriminate against one another. A number of commenters, including a civil liberties advocacy group and an interfaith policy and advocacy organization, commented: “Federal contractors should not be allowed to hang a sign that says ‘Jews, Sikhs, Catholics, Latter-day Saints need not apply.’”

Many commenters asserted that the proposal could allow racial discrimination as well. An organization combatting hunger claimed that discrimination would occur by citing a 2014 study in their comment which found that only 10% of Americans were comfortable permitting a small business to refuse service to African-Americans based on a religious reason. Commenters including an LGBTQ wellness organization also warned that, under the proposal, a religious contractor will be permitted to discriminate against interracial couples if it believes that marriage should be between a man and a woman of the same race. A legal think tank commented that employers could require employees to join a majority- or exclusively-white church, for instance, or to share particular religious beliefs that have racial implications and/or are more common among white Christians.

Some commenters argued that federal funds should not be used by contractors who may commit hiring discrimination. For example, a transgender advocacy organization commented that people should not be legally compelled to financially support entities that would refuse to employ them because of their identities, and noted that religious employers who seek to employ only “their own kind” should seek out non-federal funding. Other commenters stated that U.S. federal government contracting serves as a model for the private sector or foreign nations, which may emulate discriminatory practices permitted by this proposal.

As explained above, the religious exemption generally speaking does not excuse a contractor from complying with E.O. 11246’s requirements regarding antidiscrimination and affirmative action; notices to applicants, employees, and labor unions; compliance with OFCCP’s implementing regulations; the furnishing of reports and records to the government; and flow-down clauses to subcontractors. See E.O. 11246 §§ 202–203. Religious organizations that serve as government contractors must comply with all of E.O. 11246’s nondiscrimination requirements except in some narrow respects, under some narrow and reasonable circumstances recognized under law, where religious

organizations maintain, for instance, sincerely held religious tenets regarding matters such as marriage and intimacy which may implicate certain protected classes under E.O. 11246.

Some commenters argued that the proposed rule would violate the Establishment Clause specifically because of the increased discrimination they believed it would permit. Most of these commenters argued that potential discrimination will unconstitutionally burden third parties, including employees, applicants, and beneficiaries of contracting services. A labor union wrote that granting employers a broad religious exemption would harm employees and applicants based on their own religious beliefs and practices (or lack thereof), in violation of the Establishment Clause.

As noted above, the Supreme Court upheld Title VII’s religious exemption, on which E.O. 11246’s exemption is modeled, against an Establishment Clause challenge. *Amos*, 483 U.S. at 330. It did so in spite of the fact that the application of the exemption “had some adverse effect on those holding or seeking employment with those organizations.” *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); cf. *Amos*, 483 U.S. at 338–39 (rejecting the claim that the religious exemption “offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers” in part because the exemption had “a permissible purpose of limiting governmental interference with the exercise of religion”). If the E.O. 11246 religious exemption similarly affects some third parties, it does so to “prevent[] potentially serious encroachments on protected religious freedoms.” *Texas Monthly*, 489 U.S. at 18 n.8.

Some commenters stated that what they viewed as the proposal’s failure to consider the effects of increased discrimination made the proposed rule inconsistent with OFCCP’s previous rulemakings. Multiple commenters stated that previous rulemakings identified discrimination as wasteful of taxpayers’ money, and that this proposal failed to address this issue. For example, a state civil liberties organization commented that, in prior rules, OFCCP has consistently stated that discrimination in government contracting wastes taxpayer funds by preventing the hiring of the best talent, increasing turnover, and decreasing productivity. In addition, several commenters, including a women and family rights advocacy organization, referred to the rule as an “abrupt

departure” from OFCCP’s previous EEO enforcement. A civil liberties organization commented that the “Department itself has previously acknowledged the harms of discrimination to the country as a whole, but ignores them entirely in the Proposed Rule.” An LGBT legal services organization commented that the proposed rule indicates that OFCCP will not enforce the relevant protections sufficiently.

Some commenters noted more specifically that they believe the proposal is inconsistent with the agency’s rule implementing E.O. 13672, which added sexual orientation and gender identity to the bases protected by E.O. 11246. For example, a legal think tank commented that, in its rule on sexual orientation and gender identity, OFCCP took into account the benefits of nondiscrimination—meaning that it would be arbitrary and capricious for OFCCP to ignore these benefits of nondiscrimination “in the present rulemaking.” A watchdog organization wrote that “undoing these protections could have adverse long-term effects on the federal contracting system, including lower-quality goods and services, and impaired federal programs and missions.”

Commenters also criticized the proposal as purportedly inconsistent with OFCCP’s 2016 sex discrimination rule. A civil liberties organization commented that, in that rule, the agency cited social science research supporting the need for effective nondiscrimination enforcement. Similarly, a legal think tank wrote that, in its sex discrimination rulemaking, OFCCP specifically cited research indicating that employment discrimination against transgender workers is pervasive. These commenters asserted that OFCCP ignored such statistics in proposing the current rule.

OFCCP continues to believe that discrimination by federal contractors generally has a negative impact on the economy and efficiency of government contracting. Indeed, that is one of the primary justifications for E.O. 11246. However, it has long been recognized that a religious exemption in the Executive Order is also warranted, Congress has determined that accommodations under RFRA are sometimes required, and OFCCP’s policy is to respect the religious dignity of employers and employees to the maximum extent permissible by law. Further, OFCCP believes that this rule will have a net benefit to the economy and efficiency of government contracting. For those current and potential federal contractors and subcontractors interested in the

exemption, this rule will help them understand its scope and requirements and may encourage a broader pool of organizations to compete for government contracts and more of them, which will inure to the government's benefit.

Commenters' concerns here are also exaggerated. As explained above, OFCCP does not anticipate this rule will affect the vast majority of contractors or the agency's regulation of them, since they do not and would not seek to qualify for the religious exemption. As commenters noted, religious organizations do not appear to be a large portion of federal contractors. And even for them, adherence to E.O. 11246's nondiscrimination provisions is required except in those circumstances well-established under law, including the religious exemption, the ministerial exception, and RFRA. OFCCP also reemphasizes that the proposed definitions have been altered in the final rule to respond to commenters' concerns that nominally religious employers might qualify for the exemption, as well as to clarify the steps OFCCP will take in analyzing claims of discrimination by religious contractors. As explained in more detail in the Regulatory Procedures section below, OFCCP has considered the possible adverse effects of the rule and believes they will be minimal and will be outweighed by the benefits.

C. The Equal Employment Opportunity Commission

Some commenters raised concerns about this rule's compatibility with the positions of the EEOC. Different aspects of this concern have been described and addressed in earlier parts of this preamble. OFCCP consolidates those concerns and addresses them here as well. Those concerns included general concerns that the proposed rule would undermine the EEOC's efforts by taking positions contrary to the EEOC or that the proposed rule would introduce confusion by subjecting federal contractors to conflicting or at least different legal regimes. Commenters also objected to specific aspects of the rule on grounds that they differed from the EEOC's position, including the proposed rule's inclusion of for-profit entities as among those able to qualify for the religious exemption, the proposed rule's disagreement that the exemption's scope is limited to a coreligionist preference, and the proposed rule's but-for causation standard.

OFCCP has a decades-long partnership with the EEOC and works closely with it to ensure equal

employment opportunity for American workers. OFCCP rejects the idea that this rule would undermine that longstanding and constructive partnership. The EEOC reviewed the proposed rule and this final rule. This final rule applies only to government contractors and subcontractors, not the broader swath of U.S. employers that the EEOC regulates. Within that smaller segment of employers, it applies only to that small minority of contractors and subcontractors that qualify or may seek to qualify for the religious exemption. Among that group, they would need to have 15 or more employees to be covered by the EEOC. And within that group, there would still need to be a situation in which any differences between the views of OFCCP and EEOC would cause a different result. In short, OFCCP doubts this rule will create any systemic disharmony between the agencies' enforcement programs.

For the small universe of employers remaining as defined above, the differences that may exist are minor. At the outset, OFCCP notes that EEOC does not have substantive rulemaking authority under Title VII, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), and the EEOC statements on this issue are in nonbinding subregulatory guidance. As to the specifics of that guidance, the differences that do exist are small. OFCCP has revised its approach in the final rule to adopt a motivating-factor standard of causation, so a difference there, assuming there was one, no longer exists. Regarding OFCCP's definition of *Religious corporation, association, educational institution, or society*, the EEOC's current subregulatory guidance on this topic has not been updated since 2008, before *World Vision* and *Hobby Lobby* were decided.³¹ Contrary to some commenters' assertions, this guidance treats for-profit status as a significant factor, but not as dispositive; this final rule does the same. Notably, the EEOC very recently issued a proposal to update its compliance manual on religious discrimination.³² This rule is not inconsistent with the proposal

³¹ See EEOC, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace; EEOC, EEOC Compliance Manual § 12–I.C.1 (July 22, 2008), www.eeoc.gov/laws/guidance/section-12-religious-discrimination. The EEOC's website states for both these documents that, “[a]s a result of the Supreme Court's decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, we are currently working on updating this web page.” *Id.*

³² See EEOC, “PROPOSED Updated Compliance Manual on Religious Discrimination” (Nov. 17, 2020), <https://beta.regulations.gov/document/EEOC-2020-0007-0001> (last accessed November 18, 2020).

either, which notes that “[t]he religious organization exemption under Title VII does not mention nonprofit and for-profit status” and states that “[w]hether a for-profit corporation can constitute a religious corporation under Title VII is an open question.”³³ The EEOC's 2008 guidance states that the exception is only for organizations that are primarily religious. Its recently proposed guidance describes the inquiry as one into “whether an entity is religious.”³⁴ OFCCP's test also seeks to identify organizations that are primarily religious—through an appropriately guided, reliable, and objective inquiry. The EEOC's 2008 guidance (and its proposed guidance) suggests an open-ended set of non-dispositive factors, while this final rule uses a set of clearly defined factors that are sufficient for non-profit entities; regarding for-profit entities, additional evidence compatible with some of the additional factors listed by the EEOC's 2008 guidance may come into play. Insofar as any difference still remains between this final rule and EEOC's 2008 guidance, OFCCP believes that difference is tolerable when weighed against the subsequent developments in the case law, the reasoning of which OFCCP finds persuasive, and OFCCP's desire for a more structured test, especially given OFCCP's unique contract-based regulatory structure.

Regarding OFCCP's definition of *Particular religion*, the same EEOC guidance documents from 2008 state that the religious exemption “only allows religious organizations to prefer to employ individuals who share their religion.” It then addresses two religiously based views that are not protected by the exemption: Racial discrimination and differences in fringe benefits between men and women. This final rule is fully compatible with both those examples. As discussed earlier in this preamble, OFCCP always has a compelling interest in enforcing prohibitions on racial discrimination, and OFCCP endorses the result in *Fremont*, 781 F.2d 1362. This final rule, however, does provide an exemption broader than a mere coreligionist hiring preference. OFCCP believes, for the reasons stated earlier in this preamble, that that view is sufficiently supported by the Title VII case law, and in fact is the more persuasive view of the law. OFCCP also believes that a broader view is more likely to encourage religious organizations to enter the pool of competitors for government contracts, which benefits the government. For

³³ *Id.* at 21.

³⁴ *Id.* at 20.

these reasons, OFCCP believes that any issues arising from any differences with the EEOC's views as stated in subregulatory guidance from 2008 are outweighed by the benefits of adopting a broader view of the exemption. Additionally, OFCCP believes any differences on this issue may be resolved in the near future. The EEOC's proposed guidance is even more consistent with OFCCP's final rule. The proposed guidance states that "the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs."³⁵ The guidance goes on to state that "[t]he prerogative of a religious organization to employ individuals 'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."³⁶

OFCCP also believes some commenters mischaracterize any differences between the OFCCP and EEOC in this area as presenting contractors with conflicting liability. OFCCP's final rule is at least as, or more, protective of religious organizations than the view stated in the EEOC's guidance. A contractor can choose to adhere to the view articulated by the EEOC in 2008 and be in full compliance under the view of both agencies.

Finally, OFCCP must balance its coordination with the EEOC with its need to follow directives from the President and the U.S. Department of Justice. Section 4 of Executive Order 13798 states that "[i]n order to guide all agencies in complying with relevant Federal law, the Attorney General shall, as appropriate, issue guidance interpreting religious liberty protections in Federal law." The Attorney General issued such guidance on October 6, 2017, "to guide all administrative agencies and executive departments in the executive branch." Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 1 (Oct. 6, 2017), available at www.justice.gov/opa/press-release/file/1001891/download. This rule is fully compatible with that guidance:

Religious corporations, associations, educational institutions, and societies—that

is, entities that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes—have an express statutory exemption from Title VII's prohibition on religious discrimination in employment. Under that exemption, religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school. Indeed, even in the absence of the Title VII exemption, religious employers might be able to claim a similar right under RFRA or the Religion Clauses of the Constitution.

Id. at 6; see also *id.* at 12a–13a

IV. Regulatory Procedures

A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

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

Executive Order 13563 (E.O. 13563) directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor

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

This final rule is an E.O. 13771 deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities.

1. The Need for the Regulation

As discussed in the preamble, OFCCP received numerous comments addressing the need for the regulation. Some commenters stated the proposal was necessary to ensure religious entities could contract with the federal government without compromising their religious identities or missions. Some commenters also agreed with OFCCP's observation that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption.

OFCCP also received comments objecting to the proposal because they claimed it would permit taxpayer- or government-funded discrimination. Commenters argued that the Government should not allow federal contractors to fire or refuse to hire qualified individuals because they do not regularly attend religious services or adhere to the "right" religion. Additionally, commenters expressed skepticism about religious organizations' reluctance to participate as federal contractors. Many of these commenters stated that OFCCP provided no evidence to support its claim or asserted that the proposed rule would increase rather than reduce confusion. In addition, several commenters cited a report from a progressive policy institute concluding that faith-based organizations that had objected to the lack of an expanded religious exemption in E.O. 13672 continued to be awarded government contracts.

OFCCP disagrees with commenters' characterization of the rule as discriminatory. OFCCP is committed to enforcing all of E.O. 11246's protections, including those protecting employees from discrimination on the basis of religion. OFCCP emphasizes again that

³⁵ EEOC, "PROPOSED Updated Compliance Manual on Religious Discrimination" at 24.

³⁶ *Id.* (citing *Hall*, 215 F.3d at 625; *Little*, 929 F.3d at 951).

this rule will have no effect on the overwhelming majority of federal contractors. Even for religious organizations that serve as government contractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some narrow and reasonable circumstances recognized under law. This rule provides clarity on those circumstances, consistent with OFCCP's obligations to also respect and accommodate the free exercise of religion.

OFCCP agrees with the comments stating that the religious exemption contained in section 204(c) of E.O. 11246 is necessary to ensure religious organizations can contract with the federal government without compromising their religious identities or missions. The fact that some faith-based organizations have been willing to enter into federal contracts does not mean that other faith-based organizations have not been reluctant to do so. Indeed, a few commenters offered evidence that religious organizations have been reluctant to contract with or receive grants from the federal government because of the lack of clarity regarding religious exemptions in federal law. In addition, although some commenters objected to the provision of any religious exemption for federal contractors, the religious exemption is part of E.O. 11246 that OFCCP is obligated to administer and enforce and has been part of the Executive Order for nearly two decades.

OFCCP is publishing this final rule to clarify the scope and application of the religious exemption. The intent is to provide certainty and make clear that the exemption includes not only churches but employers that are organized for religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in activity consistent with and in furtherance of that religious purpose. OFCCP believes that the rule will promote consistency in OFCCP's administration and that it will be clearer for contractors to follow. Further, OFCCP believes it will help achieve consistency with the administration policy to enforce federal law's robust protections of religious freedom.

2. Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the new definitions in § 60–1.3 and the new rule of construction in § 60–1.5. While this rule will only apply to federal contractors that are religious, OFCCP lacks data to determine the number of contractors that would fall

within that definition and thus evaluates the impacts using data for the entire contractor universe despite the fact this number significantly overstates the number of religious contractors. Prior to publication of the NPRM, OFCCP surveyed the list of contractors in the General Service Administration's System for Award Management (SAM) to identify organizations whose North American Industry Classification System (NAICS) descriptions or names included the word "religious," "church," "mosque," etc. This survey was not a useful or appropriate proxy for the number of potentially affected entities for several reasons. First, not all organizations with "religious" NAICS codes or names would qualify for the exemption, given that any formulation of the religious-organization test is fact-intensive and requires much more than that the organization simply have (what is commonly understood to be) a religious term in its name. This holds true under any formulation of the test, whether that used in a case like *LeBoon* or the test set out in the NPRM and refined in the final rule. Second, and similarly, many religious organizations that could qualify for the religious employer exemption at issue here may not include one of those three specific descriptors in their NAICS description much like many religious organizations do not include one of those three words in their legal names. Third, the religious exemption is an optional accommodation. Organizations that qualify for it may choose to use it, or not, and OFCCP has no reliable way of determining which will do so. Fourth, OFCCP believes that, as a government agency, it would be a fraught matter for it to search for potentially religious organizations based on its own view of what sorts of terms are religious, assess the results in the abstract, and attempt to attribute religious characteristics to the organizations found. This rule elsewhere rejects that sort of approach. For all these reasons, OFCCP has chosen to use broader estimates of the contractor universe.

Further, OFCCP anticipates that many contractors would affirmatively disclaim any religious basis and thus OFCCP recognizes that the following analysis will be an overestimate, but uses it out of an abundance of caution. OFCCP determined that there are approximately 435,000 entities registered in the SAM database.³⁷

³⁷ U.S. General Services Administration, System for Award Management, data released in monthly files, available at <https://sam.gov>. The SAM database is an estimate with the most recent download of data occurring November 2020.

Entities registered in the SAM database consist of contractor firms and other entities (such as state and local governments and other organizations) that are interested in federal contracting opportunities and other forms of federal financial assistance. The total number of entities in the SAM database fluctuates and is posted on a monthly basis. The current database includes approximately 435,000 entities. Thus, OFCCP determines that 435,000 entities is a reasonable representation of the number of entities that may be affected by the final rule.³⁸ OFCCP recognizes that this SAM number likely results in an overestimation for two reasons: The system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority. Further, because this rule only applies to religious contractors, OFCCP is confident that this estimate overstates the true universe of contractors affected by the rule.

OFCCP anticipates three main groups that potentially will be impacted: Religious organizations that decide to become federal contractors because of this final rule's clarity on the scope and application of the religious exemption, religious organizations that are already federal contractors, and all current federal contractors. OFCCP is unable to reasonably quantify the costs, benefits, and transfers for these three groups of organizations, but provides the following qualitative analysis. Though religious organizations new to federal contracting will likely incur upfront costs and compliance costs associated with becoming a federal contractor, it is reasonable to assume they believe that becoming a federal contractor will further their goals, which will result in benefits to the organization (whether increased revenues, more financial stability, or better market access). In addition, if the new potential contractors are awarded government contracts, the government and the public will receive better quality or lower-cost services because most federal contracts are rewarded through competitive bidding which selects (generally speaking) either the lowest

³⁸ While the final rule may result in more religious corporations, associations, educational institutions or societies entering into federal contracting or subcontracting, there is no way to estimate the volume of increase. As noted above, OFCCP does not anticipate that the number of religious contractors will grow to be equal to non-religious contractors, but uses this estimate due to the lack of data.

cost per unit or highest quality unit at a specific price. As the number of potential federal contractors rises, the competitive process should result in better quality and prices for goods and services which will enhance the societal benefits of federal contracting. If total costs from contracting with the new organization are lower than the status quo, the result will be a transfer to taxpayers.

Religious organizations which are already federal contractors will see a minimal cost for rule familiarization and compliance and will continue to efficiently provide services to the U.S. government. The clear boundaries of the religious exemption may permit these contractors to more freely seek the religious exemption with assurance that they are complying with their legal obligations under Executive Order 11246, and they may revisit their employment practices accordingly. OFCCP cannot determine quantitatively the direction or magnitude of any changes in employment but believes the overall effects will be quite small at these organizations, as most employees at them were likely attracted to them because of a shared sense of religious mission, and extremely small when considering the entire contractor universe or the economy as a whole. On one hand, religious employers may feel more free to hire those that are not denominational coreligionists, given this final rule's explanation, consistent with law, that an organization does not forfeit the exemption when it hires outside strict denominational boundaries, and that an organization may require acceptance of or adherence to particular religious tenets as part of the employment relationship regardless of employees' denominational membership. On the other hand, given this clarity, religious employers may also feel more confident in their ability to hire and retain employees based on religious criteria. Additionally, OFCCP believes these assurances for religious organizations will result in reduced legal costs for both the religious contractors and OFCCP.

All current federal contractors may face additional competition as new potential competitors enter the market. Since the total amount of available government contracts is not anticipated to change, the increased competition may provide better prices for the government, but may also result in a reallocation of the contracts. Should this occur, it is possible that revenues will be transferred between various government contractors or from current contractors to new entrants.

3. Public Comments

In this section, OFCCP addresses the public comments specifically received on the Regulatory Impact Analysis.

One commenter, a public policy research and advocacy organization, asserted that OFCCP underestimated the wage rate of the employees who would likely review the rule. The commenter asserted that the employee would likely be an attorney rather than a human resource manager. The commenter suggested that most contractors would consult in-house or outside counsel to help with rule familiarization. The commenter also provided an alternate fully loaded hourly compensation rate for Lawyers (SOC 23-1011). OFCCP acknowledges that some contractors may have in-house counsel review the final rule. However, some contractors do not have in-house counsel, and their review will be conducted by human resource managers. Taking into consideration this comment, OFCCP has adjusted its wage rate to reflect review by either in-house counsel or human resource managers.

Several commenters addressed the time needed for a contractor to become familiar with the final rule. These commenters asserted that the estimate of one half-hour was too low. One commenter provided no additional information or alternative calculation. The remaining two provided alternative estimates ranging from 1.5 hours to 2.5 hours to become familiar with the final rule. OFCCP acknowledges that the precise amount of time each company will take to become familiar with understanding the new regulations is difficult to estimate. However, the elements that OFCCP uses in its calculation take into account the length and complexity of the final rule. The final rule adds definitions to the existing regulations implementing E.O. 11246 and clarifies the exemption contained in section 204(c) of E.O. 11246. As such, the final rule clarifies requirements and reduces burdens on contractors trying to understand their obligations and responsibilities of complying with E.O. 11246. Thus, OFCCP has decided to retain its initial estimate of one half-hour for rule familiarization. This estimate accounts for the time needed to read the final rule or participate in an OFCCP webinar about the final rule.

Many commenters asserted that OFCCP did not address the potential costs of the final rule on employees, taxpayers, and minority groups, including LGBT individuals, women, and religious minorities. The commenters asserted that OFCCP failed

to address the economic and non-economic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, job searches, and negative mental and physical health consequences of discrimination. Two commenters, a civil liberties organization and a labor union, mentioned that there are 25 states without explicit statutory protections barring employment discrimination based on gender identity and sexual orientation and asserted that workers in these states are not otherwise covered by statutory protections. The commenters who made these assertions provided no additional information or data to support their assertions. Additionally, given *Bostock's* holding that Title VII's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and transgender status, these concerns seem lessened.

OFCCP has reviewed these comments and notes that any attempt to project costs to employees would necessarily require OFCCP to speculate that certain workers will face discrimination only once this rule is finalized. Further, the commenters ignore the possibility that contractors may choose to hire individuals of greater religious diversity as a result of this rule because their incentive to only hire coreligionists will be diminished. Absent data regarding the number of individuals who are not discriminated against in the status quo but would be discriminated against when this rule is finalized, and non-coreligionist individuals who will be hired by a contractor as a result of this rule that OFCCP cannot assess the mere possibility that some workers could face different costs. Likewise, OFCCP lacks data for the number of new contractors that may enter the market and the number of employees that work for such companies. As such, OFCCP does not estimate the benefits to the employees of those new contractors.

Commenters also said that OFCCP failed to address the costs to taxpayers in the form of a restricted labor pool, decreased productivity, employee turnover, and increased health care costs related to employment discrimination and increased social stigma. In addition, some commenters mentioned that OFCCP did not account for intangible costs related to reductions in equity, fairness, and personal freedom that would result from allowing businesses and organizations receiving taxpayer dollars to opt out of critical nondiscrimination provisions that protect employees based on gender identity and sexual orientation. The commenters who made these assertions

provided no additional information or data to support their assertions. Further, the commenters provide no additional support for their assertion that the rule will increase costs to taxpayers and ignore the possibility that the rule will expand the pool of federal contractors, thereby saving taxpayers money.

Similarly, several commenters addressed the potential impact of the rule on state and local governments. Three commenters, a city attorney, a state's attorney, and a civil liberties and human rights legal advocacy organization, mentioned that state and local governments may lose important tax revenue if people relocate or choose to withdraw from the workforce because of the final rule. Another commenter mentioned that state and local governments that serve victims of discrimination will need to contribute to, provide, and administer more public benefits programs for vulnerable populations. These comments are assume that the rule will impose costs on workers and that those costs will in turn be imposed upon the communities in which those workers live. None of these commenters provided additional information or data to support their statements.

One individual commenter asserted that OFCCP did not properly determine the rule's economic significance. The commenter asserted that the Regulatory Impact Analysis in the NPRM did not take into account "the actual monetary impact of the regulation." Using all available information and data, OFCCP has addressed the quantifiable and qualitative costs and benefits of this final rule as required. It provides an assessment of the costs associated with rule familiarization and concludes that the addition of definitions and clarification of an exemption do not create additional burdens for the regulated community. As stated in the preamble, the intent of the final rule is to clarify the scope of the religious exemption and promote consistency in OFCCP's administration of it. The commenter also asserted that OFCCP did not account for the impact on larger contractors. The Regulatory Flexibility Act requires agencies to consider the impact of a regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions. It does not address larger corporations. However, OFCCP's assessment reflects

that it does not anticipate any costs beyond rule familiarization for contractors.

Taking the Regulatory Impact Analysis comments into consideration, OFCCP has assessed the costs and benefits of the final rule as follows.

OFCCP believes that either a Human Resource Manager (SOC 11-3121) or a Lawyer (SOC 23-1011) would review the final rule. OFCCP estimates that 50% of the reviewers would be human resource managers and 50% would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resource managers and lawyers. The mean hourly wage of human resource managers is \$62.29 and the mean hourly wage of lawyers is \$69.86.³⁹ Therefore, the average hourly wage rate is \$66.08 $((\$62.29 + \$69.86)/2)$. OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. OFCCP used a fringe benefits rate of 46%⁴⁰ and an overhead rate of 17%,⁴¹ resulting in a fully loaded hourly compensation rate of \$107.71 $(\$66.08 + (\$66.08 \times 46\%) + (\$66.08 \times 17\%))$.

TABLE 1—LABOR COST

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

4. Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis the estimated time it will take for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials, such as fact sheets and answers to frequently asked questions. OFCCP may also host webinars for interested persons that describe the new regulations and conduct listening

sessions to identify any specific challenges contractors believe they face, or may face, when complying with the new regulations. OFCCP notes that such informal compliance guidance is not binding.

OFCCP believes that human resource managers or lawyers at each contractor firm would be the employees responsible for understanding the new regulations. OFCCP further estimates that it will take a minimum of one half-hour for a human resource professional or lawyer at each contractor firm to read the rule, read the compliance assistance

materials provided by OFCCP, or participate in an OFCCP webinar to learn the new requirements.⁴² Consequently, the estimated burden for rule familiarization would be 217,500 hours $(435,000 \text{ contractor firms} \times \frac{1}{2} \text{ hour})$. OFCCP calculates the total estimated cost of rule familiarization as \$23,426,925 $(217,500 \text{ hours} \times \$107.71/\text{hour})$ in the first year, which amounts to a 10-year annualized cost of \$2,666,359 at a discount rate of 3% (which is \$6.13 per contractor firm) or \$3,117,259 at a discount rate of 7% (which is \$7.17 per contractor firm).

TABLE 2—REGULATORY FAMILIARIZATION COSTS

Total number of contractors	435,000.
Time to review rule	30 minutes.

³⁹ BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2019, https://www.bls.gov/oes/current/oes_nat.htm.

⁴⁰ BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$24.26 per hour

worked in 2017, while benefit costs averaged \$11.26, which is a benefits rate of 46%.

⁴¹ Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program" (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

⁴² OFCCP believes that contractor firms that may be potentially affected by the rule may take more time to review the final rule, while contractor firms that may not be affected may take less time, so the one half-hour reflects an estimated average for all contractor firms.

TABLE 2—REGULATORY FAMILIARIZATION COSTS—Continued

Human resources manager and lawyer fully loaded hourly compensation	\$107.71.
Regulatory familiarization cost	\$23,426,925.
Annualized cost with 3% discounting	\$2,666,359.
Annualized cost per contractor with 3% discounting	\$6.13.
Annualized cost with 7% discounting	\$3,117,259.
Annualized cost per contractor with 7% discounting	\$7.17.

5. Cost Savings

OFCCP expects that contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions and the interpretation provided will reduce the risk of noncompliance to contractors and the potential legal costs that findings of noncompliance with OFCCP's requirements might impose. One mass mail campaign of commenters asserted that allowing religious organizations to continue to provide a variety of services, such as assisting victims of sexual abuse, the hungry, and the homeless, is effective because it saves taxpayer dollars through contracting instead of expanding government bureaucracy.

Some commenters argued that the rule will decrease clarity and will thus increase costs for contractors, especially if those contractors believe their obligations under the EEOC conflict with their obligations under the final rule. First, OFCCP believes that the E.O. 11246 nondiscrimination obligations it enforces remain in force and that the rule is sufficiently consistent with Title VII case law and principles and that it will promote consistency in administration. Second, even assuming for purposes of this analysis that contractors' obligations under EEOC and E.O. 11246 differ (e.g., that the exemption in E.O. 11246 permits an action forbidden under the EEOC's view of Title VII), a contractor remains obligated to abide by Title VII and any exemption from E.O. 11246 simply prevents additional liability before OFCCP for the same action. Accordingly, only those contractors that wish to rely on the E.O. 11246 exemption need consider it, and we expect that the additional costs incurred by such organizations to understand the exemption beyond their existing compliance costs will be minimal.

6. Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are important, and states that agencies may consider such benefits. This final rule improves equity and fairness by giving contractors clear guidance on the scope and application of the religious exemption

to E.O. 11246. It also increases religious freedom for religious employers.

The final rule increases clarity for federal contractors. This impact most likely yields a benefit to taxpayers (if contractor fees decrease because they do not need to engage third-party representatives to interpret OFCCP's requirements). While some commenters expressed concern that the rule was not clear, OFCCP believes that the rule is sufficiently consistent with Title VII case law and principles and that it will promote consistency in administration. Furthermore, by increasing clarity for both contractors and for OFCCP enforcement, the final rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required under the regulations. This would also most likely represent a benefit to taxpayers (since fewer resources would be spent in OFCCP administrative litigation).

OFCCP notes that some commenters asserted that OFCCP did not provide evidence that faith-based organizations have been reluctant to contract with the federal government because of the lack of certainty about the religious exemption. The fact that some small number of faith-based organizations have been willing to enter into federal contracts does not mean that other faith-based organizations have not been reluctant to do so. OFCCP believes that providing clarity to the religious exemption currently included under E.O. 11246 will promote clarity and certainty for all contractors. Moreover, a few commenters confirmed OFCCP's observation that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption. One individual commenter described his experience with religious organizations' reluctance to contract or subcontract with the federal government, and two other commenters offered examples or evidence of religious organizations' reluctance to participate in other contexts, such as federal grants. Thus, OFCCP expects that the number of new contractors may increase because religious entities may be more willing to

contract with the government after the religious exemption is clarified.

A further benefit of this rule would be that some religious contractors will increase the diversity of their workforce. Under some prior interpretations, the religious exemption was only provided to contractors who hired co-religionists (e.g., a Catholic company hiring only Catholics; a Latter-day Saint contractor hiring only Latter-day Saints; etc.) and thus religious contractors were incentivized to limit their hiring to only co-religionists. Once this rule is finalized, such religious contractors will no longer be required to limit their hiring. The likely outcome of this change is that the workforces of religious employers will become more diverse.

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

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

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." Public Law 96-354, 2(b). The RFA requires agencies to consider the impact of a regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a final rule would have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. See *id.* However, if the agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. See 5 U.S.C. 605. The certification must provide the factual basis for this determination.

OFCCP does not expect the final rule to have a significant economic impact on a substantial number of small entities and does not believe the final rule has any recurring costs. The regulatory familiarization cost discounted at a 7% rate of \$50.33 per contractor or \$7.17 annualized is a *de minimis* cost. Therefore, the first year and annualized burdens as a percentage of the smallest employer's revenue would be far less than 1%. Accordingly, OFCCP certifies that the final rule would not have a significant economic impact on a substantial number of small entities. That is consistent with the Department's analysis in the NPRM.

C. Paperwork Reduction Act

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

OFCCP has determined that there is no new requirement for information collection associated with this final rule. The final rule provides definitions and a rule of construction to clarify the scope and application of current law. The information collections contained in the existing E.O. 11246 regulations are currently approved under OMB Control Number 1250-0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control Number 1250-0003 (Recordkeeping and Reporting Requirements—Supply and Service). Consequently, this final rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act.

D. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this final rule does not include any federal mandate that may result in excess of \$100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

E. Executive Order 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with Executive Order 13132 regarding federalism. OFCCP recognizes that there may be some existing costs that may shift from the federal government to state or local

governments; however, the agency believes that these effects will be neither direct nor substantial. Thus, OFCCP has determined that it does not have "federalism implications." This rule will not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

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

This final rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The final rule will not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

List of Subjects in 41 CFR Part 60-1

Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, and Reporting and recordkeeping requirements.

Craig E. Leen,
Director, OFCCP.

For the reasons set forth in the preamble, OFCCP revises 41 CFR part 60-1 as follows:

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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

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

- 2. Amend § 60-1.3 by

- a. Adding in alphabetical order the definitions of "Particular religion," "Religion," "Religious corporation, association, educational institution, or society," and "Sincere," and
- b. Adding paragraph (a) and adding and reserving paragraph (b).

The revisions read as follows:

§ 60-1.3 Definitions.

* * * * *

Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or

institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

* * * * *

Religion includes all aspects of religious observance and practice, as well as belief.

* * * * *

Religious corporation, association, educational institution, or society. (1) Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that:

- (i) Is organized for a religious purpose;
 - (ii) Holds itself out to the public as carrying out a religious purpose;
 - (iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and
 - (iv)(A) Operates on a not-for-profit basis; or
 - (B) Presents other strong evidence that its purpose is substantially religious.
- (2) Whether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets.

(3) To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

(4) The following examples apply this definition to various scenarios. It is assumed in each example that the employer is a federal contractor subject to Executive Order 11246.

(i)(A) *Example.* A closely held for-profit manufacturer makes and sells metal candlesticks and other decorative items. The manufacturer's mission statement asserts that it is committed to providing high-quality candlesticks and similar items to all of its customers, a majority of which are churches and synagogues. Some of the manufacturer's items are also purchased by federal agencies for use during diplomatic events and presentations. The manufacturer regularly consults with

ministers and rabbis regarding new designs to ensure that they conform to any religious specifications. The manufacturer also advertises heavily in predominantly religious publications and donates a portion of each sale to charities run by churches and synagogues.

(B) *Application.* The manufacturer likely does not qualify as a religious organization. Although the manufacturer provides goods predominantly for religious communities, the manufacturer's fundamental purpose is secular and pecuniary, not religious, as evidenced by its mission statement. Because the manufacturer lacks a religious purpose, it cannot carry out activity consistent with that (nonexistent) religious purpose. And while the manufacturer advertises heavily in religious publications and consults with religious functionaries on its designs, the manufacturer does not identify itself, as opposed to its customers, as religious. Finally, given that the manufacturer is a for-profit entity, it would need to make a strong evidentiary showing that it is a religious organization, which it has not.

(ii)(A) *Example.* A nonprofit organization enters government contracts to provide chaplaincy services to military and federal law-enforcement organizations around the country. The contractor is organized as a non-profit, but it charges the military and other clients a fee, similar to fees charged by other staffing organizations, and its manager and employees all collect a market-rate salary. The organization's articles of incorporation state that its purpose is to provide religious services to members of the same faith wherever they may be in the world, and to educate other individuals about the faith. Similar statements of purpose appear on the organization's website and in its bid responses to government requests for proposals. All employees receive weekly emails, and occasionally videos, about ways to promote faith in the workplace. The employee handbook contains several requirements regarding personal and workplace conduct to ensure "a Christian atmosphere where the Spirit of the Lord can guide the organization's work."

(B) *Application.* Under these facts, the contractor likely qualifies as a religious organization. The contractor's organizing documents expressly state that its mission is primarily religious in nature. Moreover, the contractor exercises religion through its business activities, which is providing chaplaincy services, and through its hiring and training practices. Through

its emails and other communications, the contractor holds itself out as a religious organization to its employees, applicants, and clients. Finally, notwithstanding that the contractor collects a placement fee similar to nonreligious staffing companies, it is organized as a non-profit.

(iii)(A) *Example.* A small catering company provides kosher meals primarily to synagogues and for various events in the Jewish community, but other customers, including federal agencies, sometimes hire the caterer to provide meals for conferences and other events. The company's two owners are Hasidic Jews and its six employees, while not exclusively Jewish, receive instruction in kosher food preparation to ensure such preparation comports with Jewish laws and customs. This additional work raises the company's operating costs higher than were it to provide non-kosher meals. The company's mission statement, which has remained substantially the same since the company was organized, describes its purpose as fulfilling a religious mandate to strengthen the Jewish community and ensure Jewish persons can participate fully in public life by providing kosher meals. The company's "about us" page on its website states that above all else, the company seeks to "honor G-d" and maintain the strength of the Jewish religion through its kosher meal services. The company also donates a portion of its proceeds to charitable projects sponsored by local Jewish congregations. In its advertising and on its website, the company prominently includes religious symbols and text.

(B) *Application.* The company likely qualifies as a religious organization. The company's mission statement and other materials show a religious purpose. Its predominant business activity of providing kosher meals directly furthers and is wholly consistent with that self-identified religious purpose, as are its hiring and training practices. Through its advertising and website, the company holds itself out as a religious organization. Finally, although the company operates on a for-profit basis, the other facts here show strong evidence that the company operates as a religious organization.

(iv)(A) *Example.* A for-profit collector business sells a wide variety of artistic, cultural, religious, and archeological items. The government purchases some of these from time to time for research or aesthetic purposes. The business's mission statement provides that its purpose is to curate the world's treasures to perpetuate its historic, cultural, and religious legacy. Most of

the business's customers are private individuals or museums interested in the items as display pieces or for their cultural value. The business's marketing materials include examples of religious iconography and artifacts from a variety of world religions, as well as various cultural and artistic items.

(B) *Application.* The business likely does not qualify as a religious organization. Its mission statement references an arguably religious purpose, namely perpetuating the world's religious legacy, but in context that appears to have more to do with religion's historic value rather than evidencing a religious conviction of the business or its owner. Similarly, it is at best unclear whether the business is engaging in activities in furtherance of this purpose when most of its sales serve no religious purpose. Finally, while the business displays some religious items, these appear to be a minor part of the business's overall presentation and do not convey that the business has a religious identity. The factors to qualify as a religious organization do not appear to be met, especially given that the business as a for-profit entity would need to make a strong evidentiary showing that it is a religious organization.

* * * * *

Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

* * * * *

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

(b) [Reserved]

■ 3. Amend § 60–1.5 by adding paragraphs (e) and (f) to read as follows:

§ 60–1.5 Exemptions.

* * * * *

(e) *Broad interpretation.* This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq.*

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

[FR Doc. 2020–26418 Filed 12–8–20; 8:45 am]

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FEDERAL REGISTER

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Part IV

The President

Proclamation 10124—Human Rights Day, Bill of Rights Day, and Human Rights Week, 2020

Proclamation 10125—National Pearl Harbor Remembrance Day, 2020

Presidential Documents

Title 3—

Proclamation 10124 of December 4, 2020

The President

Human Rights Day, Bill of Rights Day, and Human Rights Week, 2020

By the President of the United States of America

A Proclamation

Nearly 250 years ago, heroes of our Revolution signed the Declaration of Independence, offering a bold enumeration of inalienable rights endowed to us by our Creator. In time, with independence secured from a tyrannical monarchy, our Nation etched these principles of liberty and equality into the law of our fledgling Nation when we ratified our Constitution. The revolutionary idea they embodied—that certain individual rights are beyond the reach of government—has resonated around the world. Today, and this week, we celebrate our sacred rights and the example they have set for the rest of history.

James Madison, who drafted the Bill of Rights text, was initially skeptical of the need to secure specific rights explicitly in the Constitution, believing the checks and balances inherent in our system of government would operate to achieve that objective. But he came to recognize the value that the Bill of Rights could provide and worked to ensure that the individual rights and freedoms of Americans were precisely enumerated in the highest law of the land. Madison was acutely aware that, while a government formed to serve its people is just and legitimate, “power, lodged as it must in human hands, will ever be liable to abuse.” Accordingly, he worked to imprint essential human rights, including the rights to peaceful assembly, freedom of speech, and free exercise of religion in our foundational legal text, empowering generations of Americans by protecting them from government abuses.

The revolutionary understanding of human rights reflected in the Declaration of Independence and encoded in our Constitution has provided a blueprint for the world in advancing individual human rights. In 1948, looking to our Bill of Rights as a model, the United Nations General Assembly established the Universal Declaration of Human Rights, which recognizes the “inherent dignity” and “equal and inalienable rights” of mankind. Earlier this year, we also celebrated the 45th anniversary of the signing of the Helsinki Accords, in which the Western World acknowledged similar fundamental human freedoms in defiance of the Soviet Union.

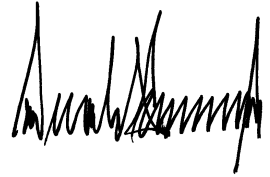
Despite these milestones, the world is still plagued by tragic human rights abuses, including the oppression of women, forced labor, racism, and ethnic and religious persecution. My Administration continues to fight these injustices on all fronts while calling on other sovereign nations to respect the unalienable rights of their people. Earlier this year, I signed an Executive Order on Preventing Online Censorship, which protects and fosters freedom of expression for Americans on social media and other platforms and also seeks to combat human rights abuses abroad like the mass imprisonment of religious minorities in China, which are often obscured by a cloud of false information online. Additionally, I recently signed an Executive Order on Advancing International Religious Freedom, which prioritizes this fundamental freedom in American diplomacy and recognizes that advancing religious freedom abroad is vital to combating rising levels of violence and crimes against humanity around the globe. There is no greater defender

of liberty than the United States, and we will remain steadfast in our efforts.

During Human Rights Day, Bill of Rights Day, and Human Rights Week, we cherish the unique story of our Nation and celebrate the patriots who helped our country secure our fundamental rights, freedoms, and values for ourselves and our posterity. We also take pride in the role that this heritage has played in advancing and protecting human rights around the world. America's commitment to individual liberty and human dignity is at our very core. We acknowledge that the principles set forth in the Bill of Rights are foundational, and we recommit to ensuring their legacy in our country as we continue to lead the way toward stronger human rights protections around the world.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 10, 2020, as Human Rights Day; December 15, 2020, as Bill of Rights Day, and the week beginning on December 6, 2020, as Human Rights Week. I call upon the people of the United States to mark these observances with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of December, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.

A handwritten signature in black ink, appearing to be "Donald J. Trump", written in a stylized, cursive script.

Presidential Documents

Proclamation 10125 of December 4, 2020

National Pearl Harbor Remembrance Day, 2020

By the President of the United States of America

A Proclamation

On the morning of December 7, 1941, Imperial Japanese forces ambushed the Naval Station Pearl Harbor on the Hawaiian island of Oahu. Tragically, 2,403 Americans perished during the attack, including 68 civilians. On this National Pearl Harbor Remembrance Day, we solemnly honor and uphold the memory of the patriots who lost their lives that day—“a date which will live in infamy”—and we reflect on the courage of all those who served our Nation with honor in the Second World War.

Seventy nine years ago, Imperial Japan launched an unprovoked and devastating attack on our Nation. As torpedo bombers unleashed their deadly cargo on our ships and attack aircraft rained bombs from above, brave members of the United States Navy, Marines, Army, and Army Air Forces mounted a heroic defense, manning their battle stations and returning fire through the smoke and chaos. The profound bravery in the American resistance surprised Japanese aircrews and inspired selfless sacrifice among our service members. In one instance, Machinist's Mate First Class Robert R. Scott, among 15 Sailors awarded the Medal of Honor for acts of valor on that day, refused to leave his flooding battle station within the depths of the USS CALIFORNIA, declaring to the world: “This is my station and I will stay and give them air as long as the guns are going.”

Forever enshrined in our history, the attack on Pearl Harbor shocked all Americans and galvanized our Nation to fight and defeat the Axis powers of Japan, Germany, and Italy. As Americans, we promise never to forget our fallen compatriots who fought so valiantly during World War II. As a testament to their memory, more than a million people visit the site of the USS ARIZONA Memorial each year to pay their respects to the Sailors entombed within its wreckage and to all who perished that day. Despite facing tremendous adversity, the Pacific Fleet, whose homeport remains at Pearl Harbor to this day, is stronger than ever before, upholding the legacy of all those who gave their lives nearly 80 years ago.

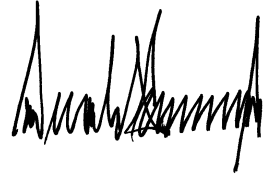
On this National Pearl Harbor Remembrance Day, we recall the phrase “Remember Pearl Harbor,” which stirred the fighting spirit within the hearts of the more than 16 million Americans who courageously served in World War II. Over 400,000 gave their lives in the global conflict that began, for our Nation, on that fateful Sunday morning. Today, we memorialize all those lost on December 7, 1941, declare once again that our Nation will never forget these valiant heroes, and resolve as firmly as ever that their memory and spirit will survive for as long as our Nation endures.

The Congress, by Public Law 103–308, as amended, has designated December 7 of each year as “National Pearl Harbor Remembrance Day.”

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, do hereby proclaim December 7, 2020, as National Pearl Harbor Remembrance Day. I encourage all Americans to observe this solemn day of remembrance and to honor our military, past and present, with appropriate ceremonies and activities. I urge all Federal agencies and interested organizations, groups, and individuals to fly the flag of the United States at half-

staff in honor of those American patriots who died as a result of their service at Pearl Harbor.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of December, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.

A handwritten signature in black ink, appearing to be "Donald Trump", located on the right side of the page.

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The text of laws is not published in the **Federal Register** but may be ordered in “slip law” (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202-512-1808). The text will also be made available at <https://www.govinfo.gov>. Some laws may not yet be available.

H.R. 835/P.L. 116-206

Rodchenkov Anti-Doping Act of 2019 (Dec. 4, 2020; 134 Stat. 998)

H.R. 1668/P.L. 116-207

Internet of Things Cybersecurity Improvement Act of 2020 (Dec. 4, 2020; 134 Stat. 1001)

H.R. 3589/P.L. 116-208

Greg LeMond Congressional Gold Medal Act (Dec. 4, 2020; 134 Stat. 1008)

H.R. 4104/P.L. 116-209

Negro Leagues Baseball Centennial Commemorative Coin Act (Dec. 4, 2020; 134 Stat. 1011)

H.R. 8276/P.L. 116-210

To authorize the President to posthumously award the Medal of Honor to Alwyn C. Cashe for acts of valor during Operation Iraqi Freedom. (Dec. 4, 2020; 134 Stat. 1016)

H.R. 8472/P.L. 116-211

Impact Aid Coronavirus Relief Act (Dec. 4, 2020; 134 Stat. 1017)

S. 3147/P.L. 116-212

Improving Safety and Security for Veterans Act of 2019 (Dec. 4, 2020; 134 Stat. 1019)

S. 3587/P.L. 116-213

Department of Veterans Affairs Website Accessibility Act of 2019 (Dec. 4, 2020; 134 Stat. 1024)

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